



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr Mark Sheridan

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

**EMPLOYMENT
JUDGE:** Mr D P Thompson

MEMBERS: Mr G R Thomas
Mr J E Jenks

Appearances -

For the Claimant: Mr J Boddy, 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 he was constructively unfairly dismissed.

REASONS

1.0 CLAIMS AND ISSUES

- 1.1. The issues to be determined by the tribunal were identified (at the case management discussion on 25th June 2007) to be those agreed by the parties and set out in the letter to the tribunal dated 22nd June 2007. It is not in dispute that:
- (1) the respondent has an ethos based on Christianity;
 - (2) 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) ("the recruitment policy");
 - (3) The claimant was required to adhere to the above policy.
- 1.2 Did the respondent subject the claimant to discrimination on grounds of religion or belief by subjecting him to a detriment (namely requiring him to adhere to the recruitment policy) and/or dismissing him?
- 1.3 If so, having regard to the respondent's ethos and to the nature of the employment or the context in which it was carried out, was being a practicing Christian a genuine occupational requirement ("GOR") for the posts of Support Worker Level 1 and Support Worker Level 2 in Conwy Day Opportunities, and was it proportionate to apply that requirement in every case.
- 1.4 Did the respondent's actions amount to a fundamental breach of the claimant's contract of employment?
- 1.5 Did the claimant resign in response to any such breach so that he should be regarded as constructively dismissed?
- 1.6 At the case management discussion held on 13th December 2006 the respondent conceded that in the event the Tribunal were to find that the claimant had been constructively dismissed, then that dismissal would be unfair.
- 1.7 This claim was heard together with that of Mrs Louise Mary Hender, 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

- 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
- 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.
- 2.12 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 level 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."
- 2.11 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.
- 2.10 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 fulfill the criteria at Level 3".

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".

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 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 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.
- 2.24 The claimant was employed by the respondent from January 1998 until 30th April 2006. He was a relief and voluntary support worker at Conwy Day Opportunities until becoming Day Opportunities Co-ordinator in August 1999, Manager in August 2003 and Service Manager in April 2005 (399-407).
- 2.25 When the position of co-ordinator became vacant the claimant applied and was successful. At interview for this position it became apparent that John McMillan (Assistant Director) and Mike Picton (Manager) were looking for someone to take the service forward. The Prospects Strategic Plan 1995-2000 had listed development of Day Services as Strategic Objective 3 (document 896). They indicated that there was potential to expand the service by providing support through referrals from the local authority, Conwy County Borough Council. This meant that Prospects would now look for work whereas before they had responded to work offered to them. Mike Picton included this development in the Conwy Service Plans for 2000-2001 (748-749) and 2001-2002 (767-768). It competed with other providers of support.
- 2.26 The number of people wanting the respondent's support quickly increased to 45. So it also had to recruit staff in order to keep up with this demand. Mike Picton explained that whilst a service was growing Prospects' procedure was that additional staffing would be on a relief basis. Consequently, advertisements for Support Workers usually included requests for relief workers as well (569, 570).
- 2.27 At that time it was not a pre-requisite for relief workers to be Christians who signed the 'Basis of Faith'. They could be Christians or non-Christians who signed the 'Basis of Faith' as "sympathetic to the Christian ethos" of Prospects (491). Some practising Christians who applied could not agree with the complete 'Basis of Faith' and could only sign it as "sympathetic to the ethos." It advertised as a Christian organisation and because it networked with local churches some new recruits could sign as to their belief in the 'Basis of Faith', but not enough of the people who applied could, and others, who only felt able to sign up as "sympathetic", were enlisted to the team. So the staff team became a mixture of Christian and ethos-sympathetic staff and volunteers, united in providing high quality, flexible, responsive person-centred support.
- 2.28 Alongside the expansion that Day Opportunities was experiencing Mike Picton also made moves to expand Prospects' residential support base. He had successfully tendered to Conwy County Borough council for Prospects

to provide support to three people living in an established residential situation in Clarence Road, Craig y Don, Llandudno. The existing staff team however had to be kept on if they wished to be. There was no guarantee that they would be Christian and wanting to sign the 'Basis of Faith'. This was a divergence from the usual pattern of Prospects being invited to provide residential support to Christian individuals because of their distinctive Christian ethos. Prospects seemed content at the time to employ staff who were not necessarily Christian on permanent contracts. A statistical survey undertaken by Mike Picton in August 2000 showed that this did increase the proportion of non-Christians in Conwy Services (915-916).

