

RESERVED JUDGMENT



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondent
Mrs Louise Mary Hender		Prospects For People With Learning Disabilities

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT:	Shrewsbury	ON:	3-7 December 2007 10-12 December 2007 22 January 2008 25 January 2008 and 12 May 2008 – Judge and Members Only
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EMPLOYMENT JUDGE:	Mr D P Thompson	MEMBERS:	Mr G R Thomas Mr J E Jenks
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Appearances -

For the Claimant:	Mr A Blake, Counsel
For the Respondent:	Mr A R Halden, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the Respondent unlawfully discriminated against the Claimant on the grounds of religion or belief

contrary to the Employment Equality (Religion or Belief) Regulations 2003 and she was constructively unfairly dismissed.

REASONS

1.0 CLAIMS AND ISSUES

- 1.1 The Claimant claims that the Respondent has both directly and indirectly discriminated against her contrary to regulation 3(1)(a) and (b) of the Employment Equality (Religion or Belief) Regulations 2003. She also claims that she has been constructively unfairly dismissed. The Claimant claims that the discrimination she suffered on the grounds of religion or belief was in relation to the opportunities which it afforded her for promotion, and by disqualifying her from applying for or refusing to promote her to the position of Support Worker Level 2, and by constructively dismissing her.
- 1.2 By consent of all parties the appropriate law before the amendments made by the Equality Act 2006 applies to this case. Further, it is not in dispute that the Respondent has an ethos based on Christianity.
- 1.3 Although not pleaded in its defence, at the commencement of the hearing on 4 December 2007, the Respondent raised an argument that the Claimant fell outside the protection of the 2003 Regulations because she did not have any particular religion or religious or philosophical beliefs. That is one of the issues that this Tribunal will need to resolve.
- 1.4 In arriving at its judgment, the Tribunal will need to consider whether the Respondent has made out its genuine occupational requirement defence under Regulation 7. In particular, the Tribunal will need to decide whether being a practising Christian was a genuine occupational requirement for Support Worker Level 2 post and whether it was proportionate to apply that requirement to the Claimant and her application for such a post.
- 1.5 In respect of the unfair dismissal claim the Tribunal will have to decide if the treatment of the Claimant amounted to a fundamental breach of contract, if she resigned in response to that breach, and if she waived any such breach.
- 1.6 The Respondent accepts that their policy undoubtedly deprived the Claimant of applying for promotion to Level 2, and accepted that that was capable of amounting to a detriment short of dismissal.
- 1.7 This claim was heard together with that of Mr Mark Sheridan, and all of the evidence and submissions was given together at one combined hearing.

2.0 THE FACTS

- 2.1 The Respondent is a company limited by guarantee, and a charity which provides housing and day care provisions for persons with learning disabilities, which is motivated by the Christian faith. It operates from over 60 different locations across the United Kingdom, and employs approximately 500 people. It was founded in 1976 by the Reverend David Potter, a Baptist Minister.
- 2.2 The present company was incorporated on 22 January 1997, and a copy of its memorandum and articles of association was at pages 94a-94f of the agreed bundles of documents.
- 2.3 Within that document it sets out the Respondent's objectives as "to promote the welfare of those persons with a physical or learning disability in any manner which now is or hereafter may be deemed to be charitable". After a recital of its powers, in clause 3(m) it states as follows:-

"To employ and pay any person or persons to supervise, organise, carry on the work of the Company such persons shall as a condition of such employment (save where such a condition is prevented by law or in cases approved by the Directors) be committed to the following Basis of Faith:-

- (1) **The Bible**
The entire Bible as originally given was inspired by God and is without error and fully reliable. It is our supreme authority in all matters of faith and practice.
- (2) **God**
There is one God, who exists eternally in three persons, the Father, the Son and the Holy Spirit, who are equal in power and glory.
- (3) **The Lord Jesus Christ**
The Lord Jesus Christ is fully God and fully man. He was conceived by the Holy Spirit, born of the virgin Mary and lived a sinless life. He died on the cross in the place of sinners. He rose from the dead and in His resurrection body ascended into heaven. There He prays for us as the only mediator between God and people.
- (4) **The Holy Spirit**
The Holy Spirit brings individuals to new birth, repentance and faith in Jesus Christ. He lives in all believers, in whom He produces increasing likeness to Christ.
- (5) **The Human Race and Salvation**

All men and women are created by God in His image and have equal dignity and worth. Because of the disobedience of our first parents we are all sinful before God. By grace we are forgiven and accepted by God through faith in what Christ has done for us.

(6) **The Future**

The Lord Jesus Christ will return in power and glory. He will raise the dead and judge the world. People not saved will be eternally condemned. Those who are saved will be welcomed into a life of eternal joy in the presence of God".

2.4 The Respondent's employment policy in 1997 is set out in a document a copy of which is at pages 163-163c. That in turn refers to the memorandum and articles of association, and specifically refers, in its introduction, to that part of the company's objects which states: "To employ and pay any person or persons to supervise, organise, carry on the work of the company, such persons shall as a condition of such employment (save where such a condition is prevented by law or in cases approved by the Directors) be committed to the following basis of faith". It then recites: "Cases approved by the Directors where this condition does not apply are set out in the following paragraphs". Thereafter the following 3 paragraphs are set out:-

"1 **Non-direct support staff, relief staff and temporary staff**
Every endeavour should be made to appoint Christian staff to these posts. However, if staff who are not Christians are appointed to such posts they must sign a form to acknowledge their sympathy with the aims and beliefs of PROSPECTS and agree to work within its policies. This applies to the following posts:

Cook
Cleaner
Gardener
Maintenance Assistant
Relief Staff

Normally temporary staff are appointed for 6 months or less.

2 **Services taken over by PROSPECTS from other providers**
The Board of Directors recognise the importance of continuity in terms of support and relationships for people with learning disabilities. They and their advocates should be consulted about moves which might be contemplated and the changes involved need to be handled with sensitivity and wisdom. Where a service is being transferred to PROSPECTS the following conditions apply:

- (a) The Manager should be a Christian, as should the Deputy/Home Leader (unless TUPE applies);
- (b) All new permanent staff appointments should be Christians;
- (c) Any unacceptable practices should be changed;
- (d) If TUPE does not apply to the transfer as a whole, the majority of staff should be Christians;
- (e) Staff should agree to accept and work within both the Christian ethos and the policies of PROSPECTS.

The Board of Directors intends the following guidelines should be implemented where possible:

- (a) a strong link to a local church or churches should be established if possible, for prayer support for the service;
- (b) every encouragement should be given to develop such support into an active Local Support Group;
- (c) the new Manager should have at least one other Christian for prayer support and preferably a cluster of Christian staff for mutual support.

3 **Where recruitment is difficult or a new service is being opened**

The Board of Directors have agreed that there should be some flexibility for posts below the level of Manager:

- (a) where the recruitment process fails to identify a suitable Christian applicant for a post or there are known difficulties of recruitment, discretion is given to the Chief Executive to authorise appointment of a person in sympathy with the Christian ethos of the Charity;
- (b) the Chief Executive shall have similar discretion where several appointments are required simultaneously, particularly when opening a new service".

2.5 That policy remained in force throughout from that time and at all relevant times for the purposes of these claims.

2.6 The Respondent's historical context is that it was founded as a Christian charity to provide residential care to adults with a learning disability who were themselves Christian or who had grown up in Christian families. The

founders were Christian parents who wanted their daughter to continue to experience a Christian way of life on leaving the family. In the early days the charity's services were funded by parental contribution, fund-raising in Christian churches and what were then Social Security benefits. There was relatively little involvement with the statutory sector either as purchasers or regulators of care. The small number of homes that came into operation in the late 70's and early 80's resembled small Christian communities with all Christian staff. Staff were encouraged to see working for Prospects as a Christian calling or vocation.

- 2.7 Prospects, as an organisation, has evolved and changed over time. It is no longer the small Christian organisation it once was. It sought to develop by contracting to supply care services for local social services departments and was prepared to accept the TUPE transfers which often are a consequence of such outsourcing. In some instances Day Opportunities centres were opened with local authority funding and in these centres the majority of people supported were not Christian. Conwy Day Opportunities, where the claimant worked, had started in a modest way in the late 1990's but had latterly become the largest day opportunities provider in the whole organisation supporting approximately 70 people, of whom 50-55 were non-Christian. There were approximately 25 Level 1 Support Workers of whom one third were non-Christian themselves.
- 2.8 The growth strategy impacted on the charity's activities in a number of ways. Direct service provision dwarfed all the other activities of the charity, e.g. mainstream Christian ministry (Causeway Prospects). The charity no longer provided services exclusively to people with a Christian faith or background. Only a minority of service users were Christian. Services to people with learning difficulty are labour intensive and generally high cost. The charity could not exist on its own resources. It was seeking funding from local authorities to make its services financially viable and could not afford to enter into contracts for new services with the local authorities unless they were one hundred per cent publicly funded. Partnership arrangements with local authorities, supporting people teams and housing providers focussed attention on the differences between the respondent's equal opportunities employment policy in theirs. Although authorities liked the product that the respondent offered, they were not always keen on the exclusively Christian employment, which admittedly the respondent's believed gave the product its high value and uniqueness. By 2005 most Prospect's services came within the ambit of the Care Standards Act and most services were registered, highly regulated and inspected. It became increasingly difficult to maintain the Christian distinctive over secular standards for care. Accordingly, the charity's recruitment desires had been significantly eroded particularly in the Wales and Marches region.
- 2.9 As early as August 1999 Maureen Wise, then Director of Living Prospects, produced a report headed "Christian employment policy update", a copy of which is at pages 205-207 of the agreed bundles of documents. In that report she records that in April 1996 Prospects agreed to take over the