- 2.29 The Conwy staff were always stretched to the limit when trying to cover support hours for the people they supported. This was because their recruitment always followed new referrals for support. So the staff members were working to their full capacity, with regular hours each week. Whilst doing this they were also undergoing training and developing positive relationships with people supported and their team members.
- 2.30 Prospects it seemed increasingly relied upon relief workers, as reported in the Human Resources report of November 2004 (323). During 2000, 2001 and into 2002 it also relied heavily on an increasing number of committed relief workers inevitably working regular hours. The claimant expressed his concerns about the implications of this for the delivery of services in Conwy to Mike Picton in writing at the beginning of 2002. This did precipitate a meeting with John McMillan, Mike Picton and Louise Conningsby (Personnel Officer). The issue of contracts was discussed. In August Mike Picton highlighted this issue in a memo to Maureen Wise (918-919), then a little while later Mike Picton was told by John McMillan that legislation demanded that permanent contracts had to be offered to people after they had continuously worked as relief for, 3 months or more. As a consequence those relief workers that qualified would need to be offered contracts for hours of working that reflected their regular hours over the preceding 3 months. This they did and as a result a number of staff took up the offer of a contract for a Support Worker Level 1 – both Christian and non-Christian, starting contracts at the beginning of December. At that time there were no Level 2 posts in Conwy Day Opportunities and the claimant was still Level 3. Staff in Conwy were officially informed of the change and the contractual position of relief workers at a team meeting.
- 2.31 Conwy Day Opportunities continued to grow over the following year or so. The claimant was offered the position of Manager in August 2003, which he accepted.
- 2.32 The growth in the numbers of people supported by Conwy Day Opportunities continued so the respondent again increased its team for that service. As the establishment figures for staffing only reflected existing levels of support required, all new staff employed during the year were employed on a relief basis. Therefore, it employed both committed Christian and ethos-sympathetic staff. Relief workers were considered

"exempt" from signing the basis of faith as Christians but needed to sign as "ethos sympathetic". These were often converted to permanent contracts after the appropriate period. This issue began to receive attention at senior management level. Minutes from the meeting held on 10th February 2004 itemised this as one of a number of issues thought to be challenging the Christian Employment Policy (358).

- 2.33 On 4th October 2004, with fellow team managers from Conwy, the claimant attended a Prospects Senior Team Meeting for the management team of Wales and the Marches region. At this meeting Paul Ashton (Chief Executive of Prospects) made them aware of the Employment Equality (Religion or Belief) Regulations 2003. He did this by way of a Powerpoint slide show. He announced that as a result of this new legislation, Prospects would have to demonstrate its Christian credentials by only employing practising Christians for all jobs within Prospects. Paul Ashton indicated that this would become effective from April 2005. We accept that the claimant raised questions in his mind such as: how were they going to fulfil existing contracts let alone grow to take on more? - was that going to destroy any team spirit? - were individuals going to feel devalued and leave? - would the effect of that reverberate onto the people they supported?
- 2.34 It was admitted by Paul Ashton that up to that time, recruitment practice had enabled non-Christians to work within Prospects. They were told that this would need to stop, as the legislation demanded that organisations calling themselves Christian would need to have a wholly Christian workforce, or risk losing their Christian status. It was recognised that this would have particular ramifications in workplaces that had staff teams such as those at Conwy Day Opportunities. One of the claimant's main concerns was that recruitment would become more difficult, as the available workforce would be drastically reduced, and employing suitably experienced and qualified staff would become increasingly more difficult. He considered this would potentially affect the quality of support he could offer, and would inevitably have a knock-on effect with regard to the obligations to Conwy County Borough Council. It would also affect any development plans, as these by their nature depended upon recruiting relief staff. More importantly, he considered existing non-Christian staff could be made to feel devalued and even unwelcome.
- 2.35 During the latter part off 2004, John McMillan acted as the claimant's manager during a period when Mike Picton was covering for staff shortages in South Wales. He told him that the GOR would not come into effect until around April 2005. He felt sure that all existing Level 1 staff would be secure in their jobs whether they were Christian or not. He also suggested that they would be able to apply internally for Level 2 positions and their success or not would depend only on their professional merits. He described this as the way Prospects had worked over the previous years and saw no reason why it should change. He also said that management posts of Level 3 and above would undoubtedly be subject to the GOR.

- 2.36 The Level 1 staff team at this time at the end of 2004 comprised of 24 workers. The claimant was asked to assess how many were Christian and he thought 16 probably were.
- 2.37 In early 2005 (January or February) Mike Picton informed the claimant that he had been told to instruct all managers to consider all new posts to be subject to the requirement of being a "committed Christian". He instructed him to examine each applicant's letter for evidence of their Christian commitment. He told him to look for evidence of church attendance, a Christian conversion experience, involvement in church activities as a volunteer, a sense of being guided by God to apply to Prospects, and to be able to believe and sign up to the 'Basis of Faith'. He stressed that if any applicant did not meet these criteria then they should not be shortlisted for interview. He impressed upon him that it was imperative not to employ any more people who could not demonstrate this level of Christian commitment. Relief workers and volunteers were to be included. Agency workers were not.
- 2.38 Advertisements then included the GOR qualification. Even so, there were applications from people whose details in letters of application did not meet the criteria. The claimant would always phone to speak with every applicant and explain the level of Christian commitment Prospects demanded. As a result he did turn away about 6 or 7 people some of whom were qualified and experienced and felt themselves to be Christian but not committed and practicing. Throughout 2005, as instructed, he vetted applicants as to their Christian credentials. He turned away many experienced and qualified people. This was something that he found very difficult to do as he could see that some of these people had the potential and the desire to contribute their skills and experience to Conwy Day Opportunities. As a consequence of this the numbers of people eligible for interview were much reduced. This in turn created concerns in the claimant's mind that this might lead to the possible lowering of standards of support.
- 2.39 During 2005 the claimant complied with the instruction that he had been given and applied the GOR to all posts. He did express his unhappiness at doing so to his line manager, Mike Picton, and also to his other management colleagues locally. He felt that the previous recruitment and employment procedures had worked well and had enabled Day Opportunities to grow and thrive. In his view, the ethos was maintained and not undermined. He understood that management posts of Level 3 and above would only, in exceptional circumstances, be filled by non-Christians, but for Level 1 and 2 where the overwhelming amount of support was in working with adults who showed no inclination for Christian support he felt that using ethos-sympathetic workers would be proportionate.
- 2.40 When first told to impose the GOR for all recruitment by Mike Picton, the claimant told him that he felt that it would be only right to inform all of his staff team; firstly, in the interests of good communication, and secondly because many referrals for staffing, particularly relief workers, came from

the existing staff group. They needed to know not to refer non-Christians to avoid any unnecessary questioning and explaining.

- 2.41 The claimant had little knowledge of alternative ways to comply with the new legislation and was very much occupied in trying to maintain a good service under pressure, balancing management, supervision, administrative and financial duties over 25 staff in 3 buildings supporting 70 people. He loved his job and just wanted to do the best that he could. As a result of only being able to interview practising committed Christians for any posts, the claimant struggled to maintain staffing levels, both in support and administration. These levels were necessary to comply with the support arrangements agreed with Conwy County Borough Council.
- 2.42 These events affected the claimant badly and took him to a very low state of mind. He felt that all that he had worked so hard to achieve could suddenly be reversed. He felt let down by the respondent. Impulsively, on the 26th September 2005, the claimant submitted a letter of resignation to Mike Picton (document 450). The claimant felt a weight had lifted, but over the following few days the impact of his impulsive act gripped him with panic. For 6 years he had devoted his life to developing the service so much that he felt ill at the thought of not being a part of it. He asked Mike Picton if he could retract his resignation and think further about it. Mike Picton said that as he had already informed Jan Groat (Director of Operations), his line manager, she would have to be the one to give such consent.
- 2.43 Jan Groat and the claimant spoke on the phone and she agreed to his reinstatement with the proviso that he affirm his commitment and promotion of the Christian ethos of Prospects. This was not difficult as this was something that he had always done. He told her that he found the blanket imposition of the "Christians only" policy difficult because he felt that it had adversely affected morale and team spirit and because it devalued the contribution made by their ethos-sympathetic workers. He told her that probably a third of their workforce were not Christian. He said that this had not presented a problem until the GOR was imposed.
- 2.44 The claimant retracted his resignation officially by letter (454) as requested. He was determined to make a new start but that was not easy when nothing had changed and he knew that Level 2 Support Worker positions were going to be advertised soon. He had made it clear in the Service Plan that it would be difficult to continue growth. He had informed Social Services that he could not accommodate any more referrals and indeed there might come a time when present support might have to be reduced. He decided that consolidation and if necessary a decrease in the size of service they provided might be the appropriate response to difficulties in offering consistent support.
- 2.45 The claimant stated that his health began to suffer and he visited his GP. He referred him to a gastroenterology specialist and possible Irritable Bowel Syndrome was diagnosed. The claimant learned to manage his symptoms

by adjusting his diet by trial and error (977-978). There was no in depth medical analysis produced to the tribunal.

- 2.46 Towards the end of 2005 Mike Picton was keen to initiate the process of recruiting Level 2 Support Workers who would take on responsibilities additional to those of a Level 1 Worker. The additional responsibilities envisaged would include taking charge of particular aspects of support and supervisory duties with regard to the general running of a Day Opportunities Centre. The procedure of recruitment was discussed at a Day Opportunities management meeting (394-396). Mike Picton had made it clear to the claimant that only committed Christians who could present appropriate evidence to be such would be considered for shortlisting for interview.
- 2.47 The claimant was aware that some staff had approached Chris Spree who was the Conwy representative to PERC (Prospects' Employees Representative Council) to raise the issue of staff feeling discriminated against by being unable to apply for promotion if they were not Christians (929).
- 2.48 On a number of occasions Level 1 Workers approached the claimant to enquire about the possibility of applying for a Level 2 position. Louise Hender did so, and he explained to her the respondent's position and the "Christians only" policy that applied to all jobs. She expressed her dissatisfaction with this, given that she had proved her worth as a support worker willing to take on added responsibilities. The claimant acknowledged this, said that he understood her view, but explained that there was no chance of any non-Christians being considered, but he would speak to Mike Picton about it again.
- 2.49 The claimant again told Mike Picton that he felt that all Level 1 staff should be given an equal opportunity to apply for the Level 2 positions. He also spoke with other managers about the frustration that he felt. He intended to appeal to Paul Ashton and the Executive team during their visit to Conwy in January 2006 regarding this situation, and to explain that his conscience was struggling with their policy. He and other managers each made a presentation to the Executive team members. He presented a "road map" (1009) depicting the progress Conwy Day Opportunities had made since its beginnings.
- 2.50 The following day, 18th January 2006, the claimant asked Mike Picton to ask the Executive team if he could have some time to speak with them about a specific issue. Paul Ashton and Rose-Marie Edwards agreed to meet him in his office. He explained the situation regarding the forthcoming advertisement for Level 2 positions. He said that they had working in Day Opportunities a number of Level 1 workers who had the qualifications and experience and who had demonstrated a willingness and ability to take on added responsibility. He further explained that some of them had been employed as being sympathetic to Prospects' Christian ethos but were not practicing Christians. They indicated that they should not have been

employed in the first place if they were not Christian. He explained the process as to how they were indeed employed. He then proposed that, as this was no fault of their own, there could be a compromise that would allow all existing permanent employees to apply, and for shortlisting for interview to be made on merit.