management of Linden House Swansea at a time when there was only one Christian member of staff. In Neath it is recorded that Prospects had entered into a tripartite arrangement with Swansea Housing Association and Social Services to provide support for 6 people in a supported living arrangement in Neath. Maureen Wise records: "Each of the people we are supporting in Neath have high levels of support needs and the total staff establishment is approximately 20 full-time equivalent members of staff. In the absence of an Assistant Director for Wales at the time, I took over management of the project to discover that an undertaking had been made with Neath and Port Talbot Social Services by an Assistant Director who has since left, that Prospects would advertise for staff who were "sympathetic to our Christian position" rather than "committed Christians". The consequence of developments in Neath has been that Prospects has recruited a predominantly non-Christian staff team, with the exception of the Locality Manager and the two Home Leaders". In respect of Clarence Road Conwy, Miss Wise records: "Earlier this year we won a bid in Conwy to take over the provision of support from an existing provider. TUPE applied and we have taken over management of an existing staff team, but have appointed our own Christian Manager in accordance with the Board's policy. The total staff team consists of 8 workers which includes 2 relief staff. They are professionally committed but only one Support Worker and the manager are Christians. All new appointees will be Christian staff". In her conclusions Miss Wise states: "Where TUPE applies the strong likelihood is that Prospects will be taking over an existing staff team that is probably not Christian. The arguments from the perspective of continuing support from known people as well as security of employment for existing staff are however understandable ones. There is obviously the possibility for Christian influence and a gradual change towards a Christian staff team to be made". Further on in the report she states: "I am concerned that what amounts to a passive erosion of our Christian Employment Policy is taking place, which has already significantly reduced the proportion of Christian staff in our total workforce. The dilemmas are not simple ones as I hope I have illustrated. There are some historical undertakings to which we are already committed; bidding for contracts will inevitably sometimes bring us into the sphere of TUPE regulations and the pressures to recruit sufficient staff to keep a service running are very real ones. Nevertheless, it would be salutary for us to think through carefully the longer-term implications of our current staffing situation". Miss Wise ended up with recommendations that:

- [1. Not applicable as this refers to Northern Ireland.]
2. "That we do not enter into any new contracts where we cannot advertise for committed Christians to fill staff vacancies.
3. That the Board consider whether an embargo should be placed on bidding for new contracts where TUPE applies for a time limited period, after which it should be subject to review. This would not include the bids which are in the process of being submitted for

Conwy. This would be in order to allow re-stabilisation of our Christian staffing situation.

4. That longer-term bids which include TUPE regulations will not raise our total complement of non-Christian permanent staff above say 5% or 10".
- 2.10 It is clear that the situation was still continuing in 2001, by reference to a confidential briefing for Board members a copy of which can be found at pages 296-299 of the agreed bundles. That records: "I have just returned from a 2 day visit to Swansea, Neath and Briton Ferry the purpose of which was to review the implications of our employment policy in respect of the large number of non-Christian staff that we employ. The current position is that we have 3 vacancies at support Level 3, which is the first level of post that carries supervisory responsibilities. 2 of the vacancies have been advertised on 3 separate occasions and to date we have not been able to recruit. Because the posts have supervisory responsibilities it has been necessary to seek active Christians. God has not seen fit to bring Christians to these posts and this has caused local management difficulties particularly as there are a number of non-Christian staff who operate at support Level 2 and have the potential to fulfil the criteria at Level 3".
- 2.11 During this time of expansion, because of the difficulties of recruiting staff to meet service obligations, some managers relied increasingly on employing relief workers, who were exempt from being Christian, in accordance with the 1997 policy. Such persons were required to sign a document which essentially was the basis of faith document which at its foot stated "I am applying for an exempt post and agree to respect and not undermine the values and ethos of Prospects". A copy of that can be found at page 491 of the agreed bundle of documents.
- 2.12 A large number of these relief workers worked regular hours each week. This is recognised in a Human Resources report for 2003-2004, at page 323 of the agreed bundle of documents, which states "66% of all staff (by heads) worked part-time in 2003-2004. Only 4% of staff at management worked part-time compared with 85% of Support Worker Level 1 post holders. Clearly the trend is for management posts to be filled by full-timers as opposed to job shares. The total number of people working in living Prospects has increased from 450 in 2002, 478 in 2003 to 518 in 2004. The number of relief workers is 185 which is a 16% increase compared to last year. Ratio of relief to permanent staff is 0.6 to one."
- 2.13 At some time after the commencement of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, one Louise Conningsby, the then Personnel Manager, advised that all relief workers who were working regular hours should be offered permanent contracts. This, of course, had the effect of immediately substantially increasing the number of non-Christian personnel working for the charity, particularly at Support Worker Level 1.

2.14 On 13 August 2001 the Respondent held a review meeting in respect of South Wales and Christian employment. A copy of the notes of that meeting can be found at pages 213-216 of the agreed bundle of documents. The paper states: "In December 2003 it will become UK law that to retain organisational ethos some organisations can discriminate on the grounds of religion/belief. However, the Equal Treatment Directive is only a framework currently and is not yet UK law". It is further recorded that:

3. PROSPECTS can legitimately choose to preserve its ethos. The Department of Employment has said that organisations can choose to retain their ethos and adapt their recruitment and selection and disciplinary procedures in the light of this.
4. PROSPECTS has compromised in the South Wales situation so that its employment position in South Wales is different from any other area of the country".

Further on it states:

- "8. PROSPECTS is not breaking the law. The organisation is swimming against the relative, pluralist, cultural tide, by choosing to discriminate on the grounds of religion.
9. PROSPECTS is operating a difference of treatment to maintain its corporate and core ethos. We do have an exclusive policy to only employ Christians. However this is common-sense at the macro level to override an individualistic local level".

Further on it recognises that:

"Another issue is avoiding a glass ceiling so limiting promotional opportunities for staff in the organisation".

2.15 On 1st December 2003 Mr Paul Ashton, the Respondent's Chief Executive sent a memo to all Managers with copies to Directors and Assistant Directors (pages 220-221). In that memo he stated: "Under the Employment Equality (Religion or Belief) Regulations 2003 it now becomes illegal for us to advertise for Christian staff unless we can justify a General Occupational Requirement (GOR).

It has become clear that our current documentation does not reflect our true Christian ethos and the aim of this memo is to clarify actions required by you to ensure we do not infringe the law.

As a Christian organisation the majority of our posts have a General Occupational Requirement for a Christian to be recruited into them. All

documentation issued from the Reading office has been amended to reflect this more clearly."

- 2.16 There is a discussion paper at page 219 where under the heading "PROSPECTS' Employment Policy - until December 2003 it states:
- "needs to identify tasks and responsibilities within jobs that only a Christian can carry out – General Occupational Requirement.
 - "needs to link to the number of people we support who are Christians.
 - "needs to link to preserving the Christian ethos of the organisation.
 - "needs to avoid creating inequality in other ways e.g. creating a glass ceiling in that Support Workers cannot progress through the organisation unless they are Christian.
 - "needs to consider each post every time it becomes vacant".
- 2.17 There is no credible evidence before the Tribunal that the Respondent reviewed the appropriateness of the GOR and/or the need for a Christian to carry out the work in question. However, the Claimant did accept that the higher one was within the organisation the likely greater need was there for that person to be a Christian.
- 2.18 On 26 February 2004 (page 236 of the agreed bundle of documents) Mr Ashton sent to all managers a draft Christian ethos statement (pages 107-112), the justifiability statement (pages 113-116) and GOR (page 114-115). They were all agreed in June 2004. This was followed by a senior management team carrying out a roadshow for all the Respondent's Managers and Assistant Managers from June to October 2004. (Pages 256-262).
- 2.19 As at February 2005 the Respondent confirmed to its staff that all roles save those of a cook, cleaner, gardener, maintenance assistant and relief staff had the GOR for a Christian to be appointed on the basis that they were all employees who deliver the Christian ethos of Prospects to the people it supports. The Respondent stated that employees would be required to closely support people in church activities and spiritual support, if requested, and would be required to represent Prospects in the Christian community and joining in and/or leading prayer. This meant that Support Workers Levels 1, 2 and 3 all attracted the GOR, and that if an appointment outside the GOR was requested, then this had to be authorised by the Chief Executive as per the past policy.
- 2.20 The Respondent (Paul Ashton, the Chief Executive and Jan Groat, Director of Operations) decided that whilst Prospects should dismiss those non-Christian employees, it would not do so, as the non-Christian employees had come to the jobs in good faith and to do so would not measure up to

Christian standards. However, they recognised that they would be unable to promote these non-Christian employees, as all the promotional posts, plus the posts they currently held, had a GOR. They therefore decided that they would advise the non-Christian employees that they could remain in employment in Prospects even though they were not able to fulfil what the Respondent regarded as the fundamental elements of the role (being unable to give spiritual guidance, be active in the Christian community or lead prayers etc).

- 2.21 The support staff in Conwy Day Opportunities where some Level 2 posts were about to be established for the first time, felt they would be disadvantaged by this and their concerns were conveyed to Mr Ashton and Mrs Groat when they visited the Conwy centre in February 2006. The respondent therefore decided to convene a general meeting of the Conwy staff in the course of which they indicated that non-Christian staff could be trained at Prospect's expense to equip them to achieve a higher graded role within another non-Christian organisation should they wish to do so. This was followed by a letter which Mrs Jan Groat, Director of Operations, sent to all Conwy employees on 1 March 2006. This letter (page 465) stated:

"We wish to reiterate the offer that was made on Monday to any of you who are not able to apply for Level 2 posts in the charity but to aspire to achieve a supervisory role in the future. We are prepared to assist you to train to NVQ2, thus giving you the qualification to apply for a second level post in other organisations. This does not imply that we wish any of you to leave Prospects, but is offered in recognition that advancement is a natural thing for anyone to seek, and as a small but tangible expression of our regret for the situation that has occurred."