- 2.51 Paul Ashton and Rose-Marie Edwards said the job descriptions for all Level 2 workers within the charity were subject to the GOR. This, they said, could not be relaxed for anyone. They emphasised that an important part of the job was the Christian support given to Level 1 workers. They added that any relaxation of the imposition of the GOR for any post would leave them open to claims through the Employment Tribunal from non-Christians seeking employment. The GOR they said was necessary for all posts from Level 1 upwards. The whole discussion seemed to revolve around what they perceived was the law.
- 2.52 The meeting concluded with no change to the situation, and the claimant was pessimistic for his future working for Prospects. He felt that he had appealed to the two people that could initiate a compromise. Although at this time he had little knowledge of the legalities, his Christian conscience was telling him that this discrimination was wrong. He thought that he had given it his best shot in trying to represent his colleagues and the service's best interests.
- 2.53 The claimant finally resigned by way of letter to Mike Picton dated 23rd January 2006 (457). This time it was a considered decision. The claimant had struggled imposing the GOR on all applicants for Level 1 Support and administrative posts, ruling out people who, although experienced and qualified, did not have the necessary Christian credentials (467). To do the same to people he had known and respected for many years in respect of promotions to Level 2 posts went against his conscience. He felt no desire to compromise the ethos of Prospects and was at all times supportive of this ethos. He said he thought that the ethos of the organisation should have encompassed regard for and acknowledgement of the commitment and dedication of all its existing workers.
- 2.54 The claimant had left without stating his reasons for doing so and he did so by further letter dated 31st May 2006 (467). Paul Ashton replied on 21st August 2006 (476).

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, which Mr Boddy, Mr Sheridan's counsel refers, and also to Mr Boddy himself, for the submissions he makes on behalf of Mr Sheridan. The Tribunal makes no apology for quoting at length from their final written closing submissions, both as to the law and the application of the law to the facts.

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 3 of the 2003 Regulations defines discrimination. It provides where relevant to Mr Sheridan'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."

3.4 Regulation 6 prohibits discrimination against applicants and employees. It provides, where relevant to Mr Sheridan'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."

3.5 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."

3.6 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."

3.7 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."

3.8 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."

- 3.9 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.
- 3.10 Paragraphs 28-30 of the DTI explanation of the 2003 Regulations provide as follows:

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.

Paragraphs 29-30 provide:

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].

3.11 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

3.15 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?

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

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

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

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

4.0 DECISION AND CONCLUSIONS

4.1 Mr Halden on behalf of the respondent made the following written submissions in respect of all issues other than the alleged constructive dismissal:

"LEGAL FRAMEWORK

4.1.1 The Directive is primarily concerned with the protection of the rights of the individual. It should be noted that the Directive targets discrimination on the grounds of religion or belief, disability, age or sexual orientation: Article 1, which introduces the broad scope of discrimination.

4.1.2 By Article 2.2(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief ... at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are proportionate and necessary, or

(ii) ...

4.1.3 Article 2.4:

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.”

3.12 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.

3.13 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”.

3.14 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.”

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.

4.1.4 The GOR exception is provided by Article 4:

1. ... 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 particular occupational activities concerned or 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.

4.1.5 Article 4.2: application of the GOR to

... occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief ...

and, specifically

... this Directive shall 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.

4.1.6 Relevant parts of the 2003 Regulations are set out in respondent's opening submissions. Curiously, they:

- (i) as drafted, provided no GOR;
- (ii) as brought into law failed (and there has been no amendment since) to make any provision as per Article 2.4

4.1.7 Accordingly the provision required by Article 2.4 is missing. In UK domestic law it appears only in Section 30 Race Relations Act 1976, and nowhere in the legislation relating to the forms of discrimination covered by the Directive.

JURISDICTION

4.1.8 It is the respondent's case that claimant's case must fail by reason of the absence from the Regulations of an Article 2.4 provision.

4.1.9 The claimant relies on s.3 HRA 1998. to do so, it is submitted, is to invite the Tribunal to insert into the regulations a provision that is simply not there. It is not a question of reading and giving

effect to the regulations "in a way that is compatible with the Convention rights".

- 4.1.10 At the case management discussion on 20th December 2006, the Chairman referred to *Weathersfield Ltd v Sargent*. That case was one of a line of cases under the Race Relations Act 1976, starting with *Zarcynska v Levy*. The claimant himself refers to *Showboat Entertainment Centre Ltd v Owens*. All those cases involved instructions to employees (in each case the complainant) to discriminate against ethnic minority customers.
- 4.1.11 That jurisprudence arises from Section 30 RRA, which specifically outlaws the giving of instructions to perform an act that is unlawful (under the Act). The court was concerned in the above cases with whether the enforcement provisions under Section 30 (claims to be brought by the Commission for Racial Equality) precluded a claim by the individual affected. They did not.

ETHOS

- 4.1.12 Mark Sheridan and Louise Hender (the claimants) have admitted that the respondent has an ethos within the meaning of the Regulations.
- 4.1.13 The respondent submits that Article 4.2, as implemented by the Regulations, affords the "private organisation", commonly employer, balancing protection for its ethos. It is not merely the employee that enjoys the law's protection. Otherwise few "faith based" organisations, it is submitted, would survive today.

OBJECTIVE

- 4.1.14 Extensive reference has been made to the foundation and operation of the respondent. A sentence in paragraph 3 of the Paul Ashton's statement:

The professional objective of Prospects is to deliver high quality care as a means of serving Christ.

- 4.1.15 As Paul Ashton puts it in paragraph 13:
In order to maintain its Christian ethos, Prospects implements a "Basis of Faith", which is affirmed by each of its employees and volunteers during the recruitment process. This results in holistic approach to professional and spiritual matters and Prospects believes that through its employees, who each promote and exemplify the love of Christ in all that they undertake. Therefore, employees are expected to actively engage with churches and the wider Christian community for their own spiritual development and in the furtherance work of Prospects.

- 4.1.16 It has throughout been the respondent's case, and conviction, that it is a Christian organisation, established to work out its faith in the service it provides. It is not an organisation of Christians, whose decision is to provide a particular service (which might equally be provided by a secular organisation).
- 4.1.17 Mrs Christine Davies is a good example of the demand, from a non-believer, for provision by a Christian organisation.

GENUINE OCCUPATIONAL REQUIREMENT

- 4.1.18 The words "and determining" appear in Regulation 7(2)(a) but not in Regulation 7(3)(a), on which the respondent relies. The defence under 7(3) is less stringent to apply.
- 4.1.19 The claimants charge 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.
- 4.1.20 The respondent roundly rejects that charge. To make it, at the same time acknowledging the respondent's ethos, is to a point contradictory.
- 4.1.21 In fact, the process had started with the appointment of Paul Ashton [Paul Ashton's second statement paragraph 6]. It continued – with an end to tenders and TUPE transfers [Paul Ashton's second statement paragraph 9, and pp295a-c].
- 4.1.22 The respondent has oft repeated, conducted a close scrutiny of the 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.
- 4.1.23 What the claimant's charge fails to address is the fact that the policy (on the respondent's evidence) had been consistently applied through the respondent, save in pockets in S Wales (Neath and Britton Ferry) and N Wales (Conwy) where the claimant worked. Contrary to the claimant's assertions about difficulty in recruitment, the respondent's evidence is that full liaison with local churches etc produces Christian recruits.
- 4.1.24 The respondent's evidence is that it was its employees in the areas mentioned that had acted to undermine its policy. The claimant, Mike Picton and John McMillan are blamed [Paul Ashton's first statement paragraph 66, second statement paragraph 5].

- 4.1.25 By implication Rutter, if reluctantly, accepted the charge:
- 4.1.26 *Q: You're a Christian, work for Christian organisation, policy to recruit Christians. Difficulties in finding Christians should not lead to policy being changed?*

A: When I joined respondent, very small. Time went on. Respondent developed and became more difficult to find Christians to fulfil. One hand respondent wanted to grow and ? problems but wanted to stay consistently Christian. That caused problems. Respondent did change. When started, families that were Christian would want Christian support.

Q: Can you get to the point

A: As respondent grew staffing issue became more difficult and at this time managers, not just in Wales, finding it difficult.

Q: Ask question again. Should difficulties lead to compromise of core values and beliefs of the respondent?

A: No, we shouldn't but there were lots of staffing difficulties. I had suggested to line manager and Paul Ashton that better to cease growth and adequately support PWS with required number of Christians. Continued growth making matters worse.

- 4.1.27 Contracts with local authorities and TUPE transfers involving non-Christian providers are put as examples of respondent's departure from its policy.

PROPORTIONATE MEANS

- 4.1.28 Regulation 7(3) applies.
- 4.1.29 See DTI Explanation: paragraphs 39 to 43.
- 4.1.30 Louise Hender refers to *Kutz-Bauer v Freie und Hansestadt Hamburg* and recites paragraph 51:

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 provision 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.

- 4.1.31 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.

- 4.1.32 The Tribunal's task in considering proportionality was considered in *Hardys & Hansons plc v Lax*: admittedly in the context of a Sex Discrimination Act claim. Reasonableness is an issue to be considered, but does not equate to proportionality. At paragraph 32, per Pill LJ:

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.

- 4.1.33 As set out in Louise Hender's opening submissions, Mummery LJ in *R (Elias) v Secretary of State of Defence* identified three key 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?

- 4.1.34 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 at the heart of the present dispute: see paragraph 43.2 of Louise Hender'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.

DETRIMENT: FIRST CLAIMANT

- 4.1.35 Mark Sheridan was required to apply the respondent's policy. He will have been subjected to a detriment if
- (i) the respondent's GOR defence fails; and
 - (ii) the respondent's Article 2.4 argument fails.