- 2.22 At the time, there were no Level 2 posts in Conwy. However, the overwhelming proportion of the support given at Level 1 was secular in nature, working with people who expressed no particular wish for either spiritual or Christian input. Mr Sheridan gave a typical example as exemplified at pages 1007/1008. He stated that the day would start at 9.00am with Support Workers who could drive, pick up people from their homes and transported them to one of the two centres that they then had. Other support staff would be in the centres preparing for the day ahead. On arrival people would be welcomed and offered a drink and a chance to chat. After this, activities would commence. In Conwy three people undertook a local recycling project, one baked and four did art and craft, then walked into town. In Llandudno two people used the sensory room, one person enjoyed music and then a walk, four did basic skill work, two took a walk to play pool, two went for a walk then enjoyed music and art and craft, two were supported in nail care activity, one volunteered as a local church playgroup (supported by a Christian), one volunteered in a local charity shop and one had free choice. At lunch a prayer of thanks for the food would be said by either a Christian staff member or a person supported. After lunch there was some transport of people between centres. In Conwy one person did domestic jobs and four took a trip out to the local dog

kennels. In Llandudno, one person visited her Mother, two went to the library, one baked, four did art and crafts and six went tenpin bowling. After a drink and a chat and a filling-in of people's diaries the driving support staff transported people home from 4.00pm onwards. On that particular evening they did not support anyone, but they did do so on other evenings. On Wednesday and Thursday they supported people to Gateway Club, line dancing, and on Tuesday to the Special Alpha course at Princess Drive Baptist Church, Colwyn Bay. The Tuesday evening activity would need Christian support. On Saturday and Sunday they supported people in activities involving shopping, swimming, football and other social activities. When Builders Street Centre opened in June 2004 the timetable then included similar support as well.

- 2.23 The Claimant commenced work with the respondent on 1st May 2003, initially as a relief worker. On her application form she stated: "I would be committed to working within Prospect's Christian values and ethos and would be sympathetic and understanding of anyone's beliefs." She was offered a permanent contract and started that on or about the 1st July 2003. This was a Support Worker Level 1. She gave evidence that the only Christian element was saying a prayer before weekly team meetings and grace at lunchtimes. Nothing else about the job was overtly Christian. The people they looked after did not know whether the staff were Christian or not. They never demanded or expected that the staff undertook or provided Christian teaching or other Christian based activities. She was not required to say prayers or grace.
- 2.24 As far as the Claimant was concerned the issue of Christianity at work changed in early 2005. There was a meeting with Mark Sheridan, her line manager. He advised that head office had decided that from then on non-Christians would not be appointed for any post at Prospects. After the meeting, various staff questioned Mr Sheridan about promotion, including the Claimant. He informed them that all jobs had to be filled by Christians. She realised that there would not be any promotions for non-Christians.
- 2.25 The claimant went on maternity leave in May 2005 and returned to work on the 2nd November 2005. In her absence there had clearly been some changes, some of the non-Christians had left and new Christian appointments had been made. The claimant raised her concerns with her then manager, Iris Barlow, the Day Opportunities Co-ordinator, and also with Mark Sheridan, saying how unhappy she was with the policy and how she objected to it.
- 2.26 In the autumn of 2005 it was agreed that some Day Opportunity Level 2 positions should be created in Conwy Day Opportunities. Subsequently, Mark Sheridan advised her not to bother applying for Level 2 positions because the policy would mean that he would not even be able to shortlist her. He told her not to humiliate herself in this way.

- 2.27 At this stage, the claimant had been with Prospects over three years and had been doing a great deal of the work that was required by the job description of a Level 2 worker. She had been doing the books, answering queries of less experienced staff, mentoring less experienced staff, building up ties with a local church, organising other Level 1 day opportunities workers and answering questions for the less experienced and new staff.
- 2.28 In May 2006 the respondent advertised for Level 2 support workers in the local paper. The closing date for applications for the post was 9th June 2006. On the 7th June 2006 the Claimant applied for the Level 2 position in a letter of that date. She applied because she felt strongly that she was suited for it and had as much right as anybody to be considered for it. She drafted the application letter together with a colleague, Hazel Mann, on Hazel Mann's computer. Hazel Mann then delivered this letter personally to the address in the job advertisement. She addressed the letter to Mrs Tina James. However, for some unknown reason, Tina James is clear that she never received that application.
- 2.29 There was a meeting on the 7th June 2006 at which some of the staff concerns were raised. After this meeting Iris Barlow called the Claimant into her office to tell the Claimant how sorry she was that she could not be promoted because she was non-Christian. Iris Barlow advised the Claimant that she would be her ideal number 2, but she could not promote her because of the policy.
- 2.30 Around the end of July or start of August 2006 the claimant found out that someone else had been appointed to the Level 2 role that she had applied for. On the 2nd August the Claimant sent a letter to Mrs James asking why she had not received any response to her application for the job. She did not receive a reply to that letter. Again, Mrs James denies receiving that letter.
- 2.31 On the 6th September 2006 the claimant went into the office of Iris Barlow and told her that she wished to resign as she had not been promoted to the Level 2 post for which she had applied. She also explained that she was not happy about not receiving any response to her application or to her letter. Shortly thereafter, she wrote her letter of resignation (page 479 of the agreed bundle of documents). That letter states: "Due to recent events and Prospects policy of not promoting non-Christians I feel there is no other option for me but to leave. As I'm not comfortable to give notice it will be from 9.30 6th September."
- 2.32 The job description for the Level 2 post can be found at pages 686 and 688 of the bundle, together with the person specification at pages 689 to 690. Also referred to are principles of personal value at page 691.

3.0 THE LAW

- 3.1 The Tribunal is indebted to all three counsel for their written expositions on the law. The Tribunal is particularly indebted to the closing submissions of Mr Andrew Blake, on behalf of Mrs Hender, the Claimant, and makes no apology for quoting at length from his final written closing submissions, both as to the law and the application of the law to the facts. Additionally, he helpfully refers to some of the respondent's arguments not necessarily covered in Mr Halden's written closing speech.
- 3.2 The Employment Equality (Religion or Belief) Regulations 2003 prohibit discrimination on the grounds of religion or belief. They were made under section 2(2) of the European Communities Act 1972 and implement the European Framework Directive 2000/78/EC ('The Directive') insofar as it relates to discrimination on the grounds of religion or belief.
- 3.3 Regulation 2(1) of the 2003 Regulations, at the times relevant to this claim, provided:
- "In these Regulations, 'religion or belief' means any religion or religious or philosophical belief."
- 3.4 From 30 April 2007, the definition of religion or belief was changed by section 77 of the Equality Act 2006 to:
- "(1) In these Regulations –
- (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."
- 3.5 It is accepted that at the relevant time the original definition of religion or belief applied.
- 3.6 Regulation 3 of the 2003 Regulations defines discrimination. It provides where relevant to Mrs Hender's claims:
- "(1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if –
- (a) on grounds of religion or belief, A treats B less favourably than he treats or would treat other persons; or
 - (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but –
 - (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
- (2) The reference in paragraph (1)(a) to religion or belief does not include A's religion or belief.
- (3) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."
- 3.7 Regulation 6 prohibits discrimination against applicants and employees. It provides, where relevant to Mrs Hender's claim:

"(2) It is unlawful for an employer, in relation to a person whom he employs at an establishment in Great Britain, to discriminate against that person –

- (a) in the terms of employment which he affords him;
- (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit;
- (c) by refusing to afford him, or deliberately not affording him, any such opportunity; or
- (d) by dismissing him, or subjecting him to any other detriment.

(5) In paragraph (2)(d) reference to the dismissal of a person from employment includes reference - ...

(b) to the termination of that person's employment by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the employer."

3.8 Regulation 7 sets out the Genuine Occupational Requirement (GOR) defence. It provides:

"(1) In relation to discrimination falling within regulation 3 (discrimination on grounds of religion or belief) –

- (a) regulation 6(1)(a) or (c) does not apply to any employment;
- (b) regulation 6(2)(b) or (c) does not apply to promotion or transfer to, or training for, any employment; and
- (c) regulation 6(2)(d) does not apply to dismissal from any employment, where paragraph (2) or (3) applies.

(2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out -

- (a) being of a particular religion or belief is a genuine and determining occupational requirement;
- (b) it is proportionate to apply that requirement in the particular case; and

(c) either -

- (i) the person to whom that requirement is applied does not meet it, or
- (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it,

and this paragraph applies whether or not the employer has an ethos based on religion or belief.

(3) This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out -

(a) being of a particular religion or belief is a genuine occupational requirement for the job;

(b) it is proportionate to apply that requirement in the particular case; and

(c) either -

(i) the person to whom that requirement is applied does not meet it, or

(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it."

3.9 Article 1 of the Directive provides:

"The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

3.10 Article 2 provides, where relevant:

"1 For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

4 An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1."

3.11 Article 4 of the Directive is the basis of the GOR defence and regulation 7 of the 2003 Regulations. Article 4 provides:

- "1 Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

- 3.12 The European Court of Human Rights has held in *Kokkanikis v Greece* (1994) 17 EHRR 397 at 418 (paragraph 31) that:
- "As enshrined in Article 9 [of the European Convention of Human Rights], freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."
- 3.13 The Directive (as with all European Laws) should be interpreted in accordance with the European Convention of Human Rights. Similarly, under section 3 of the Human Rights Act 1998, domestic legislation such as the 2003 Regulations should be interpreted in accordance with the European Convention of Human Rights.
- 3.14 Paragraph 14 of the DTI Explanation of the 2003 Regulations (which pre-dates the Equality Act 2006) provides that references to religious belief and similar philosophical belief include reference to a belief structure involving

the absence of particular beliefs, because these are two sides of the same coin.

Paragraphs 28-30 provide:

28 – “The phrase “*on grounds of sexual orientation / religion or belief*” in the Regulations does not cover direct discrimination by the discriminator against another person because of his (the discriminator’s) sexual orientation / religion or belief. When a court or Tribunal considers if direct discrimination has taken place it must decide, from an objective viewpoint, if sexual orientation / religion or belief was a substantial cause of the difference of treatment in question (see *O’Neill v Governors of St Thomas More Roman Catholic School [1977] ICR 33*). For example, if an employer discriminates against a job applicant because of her sex or race, the objective cause for the difference of treatment derives from the applicant’s characteristics, not those of the employer. It cannot be said that the employer acts unlawfully because of his own sex or race.