4.1.36 He speaks of effect on health, without any medical evidence."

- 4.2 Mr Boddy, on behalf of the claimant, made the following written submissions in respect of all issues other than the alleged constructive dismissal:

"Was Mr Sheridan subjected to discrimination on grounds of religion or belief?"

- 4.2.1 "Mr Sheridan alleges he was subjected to discrimination on the grounds of the religion or belief of third parties (namely the non-Christians who he was not allowed to employ or promote).
- 4.2.2 That this form of discrimination is prohibited by the 2003 Regulations is apparent from Regulation 3(2) of the 2003 Regulations. This provides that the "grounds of religion or belief" referred to in Regulation 3(1)(a) "does not include A's religion or belief" (where A, in this case, is Prospects). The clear inference is that it may include the religion or belief of B (in this case Mr Sheridan), or of C (the third parties).
- 4.2.3 The amended version of the 2003 Regulations makes this explicit, replacing the original text of Regulation 3(1) with the following
- "... a person ("A") discriminates against another person ("B") if –
(a) on the grounds of the religion or belief of B or of any other person except A (whether or not it is also A's religion or belief) A treats B less favourably than he treats or would treat other persons"
- 4.2.4 If there were any doubt about the meaning of the pre-amendment text of Regulation 3(1)(a), that doubt should be resolved by reference to Article 2(4) of the European Framework Directive 2000/78/EEC. This provides that "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".
- 4.2.5 This is also consistent with authority under different discrimination regimes which makes clear that an employee who is instructed by his employer to discriminate against a third party on prohibited grounds is himself directly discriminated against:

see for example *Weathersfield Ltd v Sargent* [1999] IRLR 94 (CA) (see paragraph 15) and *Redfearn v Serco Ltd* [2006] IRLR 623 (CA).

- 4.2.6 In the circumstances, it is clear that Mr Sheridan was subjected to discrimination on grounds of religion or belief, in that he was instructed by Prospects to discriminate against non-Christian applicants for jobs (at Levels 1 and 2). Unless Prospects can show that a GOR applied to all these posts, this discrimination must be found unlawful.
- 4.2.7 Mr Sheridan brings his claim under Regulation 6(2)(d) of the 2003 Regulations, which renders it unlawful to discriminate against a person on the prohibited grounds, "by dismissing him, or subjecting him to any other detriment". In this case, in addition to the dismissal, Mr Sheridan suffered considerable detriment in being forced to operate under the recruitment policy for a prolonged period of time. As his witness statement makes clear, this caused substantial injury to his feelings and even physical ill-health [MS/45, 61].

Can Prospects rely on the GOR defence in the circumstances of this case?

- 4.2.8 In order to succeed in its defence, Prospects need to demonstrate that the GOR applied not just to the Level 2 Support Worker position (to which Mr Sheridan was not entitled to promote Mrs Hender), but also to each and every Level 1 Support Worker position in Conwy Day Opportunities. This is because Mr Sheridan was prevented from appointing non-Christians to any of these roles.
- 4.2.9 In general terms, it is submitted that having regard to the submissions advanced by counsel for Mrs Hender, and in particular to (i) the narrow construction which the Tribunal is obliged to place on the GOR defence, and (ii) the requirement of proportionality, Prospects has not discharged the burden of proving that a GOR applied to all these roles. What follows is intended to supplement the submissions presented on behalf of Mrs Hender, and adopts the same three stage analysis of Regulation 7(3) of the 2003 Regulations as advanced in those submissions. [dealt with in the Tribunal's reasons in that case].

Stage 1 – have regard to the ethos and to the nature of the employment of the context in which it is carried out.

- Prospects' ethos**
- 4.2.10 At paragraph 9 of its response to the claim, Prospects argued that it "exists primarily to serve Christ. The actual work of supporting people with learning disabilities is the chosen manner

of achieving that aim and is secondary to that primary objective" [1/23]. This is a surprising argument, to say the least.

- (1) It is not a description recognised by any of the witnesses supporting the claimants' cases. In particular, John McMillan, Alan Rutter and Mike Picton, all of whom had been involved with Prospects for a considerable period of time (and notably longer than Paul Ashton, Jan Groat or Rose Marie Edwards), did not recognise this description of the work undertaken.
- (2) The description does not appear in any document produced prior to these proceedings. For example, it does not appear in a document on the added value of being a Christian organisation [1/175], in Prospects' Christian Ethos statement [1/107] or in the Memorandum of Association [1/94b].
- (3) Brochures, explaining the work of Prospects did not use this type of language [2/733], even after 2004 when the Christian aspects of the organisation were promoted more overtly [2/739]. Nor did the Statement of Purpose produced for Local Authorities so as to show compliance with the Care Standards Act [4/tab 1 /3-5]. Thus parents and local authorities – Prospects' key clients – were not aware that the organisation viewed itself in this way.

4.2.11 The conclusion must be either that Prospects is not as transparent as it is claimed to be [PA/1st/12], or that the description does not accurately reflect the actual ethos of the organisation. It is submitted that the latter explanation is to be preferred:

- (1) Andy Graham, Chairperson of the Working Party looking into 'The Centrality of God in the daily life of the organisation' noted that "the main task ... is primarily the support of clients" [1/180].
- (2) Under cross-examination Mr Ashton stated that he did not like the term "secondary", and accepted that the work done by Prospects "is not less of a priority".
- (3) It is clear that Prospects as an organisation had evolved and changed over time. It was no longer the small Christian organisation it once was. Having pursued a clear strategy of growth, accepted local authority funding (and the TUPE transfers that accompanied this), and opened Day Opportunities centres at which the majority of people supported were not Christian, the ethos of the organisation had also developed. Indeed, in his evidence

Mr Ashton did not rule out tendering for more work which might involve a TUPE transfer.

- (4) It is submitted that the best expression of the ethos, at least insofar as the ethos concerns "our relationships and the way we work together" [1/108] is enshrined in the Principle of Personal Value [1/109]. This refers to Spirituality as just one of the six key principles underpinning Prospects' work.

- 4.2.12 The relevance of these points is that in order to have regard to the ethos of Prospects, the Tribunal must reach some broad conclusions about the nature of that ethos. That must be an objective assessment – it is not for Prospects to define for itself an ethos that does not accord with the reality on the ground.

The nature of the employment

- 4.2.13 As to the nature of the employment, it is important to appreciate that the majority of people supported by Level 1 and 2 Support Workers were not Christian. Mr Ashton put this figure as 59% across the whole charity. In Conwy the percentage was higher still. Sometimes this meant that Prospects would arrange for spiritual support to be provided for a client by someone from a different religious tradition [1/97 – paragraph 5.4]. Moreover, Mr Sheridan's evidence was that the overwhelming proportion of the support given was secular in nature [MS/18].

- 4.2.14 A further factor to take into account is the actual needs of the relevant service. Mr Picton's evidence was that in Conwy Day Opportunities, the need for Level 2 workers arose because of the challenges facing Mr Sheridan in running three different centres at the same time. The need for Level 2 Workers did not arise because of any perceived lack of spiritual support for clients or staff.

The context in which the employment was carried out

- 4.2.15 As to the context in which the employment was carried out, the relevant consideration here is the particular challenge facing Conwy Day Opportunities had become by some way the largest Day Opportunities provider in the whole organisation, employing a significant number of non-Christian staff. These are facts which the Tribunal must take into account at this first stage.
- 4.2.16 Prospects have alleged that the reason there were so many non-Christian staff in Conwy Day Opportunities was because Mr Sheridan and Mr Picton had deliberately flouted Prospects' employment policy. This is strenuously denied:

- (1) In fact Mr Sheridan diligently followed the recruitment policy [1/163], and the instructions of his line managers Mr Picton and Mr McMillan. Mr Sheridan was entitled to appoint non-Christian relief workers, and indeed was encouraged to do so (in preference to using agency workers) where the rapid growth in the service meant there were insufficient Christian applicants to meet staffing needs.
- (2) Mr Sheridan was subsequently instructed by his line managers (and ultimately by Louise Conningsby, Director of HR) to offer permanent contracts to those relief workers working regular hours. It is extraordinary for Prospects to suggest that Mr Sheridan should have questioned these instructions from his line management.
- (3) Prospects contend that Ms Conningsby had instructed that permanent contracts should only be given to relief workers who had worked for at least one year, but there is no documentary evidence to support this assertion, and this does not accord with the evidence of Mr Picton and Mr McMillan. Nor did Mr Ashton refer to this when he accepted that relief staff would become eligible for permanent contracts at some time [1/270].
- (4) Prospects further contend that relief workers should not have been working regular hours, but it is a fact that relief workers were widely used across the entire organisation. A 2003-2004 Human Resources Report described the total number of staff as 333 permanent employees and 185 relief workers – a ratio of 0.6 relief workers to every 1 permanent staff member [1/322-323]. It seems very unlikely that all these workers were on irregular hours.
- (5) Further, Mrs Groat accepted in her evidence that where you cannot recruit sufficient Christian posts, it becomes necessary to offer relief workers regular hours in order to fulfil statutory and other responsibilities to the people supported. The suggestion is that Mr Sheridan was responsible for these recruitment difficulties, but this ignores (i) the fact that he was running the largest service in the organisation, and (ii) that there were serious recruitment difficulties throughout the organisation. (In 2004 Maureen Wise, then Director of Living Prospects, described the problems caused by “serious understaffing in some places” and “over dependence on agency staff” [3/1005]).
- (6) In any event Head Office must have known (or should have known) that permanent contracts were being offered

to relief workers. This is because the contracts were sent out by Head Office, and sent back in again. Further, documents show that this was a live issue for senior management at Prospects. For example, notes from a Senior Management Meeting on 10th February 2004 detailed one of the challenges to the Recruitment Policy as being the transfer of Casual Staff to Permanent Contracts during 2002/2003 [1/358], and an email dated 15th August 2002 from Mr Picton to Ms Wise noted that "there should be contracts for relief workers" [3/918].

- (7) Finally, if Prospects really considered that Mr Sheridan was guilty of misconduct over this, it is very unlikely that he would have been allowed to retract his resignation in September 2005.