29 - The same reasoning applies to direct discrimination on grounds of religion or belief and sexual orientation. For example, an employer with strong religious views who refuses to employ an applicant because she is female or gay does not discriminate on grounds of religion or belief. The cause of the difference of treatment, objectively considered, is the sex or sexual orientation of the applicant. The employer’s religious views are not the cause of the difference of treatment; an employer without such views might refuse to employ a female or gay applicant in exactly the same way. The motivation for the act of discrimination (whether religious or otherwise) is not relevant.

30 - For the avoidance of doubt, regulation 3(2) of the Religion or Belief Regulations makes clear that discrimination on grounds of religion or belief does not include the discriminator’s religion or belief. No similar provision is included in the sexual orientation regulations because it is sufficiently clear that the discriminator’s sexual orientation is not a relevant factor.

Paragraphs 72 and 73 provide:

72 – “The introductory words of regulation 7(2) require regard to be had, when considering if a GOR applies, to “*the nature of the job*” or “*the context in which it is carried out*.” This effectively means that the functions of the post in question must be considered. The reference to context serves to demonstrate that the nature of the job is not to be considered narrowly, but can include wider elements related to the job.

73 - For example, one could describe the functions of a counsellor in a Christian support group for people with long term illnesses in a very narrow sense as simply talking with and advising the people involved. On this view (which would be misleading), a person of any religion or belief could perform those functions if they could offer appropriate advice. But when

considering the context of the job, it is self-evident that the person must be Christian in order to carry out the job, because the purpose of the job is to provide advice from a Christian perspective.

Regulation 7(2)(a) then provides that regulation 7 applies if, having regard to that nature or context, "*being of a particular sexual orientation / religion or belief is a genuine and determining occupational requirement.*"

- A requirement is stronger than something which is merely a factor, a preference, or a qualification for the job – it is something which is essential for the person to be able to perform the functions of the job.
- It must also be a determining requirement – that is, the requirement must be crucial to the post, and not merely one of several important factors.
- The fact that it must be an occupational requirement emphasises the necessary connection to the job in question.
- And it must be a genuine occupational requirement for that job – in other words, the employer cannot simply create a requirement on a whim because she does not like persons of a particular sexual orientation / religion or belief."

Paragraphs 85 and 87 provide:

85 - The employer must also establish that the GOR applies, having regard to its ethos. This means that the ethos should be taken into account when considering what the functions of the job and its context are, and the skills and attributes required to perform them, so as to assess whether it is a GOR for the person doing the job to be of the particular religion or belief. It also means that the GOR should not be inconsistent with that ethos.

87 - In practice, A GOR will apply to a job for an employer with an ethos based on religion or belief only in a small number of cases. A GOR is more likely to apply if the job is one which has particular importance for maintaining the ethos of the employer's organisation." [omitting the rest of the paragraph which the Tribunal has considered].

- 3.15 Similarly the ACAS Guidance (dated April 2004, so again pre-dating the Equality Act 2006) provides at paragraph 1.1 that the Regulations "also cover those without religious or similar beliefs."

In the Frequently Asked Questions section within the ACAS Guidelines, it provides as follows:

"Q Our organisation has a religious ethos. How do we determine if a person's religion or belief can be justified as a genuine occupational requirement for a post?"

A Staff can be recruited on the basis of their religion or belief where this is a genuine occupational requirement for the job. The Regulations

require you to consider the nature of the job and the context within which it is carried out when considering whether the job holder needs to practice a specific religion in order to undertake the role within the ethos of the organisation. Appendix 1 provides some further guidance on this subject.

When considering applying such a requirement look at each post individually both in terms of the duties of the job and the context within which it is carried out. Organisations should not expect to apply a blanket requirement to all its posts even if it has a religious ethos.

Organisations should consider whether there are alternatives to applying an occupational requirement. For instance, if only a small part of the job needs someone from that religion then it may be possible to redistribute work or reorganise roles in such a way as to avoid applying a religious requirement to a particular post. Organisations can reasonably expect their staff to keep to their organisational values and culture and should bear in mind that people may be able to maintain those values and culture, and therefore the ethos of the organisation, without actually belonging to the particular religion or belief.

Organisations should be clear about the link between the requirements of the job and the requirement to be of a particular religion or belief as, in the event of an Employment Tribunal claim on the grounds of religious or belief discrimination, the burden of proof will be on the employer to show a genuine occupational requirement. Tribunals tend to interpret such requirements very narrowly since they effectively go against the principle of equal treatment."

Appendix 1 sets out further guidance at paragraphs 3 to 6 as follows:

"In an organisation a GOR exemption cannot be claimed in relation to particular duties if the employer already has sufficient employees who are capable of carrying out the required duties and whom it would be reasonable to employ on those duties without undue inconvenience.

Where the organisation has a religious ethos, a GOR exemption cannot be claimed if the nature of the role and the context within which it is carried out is not of sufficient profile or impact within the organisation to affect the overall ethos of the organisation.

Each job for which a GOR may apply must be considered individually; it should not be assumed that because a GOR exists for one job it also exists for jobs of a similar nature or in a similar location. The nature or extent of the relevant duties may be different

or, for instance, there may be other employees who could undertake those duties.

A GOR can be claimed where it is necessary for the relevant duties to be carried out by someone of a specific religion or belief because being of that religion or belief is an essential requirement for the job, for example in the Islamic faith a halal butcher must be Muslim.

A GOR must be reassessed on each occasion a post becomes vacant to ensure that it can still be validly claimed. Circumstances may have changed, rendering the GOR inapplicable."

3.16 The Tribunal were referred in particular to paragraphs 70 to 74 of the case of *Azmi v Kirklees Metropolitan Borough Council [2007] ICR 1154* insofar only as it related to the question of an interpretation of proportionality.

3.17 In *Kutz-Bauer v Freie und Hansestadt Hamburg [2003] IRLR368* the European Court of Justice stated that, when assessing proportionality, it was necessary to ascertain:

"51 in the light of all the relevant factors and taking into account the possibility of achieving by other means the aims pursued by the provisions in question whether those provisions, as a means to the achievement of certain aims, are capable of advancing those aims".

3.18 More recently the Court of Appeal considered the principle of proportionality in the case of *Hardy & Hansons plc v Lax [2005] ICR 1565*. In that case; Lord Justice Pill stated, (paragraph 32):

"It must be objectively justified (*Barry v Midland Bank plc [1999] ICR 859*) and I accept that the word "necessary" used in *Bilka-Kaufhaus [1987] ICR 110* is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the Tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal Tribunal) that, when reaching its conclusion, the employment Tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."

3.19 In *R (on the application of Elias) v Secretary of State for Defence* [2006] IRLR 934 the Court of Appeal held that a three-stage test should be applied in determining whether a measure is proportionate to the aim to be achieved. The stages are:

- (1) Is the objective sufficiently important to justify limiting a fundamental right?
- (2) Is the measure rationally connected to the objective?
- (3) Are the means chosen no more than is necessary to accomplish the objective?

3.20 Section 95(1)(c) and section 98 of the Employment Rights Act 1996.

3.21 *Weston Excavating v Sharpe* [1978] IRLR 27.

3.22 *Malik v Bank of Credit & Commerce International SA* [1997] ICR 606.

3.23 *Reid v Camphill Engravers* [1990] ICR 435.

4.0 DECISION AND CONCLUSIONS

4.1 Does the Tribunal have jurisdiction to entertain the claimant's discrimination claim pursuant to the Employment Equality (Religion or Belief) Regulations 2003, because she did not have any particular religion or religious or philosophical beliefs?

4.2 The respondent states that the Tribunal does not have jurisdiction since at no material time has the claimant professed a religious belief. Mr Halden, on the respondent's behalf, opines that the regulations, as in force at the time of the claimant's departure from employment, do not tackle discrimination against those who have no belief. He refers to the definition contained in regulation 2. He states that the DTI explanation is helpful but not part of the regulations. He states that the mere fact that the government amended the regulations in the way that they did supports his view that they were not affective to protect someone such as the claimant. Mr Blake, on behalf of the claimant, pointed out that at the commencement of the hearing on the 4th December 2007 that the respondent first raised this argument that the claimant fell outside the protection of the 2003 regulations because she did not have any particular religion or religious or philosophical beliefs. He pointed out that the argument was not pleaded by the respondent.

4.3 In any event, his view was that the respondent's argument was misconceived. The amendments to the definition of religion or belief made by the Equality Act 2006 did not alter the scope of the protection offered by the 2003 regulations as in his view the definition of religion or belief has always included a lack of religion or belief. This is reflected in the European Convention of Human Rights. In 1994 the European Court of Human

Rights held in *Kokkanikis v Greece* [1994] 17 EHRR 397 at 418 (paragraph 31) that:

“as enshrined in article 9 [of the European Convention of Human Rights] freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”.

- 4.4 The Directive (as with all European Union laws) should be interpreted in accordance with the European Convention of Human Rights. Similarly, under section 3 of the Human Rights Act 1998, domestic legislation such as the 2003 regulations should be interpreted in accordance with the European Convention of Human Rights.
- 4.5 The Directive is clearly intended to apply to discrimination against an individual because she held a particular religious belief and also because she did not hold the same beliefs as the employer. For example, Mr Blake states, it is inherent in article 4 that the Directive covers discrimination because an individual was not the same religion as an employer. This would include someone who was not religious or had no religious beliefs.
- 4.6 The breadth of the coverage of the Directive is reflected in article 2 which provides that the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in article 1.
- 4.7 The 2003 regulations implement the Directive and, where possible, must be interpreted in accordance with that Directive.
- 4.8 Mr Blake urges that common sense dictates that the 2003 regulation should protect people who are discriminated against because they do not hold religious or similar beliefs. It cannot have been intended, he says, that an individual will be within the protection of the 2003 regulations if she were not promoted because she was an atheist, a Muslim, Jew or Hindu, but a person in Mrs Hender’s position would be outside that protection because she was unsure of her religious beliefs.
- 4.9 He referred the tribunal to paragraph 14 of the DTI explanation of the 2003 regulations (which pre-dates the Equality Act 2006) which provides that references to religious belief and similar philosophical belief include reference to a belief structure involving the absence of particular beliefs, because these are two sides of the same coin. He similarly refers to the ACAS Guide, dated April 2004, which provides that the regulations “also cover those without religious or similar beliefs”.

- 4.10 Mr Blake concludes by saying that in the circumstances in his view it is clear that Mrs Hender does fall within the scope of the 2003 regulations. She was not promoted and was not eligible to be promoted under the respondent's policy because she was not Christian.
- 4.11 The Tribunal unanimously agree with Mr Blake's submissions. The Tribunal's decision on this point is that it does have jurisdiction and Mrs Hender is covered by the regulations.
- 4.12 Did the respondent directly discriminate against the claimant as defined in regulation 3(1)(a) of the 2003 Regulations? Did the respondent treat the claimant less favourably than other persons on the grounds of religion or belief in the opportunities which it had afforded her for promotion, and by subjecting her to a detriment (namely disqualifying her from applying for or refusing to promote her to the position of Support Worker Level 2?). Alternatively, did the respondent indirectly discriminate against the claimant as defined in regulation 3(1)(b) of the 2003 Regulations?
- 4.13 Mr Halden conceded that the respondent's policy undoubtedly deprived the claimant of applying for promotion to Level 2 and accepted that that was capable of amounting to a detriment short of dismissal.
- 4.14 Mr Blake, on behalf of the claimant, pointed out that in relation to direct discrimination the respondent relied on regulation 3(2), which provides that the reference to discriminating on the grounds of religion or belief is not a reference to the employer's religion. He pointed out that, as set out in the DTI explanation of the 2003 Regulations, at paragraph 28 to 30, regulation 3(2) is intended to cover a situation in which, for example, an employer, because of his strong religious views, refuses to employ a female or gay applicant. This may amount to sex and/or sexual orientation discrimination, but because of regulation 3(2) it would not amount to discrimination on the grounds of religion or belief. He opined that in the present case the claimant was plainly directly discriminated against as defined in regulation 3(1)(a) because she was not a practicing Christian. She was discriminated against because of her religion or belief. If she were a Christian she would have been afforded the opportunity to be promoted. Her comparators are all applicants who applied for the Level 2 posts and were Christian, and therefore were considered for appointment or promotion. It was clear from the evidence that the respondent admitted that it discriminated against non-Christians.
- 4.15 Mr Blake stated that under Regulation 6(2)(b),(c) and (d), the respondent's treatment of the claimant is unlawful (subject to the GOR defence) because the respondent discriminated against her in relation to her opportunities for promotion and/or by refusing to promote her and/or by constructively dismissing her (dealt with below) and/or by subjecting her to a detriment. He stated that in the circumstances, indirect discrimination did not arise. However, in his view the respondent applied the recruitment policy (which amounts to a provision, criterion or practice) to the claimant, its application

amounted to direct rather than indirect discrimination as being Christian was a fundamental element of that policy. However, in the alternative, the policy clearly puts non-Christians at a particular disadvantage and falls within the scope of indirect discrimination.

- 4.16 Again, the Tribunal unanimously accepts the arguments of Mr Blake and is of the clear view that the respondent did directly discriminate against the claimant.
- 4.17 Has the respondent made out its GOR defence? Was being a practicing Christian a genuine occupational requirement for Support Worker Level 1 and 2 posts? Was it proportionate to apply that requirement to the claimant and her application for a Level 2 post? The evidence and arguments relating to these matters were at the heart of the dispute between the parties. Both counsel placed great emphasis on these matters.
- 4.18 In this context it is not in dispute that the respondent has an ethos based on Christianity, at the material time it was the respondent's policy not to appoint or promote anyone who was not a practicing Christian other than to the posts of cook, gardener, cleaner and maintenance assistant, and as a result of the recruitment policy the claimant was not entitled to apply for and/or was refused promotion to the post of support Level 2 because she was not a practicing Christian.
- 4.19 Mr Halden pointed out that the words "and determining" appear in regulation 7(2)(a) but not in regulation 7(3)(a) upon which the respondent relies. The defence under 7(3) is less stringent to apply. He states that the claimant charges the respondent with cynicism. It is said that the policy as applied to them was developed in response to the regulations and that to be a Christian is not in truth a GOR demonstrated by the appointment of non-Christians to positions from which they are "now" excluded. The respondent roundly rejects that charge. He makes the point that to place that charge while at the same time acknowledging the respondent's ethos is to a point contradictory. He points out that the process of the development of their policy had started with the appointment of their chief executive, Paul Ashton in 2000, continued with the Board deciding in 2001/2002 to cease tendering for work altogether and re-emphasise the foundations of Prospects which was to rely on their networking in the Christian community and through approaches for people that required their Christian support and the end to TUPE transfers.
- 4.20 He emphasised throughout that the respondent conducted a close scrutiny of their policy in the light of the 2003 Regulations. That was a natural and responsible approach and resulted in reaffirmation, with updating, of a policy long in place. In particular, the concept of GOR had to be taken into account.
- 4.21 He emphasised that the claimant's charge fails to address the fact that the policy (on the respondent's evidence) had been consistently applied

throughout the respondent's organisation, save in pockets in South Wales (Neath and Britton Ferry) and North Wales (Conwy) where the claimant worked. Contrary to assertions about difficulties in recruitment the respondent's evidence was that full liaison with local churches would have produced Christian recruits.

4.22 An important part of Mr Halden's submissions is that the respondent's evidence was that it was its employees in the areas mentioned who had acted to undermine its policy. Mark Sheridan, Mike Picton and John McMillan, the former Area Director, were blamed. He suggested that by implication Mr Rutter, in giving evidence, if reluctantly, accepted the charge. Contracts with local authorities and TUPE transfers involving non-Christian providers were put as examples of the respondent's departure from its policy.

4.23 In respect of the arguments surrounding proportionate means, Mr Halden points to regulation 7(3) and refers to the DTI explanation at paragraphs 39 to 43.

4.24 Mr Halden in turn refers to Mr Blake's reference to paragraph 51 of *Kutz-Bauer v Freie und Hansestadt Hamburg [2003] IRLR 368*:

"It is necessary to ascertain, in the light of all the relevant factors and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, whether such aims appear to be unrelated to any discrimination based on sex and whether those provisions, as a means to the achievement of certain aims, are capable of advancing those aims." He states that that is the starting point, and the respondent's unequivocal submission is that it cannot deliver its Christian ethos through its work (whether to Christians, service users of other faiths or indeed of no faith) without ensuring that the providers are themselves Christians.

4.25 He points out that the Tribunal's task in considering proportionality was considered in *Hardys & Hensons Plc v Lax [2005] IRLR 726*, admittedly in the context of a sex discrimination claim. Reasonableness is an issue to be considered, but does not equate to proportionality. At paragraph 32 Lord Justice Pill states:

"The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the Tribunal to take into account the reasonable needs of the business, but it has to make its own judgment upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.

- 4.26 Mr Halden referred to Mr Blake's opening submissions when he referred to *R(Elias) v Secretary of State of Defence [2006] IRLR 934*, where Lord Justice Mummery identified three questions in determining whether the means adopted are proportionate to the objective (at paragraph 165):
- "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective. Thirdly, are the means chosen no more than is necessary to accomplish the objective?"
- 4.27 Mr Halden stated that in response to those three questions the respondent says:
- (i) Yes. In principle, and subject to the answers to the other two questions, the respondent cannot fulfil its mission without imposing some limits on those who deliver the service on its behalf.
 - (ii) This question, in the respondent's case, is hard to separate from the first.
 - (iii) This is the heart of the present dispute. See paragraph 43.2 of Mr Blake's opening submissions. The claimants have repeatedly argued that the aspects of a Support Worker's role are severable, e.g. a non-Christian may take a client to swimming, or call in a Christian when spiritual support is sought. The respondent rejects this approach as missing the essence of its case: that the service it provides is holistic. It does, however, give weight to the argument, in reviewing job descriptions and identifying exempt posts.
- 4.28 Mr Blake accepts that the defence in regulation 7(3) is slightly broader than the defence in regulation 7(2) because under the former the occupational requirement need not be determining as well as genuine. That is acknowledged in paragraph 86 of the DTI explanation of the 2003 Regulations.
- 4.29 Although slightly broader than regulation 7(2), it is clear, says Mr Blake, that the GOR defence in regulation 7(3) must be interpreted very restrictively as it permits discrimination, contrary to the overriding principle of equal treatment.
- 4.30 Mr Blake advises the tribunal that it would need to interpret regulation (7)(3) based upon its wording and the wording of article 4(2) of the Directive and by reference to case law on analogous legislative provisions, in the absence of any specific case law on this provision.
- 4.31 Mr Blake submits that regulation 7(3) requires the Tribunal to consider a number of matters. First, the Tribunal should

1. have regard to Prospects ethos;
2. have regard to the nature of the employment of a Support Worker Level 2 or the context in which that work is carried out.

Secondly, in light of the factors identified in the first stage, the tribunal should determine whether Prospects have shown that there is a genuine occupational requirement that Support Worker levels 1 and 2 employees in Day Opportunities in Conwy were all practising Christians.

Thirdly, the Tribunal should determine whether it was proportionate to apply that requirement to Mrs Hender in the context of her application for promotion and/or desire to be promoted to a Level 2 post.

- 4.32 At all stages of this analysis, he says, the Tribunal should bear in mind that the language of article 4(2) of the Directive requires "a genuine, legitimate and justified occupational requirement" and that the regulation 7(3) defence must be interpreted narrowly.
- 4.33 The first stage requires the Tribunal to have regard to not just the ethos of the employer but also the nature of the employment (i.e. in this case working with adults with disabilities) or the context in which that employment is carried out (i.e. at one of three Day Centres, which together have around twenty eight staff and support seventy clients, fifty to fifty five of whom are not Christian and do not want or require Christian support).
- 4.34 At this stage the Tribunal's focus must be on whether the employer's ethos supports the application of a GOR. In this regard, the DTI explanation provides at paragraph 85:
- "85. The employer must also establish that the GOR applies, having regard to its ethos. This means that the ethos should be taken into account when considering what the functions of the job and its context are, and the skills and attributes required to perform them, so as to assess whether it is a GOR for the person doing the job to be of the particular religion or belief. It also means that the GOR should not be inconsistent with that ethos."
- 4.35 Applying this to Prospects, Mr Blake accepts that, as a result of its ethos (i) where Christian spiritual support is requested by the people supported, Prospects wishes to provide this support; (ii) it is legitimate for Prospects to do so; (iii) it is legitimate to ensure it employs sufficient staff to do so. However, Prospects must still persuade the Tribunal that there is a GOR in each case and that the application of that GOR is proportionate.
- 4.36 Having accepted that prospects had a Christian ethos, Mr Blake states that that gets them within the scope of Regulation 7(3), however, he opines that Prospects appears to seek to go further than this. They argue in their opening submissions that Prospects work is a Christian "mission". They contend that in the light of this, only Christian employees can carry out work

as part of this "mission". In their evidence, Mr Ashton, Mrs Groat and Mrs Edwards referred to the fact that Christian staff provided an added benefit because they were "called" to the work to serve Christ. As prayer is fundamental to Christians, any employee who could not pray would not be carrying out the whole job. Mr Blake submits that this argument is unsustainable, both as a matter of law and on the facts.

4.37 Mr Blake states that as a matter of law that regulation 7(3) does not allow an organisation to self-define its ethos in this way. Prospects seeks to remove any link between the actual work done and the genuine occupational requirement by suggesting that all jobs require prayer and/or because all staff had a religious calling to perform those jobs. He submits that this argument is misconceived. The motivation for performing work cannot form part of an occupational requirement. If it could, once an organisation has an ethos it could claim that its work was a religious mission and apply a GOR to all jobs irrespective of the actual requirements of the job. The references in regulation 7(3) to the nature and context of the work, the need for a GOR and proportionality would fall away and a religious ethos would provide a blanket GOR. This is manifestly not the intention of regulation 7(3). If it were, the 2003 Regulations would simply provide that the regulations do not apply to an organisation with a religious ethos which only wishes to employ people who are committed to that ethos.

4.38 Mr Blake states that rather than applying a blanket defence, as sought by Prospects, regulation 7(3) simply requires the Tribunal to have regard to the ethos and the nature of the employment or the context in which that employment is carried out. There is, therefore, a clear focus on the "work" being done or its context (a focus re-emphasised in the need to identify a GOR). The ethos may mean that some of that work is of a religious nature, but the ethos cannot make every activity, regardless of its content, a religious activity. This is reflected in the DTI explanation which provides at paragraph 87:

"in practice a GOR will apply to a job for an employer with an ethos based on religion or belief only in a small number of cases. A GOR is more likely to apply if the job is one which has particular importance for maintaining the ethos of the employer's organisation."

4.39 Similarly, paragraph 72 provides that:

"the introductory words of regulation 7(2) require regard to be had, when considering if a GOR applies, to "the nature of the job" or "the context in which it is carried out". This effectively means that the functions of the post in question must be considered. The reference to context serves to demonstrate that the nature of the job is not to be considered narrowly, but can include wider elements relating to the job." Although this deals with regulation 7(2) the relevant words are the same in regulation 7(3).

- 4.40 In the circumstances, says Mr Blake, as a matter of law, Prospects cannot succeed on its argument that its ethos requires all staff to be Christian as Prospects role is a "mission".
- 4.41 In Mr Blake's view the words "genuine", "occupational" and "requirements" provide clear guidance on the scope of the GOR defence (see, for example, paragraph 73 of the DTI explanation). A "requirement" is stronger than something which is merely a factor, a preference, or a qualification for the job. It is something which is essential for the person to be able to perform the functions of the job. Accordingly, there must be more than a mere wish, preference or desire for the post holder to be Christian. The use of the word "occupational" shows that there must be a link between the requirement and the work carried out by the employee. The requirement must be "genuine" in the sense that the employer reasonably believes, on objective grounds, that there is a requirement that the employee is, in this case, a Christian. The test is objective, so the subjective view of the employer will not be determinative and the requirement cannot simply be created on a whim. Accordingly, Mr Blake states that when assessing whether Prospects has proven that there was a GOR for the Level 2 post the Tribunal should consider what Level 2 Support Workers were actually required to do as opposed to what Prospects might have imagined, assumed or preferred them to do.
- 4.42 In respect of justification and proportionality Mr Blake states that regulation 7(3) requires that the application of the GOR is proportionate. The Directive refers to a "legitimate and justified" occupational requirement. These references to proportionality, legitimacy and justification call to mind the test of objective justification in cases of indirect discrimination and other discrimination statutes (or the genuine material factor defence in equal pay cases). Albeit that regulation 7(3) effectively, permits direct as well as indirect discrimination on the grounds of religion or belief where there is a GOR defence.
- 4.43 Although the legal context in the case of *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154, was of course different from this case, nonetheless the EAT considered the issues of justification and proportionality in paragraph 70 to 74 and noted the heavy burden upon an employer to show justification and proportionality.
- 4.44 Mr Blake submits that the common reference to proportionality indicates that the Tribunal should adopt a similar, strict approach to regulation 7(3) as it would in relation to justification under regulation 3(1)(b). In this context, he notes, it is important to realise that regulation 7(3)(b)(ii) expressly refers to proportionality in the "particular" case. Accordingly, he says, the particular circumstances in Conwy Day Opportunities must be taken into account. These will differ from those in the Conwy residential homes, and to those in other Prospect services in England and Wales. A Blanket policy applied across the organisation will not be lawful.

- 4.45 We have recited the significant case law on the meaning of proportionality earlier in these reasons.
- 4.46 Mr Blake applies the relevant principles to regulation 7(3), and accepts that it can be legitimate for an employer to seek to uphold its religious ethos by applying a GOR to certain jobs which involve activities with a significant religious element which could not be carried out by persons not of that religion. However, it will not be legitimate to apply that GOR to every job within the employer's organisation simply because that employer has a religious ethos. The employer must show that it is proportionate to apply the GOR in each case. The ethos must be closely linked to the work to be carried out by the employee to whom a GOR is applied; in effect, the employer must show that if it did not apply the GOR to the role in question, the work could not be performed or the religious ethos would be undermined. A further requirement of proportionality is that the employer should go no further than necessary in applying the GOR. So, if a job holder's responsibilities can be rearranged to remove certain tasks to which the ethos is critical, the employer should do so. Similarly, the proportionality of applying the GOR should be considered every time there is a recruitment exercise. Proportionality will also require the employer to consider whether it would be sufficient to apply a lesser requirement than being a practising member of a certain religion. For example the employer could simply require that employees were sympathetic to its ethos. This is reflected in article 4(2) of the Directive which provides that the Directive does not prevent an employer requiring "individuals working for [it] to act in good faith and with loyalty to the organisation's ethos". It is notable that, in this context, the Directive does not refer to requiring an employee to hold specific religious beliefs but rather to being loyal to that ethos.
- 4.47 The tribunal agree with Mr Blake's analysis.
- 4.48 Having outlined the legal principles Mr Blake then applied the law and the legal principles to the facts as he saw them and his arguments are set out in his written closing speech which we repeat verbatim hereunder (4.49-4.75).
- 4.49 First, Prospects' approach to the application of the GOR was diametrically opposed to the correct legal approach.
- 4.49.1 Mr Ashton stated in his witness statement [Ashton 1/25] and confirmed in his evidence that a non-Christian would only be appointed to a post if it was "necessary". However, under regulation 7(3) a GOR should be applied to a post *only* where a GOR is necessary.
- 4.49.2 On a number of occasions Mr Ashton referred to the problem of a glass-ceiling if non-Christians were appointed. However, a glass ceiling is inherent in the operation of regulation 7(3): at a certain level of seniority a GOR will become permissible in an organisation with a religious ethos. Relying on the glass-ceiling

as a reason not to appoint non-Christians in the first place demonstrably misunderstands the scope of regulation 7(3).

- 4.49.3 Mr Ashton referred on a number of occasions in cross examination to the fact that non-Christians might feel uncomfortable working for Prospects. In making this statement he referred to the evidence of Ms Tattershall. However, again, this cannot be a reason for applying a GOR to all posts (other than gardeners, cooks etc). It is management's responsibility under the discrimination legislation to integrate employees of all faiths, genders, races etc into the workplace.
- 4.49.4 Prospects contend that a GOR applied to all Level 1 and Level 2 Support Worker positions across the whole of Prospects. They further contend that there was no basis for a different approach in Conwy Day Opportunities because of the specific situation there: for example the number of non-Christian people being supported (50 to 55 out of 70 at the relevant time). Failure to take this into account is contrary to Prospects' own documentation [1/219 which provides that the GOR "needs to link to the number of people we support who are Christian"]. The failure to consider the specific circumstances of Conwy Day Opportunities suggests a complete failure to consider how the GOR applied to the Level 2 post to which Mrs Hender was denied promotion.
- 4.50 Secondly, Mr Ashton claimed that all jobs within Prospects were considered post by post on a local level to determine whether the GOR applied. However, this contention was not supported by the evidence.
- 4.50.1 It was alleged, for the first time in cross-examination, that Prospects had carried out detailed "job evaluations". However there is not a single reference to these job evaluations in the bundles of evidence: not even a passing comment in the minutes of numerous meetings at which the 2003 Regulations were discussed. Mrs Groat gave evidence of a process in which jobs were evaluated. She claimed that there was no evidence of this process because a hard drive on her predecessor's (Maureen Wise) computer was wiped. This claim does not stand up to scrutiny because (i) the loss of a single hard drive should not have removed all evidence of a process in which a number of people were purportedly involved (for example, the documents ought to have been on other computers) and (ii) on Mrs Groat's own evidence she provided information to Ms Wise in hard copy; no hardcopy documents have been disclosed. Given the process described by Mrs Groat, it is astonishing that not a single document has been disclosed. It is more astonishing, given the relevance of the 'job evaluations' to Prospect's case, that they

were not even referred to in Prospects' witness statements. The first mention came in Mr Ashton's cross examination.

- 4.50.2 The contention that there was a detailed "job evaluation" process sits uneasily with the view expressed by Mr Ashton and Ms Edwards that no post (other than cook, gardener etc) could be done by a non-Christian. If that is their genuine belief, why was it necessary to do a job evaluation? On the evidence, it is submitted that the only inference is that Prospects recognised the importance of job evaluations to showing a GOR under the 2003 Regulations. However, it had made a pre-determined decision to apply a GOR to all posts (other than cook, gardener etc). In light of this pre-determination, its purported review of individual job descriptions and the actual work undertaken in each post was at best cursory and, at worst, a sham.
- 4.50.3 The detail with which individual jobs were evaluated is further evidenced by the fact that in the November 2004 Human Resources Board Report [1/320-330], Prospects surprisingly did not even identify the composition of its workforce by religion. In the absence of this information, it is difficult to understand how it could genuinely consider whether a GOR needed to be applied to all Level 1 and Level 2 posts (whether in Conwy Day Opportunities or elsewhere in Prospects).
- 4.51 Thirdly, Mr Ashton stated in cross-examination that it was Prospects' policy to reconsider the application of the GOR every time a job became vacant. This was the local manager's responsibility. This policy was not reduced to written form. Nor was there any specific reference to it on the form completed by local managers to obtain authorisation to recruit. Nonetheless, Mr Ashton stated that this was the clear policy. Notwithstanding this clear policy, there was no evidence before the Tribunal to show any review of the continuing application of the GOR. Indeed Mr Ashton's evidence was that he had never been requested to make what he regarded as "an exemption" (other than the Wrekin TUPE transfer and the promotion of Rachelle McLaughlin). It was telling that neither he nor Ms Edwards regarded Mr Sheridan's request on 18 January 2006 [2/455 – 456] as a request for an exemption from the GOR. In the circumstances there is no evidence that Prospects has reviewed the application of its GOR since the 2003 Regulations came into force in December 2003.
- 4.52 It is submitted that these factors reflect a number of flaws in Prospects' approach to regulation 7(3). As a matter of law, they do not mean that Prospects' reliance on the GOR defence must necessarily fail. However, the burden of proof lies on Prospects. In the absence of any analysis of the job requirements at the time Prospects implemented its recruitment policy, Prospects was bound to provide, in its evidence to the Tribunal, a clear explanation and justification of the application of the GOR to Mrs Hender's cases. It is submitted that it failed to do so. In particular, it gave almost no

evidence on the actual job requirements of a Level 2 (or Level 1) Support Worker in Conwy Day Opportunities. In the circumstances, it is submitted that Prospects' reliance on the GOR defence in Mrs Hender's case is fatally undermined.

- 4.53 As noted above, Prospects appears to suggest that its work and purpose is a Christian "mission" and that, therefore, staff must be Christian to be able to carry out that mission. For the reasons above, this argument is legally flawed. In addition, it is not supported by the evidence. It is apparent that Prospects' work is the provision of support to people with learning difficulties. This is reflected in its Memorandum of Association which provides [1/94b, paragraph 3] that Prospects' objects are:
- "To promote the welfare of those persons with a physical or learning disability in any manner which now is or hereafter may be deemed to be charitable".
- 4.54 The nature of Prospects' work and its purpose are further reflected in its Statement of Purpose which it provides to local authorities in compliance with the Care Homes legislation: see tab 1 of Volume 4.
- 4.55 Focussing on the Level 1 and 2 roles within Conwy Day Opportunities, these roles are fundamentally about providing support for people with learning disabilities (who themselves, in over two thirds of cases, are not Christian and/or do not require Christian support). Of course, certain of the people supported (or their families) may request for Christian spiritual support or prayers. However, as set out in the witness statements of and on behalf of Mr Sheridan and Mrs Hender, this was rare.
- 4.56 The Tribunal also heard evidence on the context of the work carried on in Conwy Day Opportunities. This included the size of the service in Conwy (supporting 70 people), the support provided, the size of the workforce (around 25 Level 1 Support Workers, approximately 1/3 of whom were non-Christian) and the reasons why Mr Sheridan and Mr Picton planned to recruit Level 2 Support Workers.
- 4.57 The requirements and purpose of the Level 1 and 2 roles, and the context in which their work was carried out, are considered in more detail in the next section in relation to whether there was a genuine occupational requirement.
- 4.58 The Tribunal has heard evidence on behalf of the Claimants on the requirements of the Level 1 role. It also heard evidence about the reasons why Mr Sheridan and Mr Picton wanted to recruit Level 2 Support Workers and how Mrs Hender "acted up" by mentoring less experienced colleagues.
- 4.59 By contract, Prospects gave almost no evidence on the actual job requirements in the Level 1 and Level 2 posts. Mr Ashton did contend in his witness statement [Ashton/44] that in the Autumn of 2005 he and Jan Groat concluded that non-Christians could not fulfil fundamental elements of their job descriptions, causing considerable difficulties for Prospects and

requiring contingencies to be put in place. However, this contention is not supported by any evidence:

- 4.59.1 There was no evidence of any investigations being carried out before Mr Ashton and Ms Groat reached this conclusion.
- 4.59.2 The supposed difficulties and need for contingency arrangements were never raised with Mr Sheridan notwithstanding that he remained in his post until April 2006. In addition, they do not appear to have been raised in any of the meetings in Conwy between October 2005 and June 2006: see, for example, the meeting with Mr Sheridan on 18 January 2006 [2/455 – 456], the meeting with Day Opportunities Co-ordinators on 15 February 2006 [2/459-460], the meeting with staff on 27 February 2006 [2/46 to 463] and the meeting with staff on 7 June 2006 [2/468-470].
- 4.60 One very important factor which indicates that it is not an occupational requirement to be Christian to be a Level 1 or 2 Support Workers is the fact that in Prospects' recent history a number of non-Christian employees have provided support. In this regard, the DTI Guidance provides that (para88):
- "In practice, if an employer with a religious ethos already employs a person who does not have the required religion or belief in a particular post, this will provide a very strong indication that having that religion or belief is not a GOR for the post".
- 4.61 For example, in 2006, one third of the staff at Support Work Level 1 in Conwy Day Opportunities were not Christian. In addition, Mrs James confirmed that a number of non-Christian staff continued to be employed in Conwy Day Opportunities.
- 4.62 In addition to the witness evidence, the Tribunal was directed to the job descriptions for various roles within Prospects [2/598 to 720]. It is submitted that, notwithstanding Prospects' denial that there were changes [see, for example, Edwards/13], there has been a clear increase over time in the Christian emphasis in these job descriptions. To the extent that Prospects altered the job descriptions to enhance the apparent need for staff to carry out Christian activities, these job descriptions cannot support Prospects' GOR defence. Prospects should not have enhanced the religious elements of the job in attempt to suggest that the job fell within the scope of regulation 7(30). On the contrary, the opposite is true: Prospects should have considered whether it could alter job descriptions to remove any aspects which may have genuinely needed to be performed by a Christian.
- 4.63 Focussing on the most recent job description for Level 2 Support Workers [2/688]. Prospects' witnesses gave evidence in cross examination on these aspects of the job description. Mr Ashton accepted that there were four main strands to the religious elements of the job description: spiritual support for the people supported; Spiritual support for staff in Conwy and,

in particular, the Level 1 Support Workers; wider spiritual interaction with Prospects' employees; the promotion of the ethos externally. These elements are considered separately below. It is submitted that this analysis illustrates that there was no genuine occupational requirement for Level 1 and 2 Support Workers in Conwy Day Opportunities, or alternatively, that it was not proportionate to apply a genuine occupational requirement to Mrs Hender.

4.64 The evidence before the Tribunal was that the vast majority of work carried out with people supported was secular. This is reflected in the examples of the activities carried out on a daily basis [for example, 3/860 to 887]. The activities include craft, swimming, sports, walking, personal care, cleaning etc. The only spiritual activity identified was that some people supported attended Special Alpha [for example, 3/867]. In addition, some prayed and attended church.

4.65 Of course, some of the support was Christian. However, that does not mean that Prospects was entitled to apply a blanket GOR. It should have considered whether:

4.65.1 A non-Christian could provide appropriate support. For example, Mrs Hender networked with Trinity Church. She acted on a daily basis within the ethos. In this regard, the DTI Guidance provides that in many jobs being sympathetic to the ethos (it is common ground that Mrs Hender was sympathetic to Prospects ethos) will suffice.

"in many jobs, it will be sufficient that employees have some understanding of, and respect for, the faith in question. If that is the case, then being a follower of the faith in question would not be a genuine occupational requirement for the job".

4.65.2 Even if a Christian Support Worker were required, it would clearly have been possible to delegate this particular activity to a Christian colleague: as happened with Special Alpha while Mrs Hender was employed by Prospects. This is an aspect of proportionality and taking into account the context of the role. Mr Ashton accepted this, although, in response, he said it was only one of the four elements of the role.

4.66 It was common ground that only 20% to 25% of the Level 2 role would not be contact time with the people supported. However, there was no evidence that the additional responsibilities of a Level 2 Support Worker justified the blanket application of a GOR or that this management role would include any (or any significant) spiritual support.

4.66.1 Neither Mr Picton nor Mr Sheridan, who initially sought to recruit Level 2 staff, did so because of a perceived lack of spiritual guidance for staff.

- 4.66.2 There was no reference to a lack of spiritual support for staff in the minutes of the very lengthy meeting at Conwy Day Opportunities on 7 June 2006 [2/468-470].
- 4.66.3 The Investors in People reports refer to management issues but do not refer at all to prayer strategies and the Christian spiritual support provided by managers.
- 4.67 Further, it is clear that not all managers, even if Christian, would wish to provide spiritual support to staff [see, for example, 1/23331-238, paragraph 4 on the top of 238]. Similarly Mr Sheridan makes the point that, in his view, "if Christian support needed to be given, it could be undertaken by a practising Christian – but there is no reason why this person needed to be a Level 2 Support Worker" [Sheridan/54].
- 4.68 The conclusion that the Level 2 role did not require a Christian employee is reinforced by the fact that Mrs Hender acted as a mentor and supervisor, and carried out many of the functions of the Level 2 role. This is reflected in the fact that she was regarded as the "ideal number 2" by Iris Barlow [Hender/14] and was encouraged by her colleagues to apply for the job [Mann/5 and 10].
- 4.69 The history of Prospects also reflects that there was no GOR to be a Christian in a Level 2 post. For example, John McMillan states [McMillan/16 that in the past it was custom and practice that non-Christians could be appointed not only to Level 1 but also to Level 2 Support Worker posts. In this regard, a Briefing Note for Board Members dated 17 December 2001 [1/296, middle of page] states that within Neath and Briton Ferry there were "local management difficulties as there are a number of non-Christian staff who operate at support Level 2 and have the potential to fulfil the criteria at Level 3". It is inherent in this statement, that non-Christian staff could perform the Level 2 role so successfully that they would meet the criteria for promotion beyond Level 2. Indeed, in one case a non-Christian was appointed to a Level 3 post (Rachelle McLoughlin).
- 4.70 In any event, to the extent that spiritual support and prayer for other staff were required, it would have been simple to arrange that a staff member who was comfortable with this role carried it out.
- 4.71 In the circumstances, the purported requirement that a Level 2 Support Worker provide spiritual support for staff did not justify the imposition of a GOR. In any event, it was not proportionate to apply that in Mrs Hender's case.
- 4.72 In relation to attendance at prayer and encouragement days with other Prospects' staff, although this may have been a preference, it was clearly not a genuine occupational requirement nor proportionate to require every staff member to attend. In any event, it would have been possible to

arrange staff events which could be attended by staff who were sympathetic to the Christian ethos.

- 4.73 Finally, in relation to Prospects' external links, Mrs Hender did promote links with Trinity Church. Further, it cannot have been a genuine occupational requirement that a Level 2 must be able to be Christian so that they could explain the Christian faith. There is no evidence that this occurred often, if at all. In any event, non-Christians could carry out this function, and Prospects could have provided training for this. Equally, Prospects would not have been undermined if a Level 2 Support Worker, asked to explain the Christian faith, suggested that the questioner seek an answer from a colleague, manager or even a minister etc.
- 4.74 For the reasons above, Prospects has not provided any evidence to substantiate its assertion that it was a GOR that all Level 2 Support Workers in Conwy Day Opportunities must be Christian. Prospects' evidence was based on generalised assertions which often contradicted the documentary evidence. This evidence illustrated a clear preference to work with fellow Christians, but fell far short of identifying a genuine occupational requirement. The evidence was further undermined by the fact that non-Christians had been fulfilling Level 1 and Level 2 Support roles within Prospects for some time: as the DTI Guidance recognises, this strongly suggests that there was not a genuine occupational requirement.
- 4.75 In addition, to the extent that certain functions had a Christian element (and there were very few), the concept of proportionality required Prospects to consider whether it was sufficient that Mrs Hender was sympathetic to Prospects' Christian ethos (this is particularly relevant for someone like Mrs Hender who had been employed by Prospects - and performed very well - for over 3 years) and/or whether these limited functions could be carried out by other members of staff.
- 4.76 The Tribunal unanimously accept that all of the recitals relating to the evidence referred to in Mr Blake's submissions are indeed factually accurate. We have not necessarily included them all in our findings of fact as they arise out of very detailed verbal evidence and documentation perused by the tribunal and to make such findings would have necessitated these reasons being of inordinate length. We unanimously agree with all of Mr Blake's submissions in respect of his application of the law to the facts.
- 4.77 Accordingly, in summary, the Employment Tribunal considers that it does have jurisdiction to entertain the claimant's claim and that the 2003 Regulations to protect an individual with no particular religion or religious or philosophical beliefs. The respondent did directly discriminate against the claimant as defined in Regulation 3(1)(a) of the 2003 Regulations in that the respondent treated the claimant less favourably than other persons on the ground of religion or belief in the opportunities which it afforded her for promotion by subjecting her to a detriment, namely disqualifying her from applying for or refusing to promote her to the position of a Support Worker


Level 2. The respondent has not made out its genuine occupational requirement defence. Subscribing to Prospect's basis of faith was not a genuine occupational requirement for Support Worker Level 1 and 2 posts. It was not proportionate to apply that requirement to the claimant and her application for a Level 2 post. We have reached this decision having regard to Prospect's ethos and having regard to the nature of the employment of a Support Worker Levels 1 and 2 and the context in which the work was carried out. The respondent has not shown to our satisfaction that there was a genuine occupational requirement for those posts and it was certainly not proportionate to apply that requirement to the claimant in the context of her application for promotion to a Level 2 post. We do not accept that the respondent carried out a job evaluation for every post that was vacant or available and we do conclude that the respondent made a decision that all posts should be filled by Christians and considered that that was sufficient to comply with the 2003 Regulations. We agree with Mr Blake that that approach was fundamentally flawed.

- 4.78 Did the respondent's treatment of the claimant amount to a fundamental breach of contract? Did the claimant resign in response to any such breach so that she should be regarded as constructively dismissed? If so, was that dismissal unfair? Did the claimant waive any such breach?
- 4.79 Mr Halden alleges that the claimant did not resign in response to any action on the respondent's part that could amount to a fundamental breach of contract. He states that she had known since at the very latest (if not from the inception of her employment) 27 February 2006 that the respondent would apply its policy, whether properly expressed as change, re-emphasis or re-statement. He alleges that the claimant's approach from the outset had been casual. She had signed the basis of faith on 4 February 2003 but in her words (as if there were degrees of Christianity): "I did not expect Prospect's to be as Christian as it turned out to be". He alleges that her application in June 2005 was cynical. He points out that the letter was drafted for the claimant by Hazel Mann on the evening of 7 June, and then delivered by her before work the following morning. He asks why the claimant wrote a letter applying for a job she knew she would / could not be offered. In support of that Mr Halden quoted part of the evidence whereby he asked her "what caused you to think there was any point of applying for a Level 2? knowing as you did you would not and could not apply, why did you?" to which the claimant responded: "because I had a right, whether successful or not hoped something would be worked out".
- 4.80 Mr Blake referred the Tribunal to the familiar sections of the Employment Rights Act 1996, namely section 95(1)(c) and section 98. He also referred the Tribunal to the well known and familiar cases of *Weston Excavating -v- Sharp [1978] IRLR 27* and *Malik -v- Bank of Credit and Commerce International SA [1997] ICR 606*.
- 4.81 Mr Blake submitted that the respondent's refusal to promote the claimant to (or even consider her for) a position for which she was eminently suited was

obviously likely to undermine her trust and confidence in the respondent. It had that effect and she resigned. This is clearly reflected in her letter of resignation in which she states that she was resigning "due to recent events and Prospects policy of not promoting non-Christians", her exit interview in which she said that "the Christian ethos policy was her main reason for leaving", and Mrs James's understanding that the claimant was resigning primarily because of the recruitment policy.

- 4.82 Mr Blake continued by stating that it was assumed that Prospects would say that it had reasonable and proper cause to apply its recruitment policy to her. This would depend on similar factors to the consideration of the GOR defence. However, it was submitted that if the Tribunal should find that Prospects unlawfully discriminated against Mrs Hender, it also clearly breached the implied term of trust and confidence. He submitted it was hard to envisage a situation in which an employer could unlawfully discriminate against an employee and yet to be found to have acted reasonably. It was also submitted that even if the Tribunal accepted the GOR defence, it should still conclude that Mrs Hender was constructively unfairly dismissed.
- 4.83 In respect of the allegation relating to the waiver of breach on the basis that that the claimant knew of the recruitment policy from February 2006 and did not resign until September 2006, Mr Blake states that this argument is legally and factually flawed. In particular, if the policy was discriminatory and/or amounted to a breach of trust and confidence, it is clear that any such discrimination and/or breach continued as long as the policy remained in force. Every day she knew that she was not wanted by Prospects, that Prospects thought that she could not do the Level 1 job and that they would not consider her for a Level 2 job. This had a particular impact from May 2006 onwards when the Level 2 jobs were being advertised. Mrs Hender applied for a promotion in June 2006. She raised a grievance in August 2006 when she had not received a response to her application but heard that someone else had been appointed to the post. She then resigned in September 2006. Accordingly, Mrs Hender did not waive Prospects breach.
- 4.84 Again, the Tribunal unanimously prefer the arguments of Mr Blake to those of Mr Halden. First, the mere fact that the respondent discriminated against the claimant contrary to the 2003 Regulations was, in the Tribunal's view, a breach of a fundamental term of the contract of employment with the claimant, undermining trust and confidence. This is supported by the letter of 1 March 2006, referred to in paragraph 2.20 of these reasons. In the Tribunal's view there can be nothing worse than an employer indicating to an existing employee that they are willing to contribute towards training in order that that employee obtain another job with another employer! There was no legal justification for this breach of contract, and in the Tribunal's view it is clearly outside the range of reasonable responses of a reasonable employer. Accordingly, we find that the claimant has also been unfairly constructively dismissed and that in itself is another act of discrimination by reason of religion or belief, contrary to the 2003 Regulations.

- 4.85 Accordingly, the unanimous judgment of the Tribunal is that the respondent unlawfully discriminated against the claimant on the grounds of religion or belief contrary to the Employment Equality (Religion or Belief) Regulations 2003 and she was constructively unfairly dismissed.



EMPLOYMENT JUDGE

Dated: 13 May 2008

Reserved Judgment entered in Register
And copies sent to parties on

Thursday 15 May 2008

C. Hines
for Secretary of the Tribunal