Stage 2 – genuine occupational requirement

4.2.17 As for the stage 2 test, Mr Sheridan is content to adopt the submissions advanced by counsel for Mrs Hender in this regard. In brief summary, his position is that:

- (1) The exercise by which Prospects concluded that a GOR applied to every Level 1 and 2 Support Worker position in Conwy Day Opportunities was little more than a sham. In effect, Prospects determined at the outset of this process that it wished to maintain its Christian employment policy [1/301] – paragraph 4.5], and thereafter set about producing policies to support this decision. The Tribunal is particularly reminded of the evidence of Ms Edwards in this regard. It is submitted that whatever job evaluations were conducted, were not entered into with an open mind.

- (2) In effect, Prospects' position appears to confuse 'requirement' with 'preference'. Mr Ashton wants his employees to pray, and to be motivated by a sense of Mission, but these are not matters which can form an occupational requirement. An employer cannot require his employee to be, for example, 'happy and relaxed', even though he might desire this. In the same way, Prospects cannot seek to regulate the spiritual life of its employees. It might promote this, but prayer and 'Mission' are not occupational requirements.

4.2.18 The central point, however, is that it cannot have been a 'requirement' for all Level 1 and 2 Support Workers to be Christian, since Prospects had been perfectly content to operate for a number of years with a significant number of non-Christians in these roles. There were staff who had TUPE transferred into the organisation (many of whom were not Christian); former relief

workers (non-Christian now on permanent contracts; and numerous non-Christian agency workers [1/305 – the Henley Supported Living Project “continues to survive” by employing agency staff; 1/330 – Ms Edwards describes the “high use of agency staff” as a continuing challenge for Prospects].

- 4.2.19 In a 2001-2002 discussion paper for Prospects' Board, the fact that a number of services within Prospects had developed with a mixture of Christian and non-Christian staff was described as “the current reality within Prospects” [1/255]. Given this, it is hard to see how Prospects can properly contend that the presence of any additional non-Christian Level 1 Support Workers would materially undermine its ethos.
- 4.2.20 Further, Prospects was prepared to allow non-Christian Level 1 Support Workers (such as Mrs Hender) to remain in post (although they would not be considered for promotion). No criticism is made of Prospects for not dismissing non-Christian workers in these circumstances, but the fact that it didn't dismiss these workers reflects the reality: that it was not a GOR that Level 1 Support Workers (at least) be Christian.
- 4.2.21 Prospects now suggests that the support workers in Conwy Day Opportunities were not carrying out all the elements of their role, but it never raised this matter with Mr Sheridan while he managed the service. Ms Groat's evidence was that after Mr Sheridan's first resignation she instructed Mr Picton to ensure that Mr Sheridan followed Prospects' policies, but Mr Picton had been Mr Sheridan's line manager for a number of years and had never raised any concerns. Further, given that Conwy Day Opportunities was the largest service in the organisation, it seems highly unlikely that senior management did not know what was going on in the service.

Stage 3 – proportionality

- 4.2.22 One of the requirements of the proportionality test is that the measure in question must be rationally connected to the objective – see *R(ota Elias) v Secretary of State for Defence* [2006] IRLR 934 (CA) paragraph 165. It is assumed that Prospects accepts that the objective in this case was to uphold the organisation's Christian ethos, but this objective was not necessarily met by the requirement for all applicants for Level 1 or 2 posts to sign the “Basis of Faith”. This is because some people who considered themselves Christian (albeit non-practicing) did not feel able to sign (for example Gillian Tattershall [GT/7-8], and others who did not agree with all the statements in the ‘Basis of Faith’ did in fact sign (for example Hazel Mann [HM/2]).

- 4.2.23 Further, on Prospects' argument the objective would necessarily be undermined by an employee who signed the 'Basis of Faith' but subsequently began to question their faith and/or some of the particular statements in the 'Basis of Faith', but there was no provision to dismiss an employee in these circumstances.
- 4.2.24 Nor is it clear why the GOR did not apply to gardeners, cooks, cleaners and maintenance assistants. Although not client facing roles, the 'requirement' for prayer and 'Mission' advocated by Prospects must equally have applied to these posts. If the requirement was for an employee to serve Christ, that could have been done by a chef as much as by a support worker. It is submitted that no sensible distinction can be drawn between an ethos sympathetic support worker working with a non-Christian client in Day Opportunities, and a chef working with only Christian clients in a Prospects' residential home. If anything, the requirement to be Christian would apply more to the chef than the support worker.
- 4.2.25 The suspicion is that gardeners, cooks, cleaners and maintenance assistants were declared exempt roles because there were so few of them in the organisation (perhaps only 6 out of around 500), and with a view to avoiding the appearance of imposing a blanket GOR across the whole organisation.
- 4.2.26 Thus in reality, Prospects' Christian ethos was no more undermined by an 'ethos sympathetic' Level 1 Support Worker (such as Miss Tattershall) than it was by a support worker (such as Mrs Mann) who did not in fact agree with the 'Basis of Faith', or by a support worker who no longer felt able to call themselves a Christian but remained sympathetic to the ethos of the organisation.
- 4.2.27 It is submitted that in fact Prospects' ethos was not undermined by an ethos sympathetic support worker, and that the proportionate measure for Prospects to adopt in the circumstances of this case would have been to require all applicants for Level 1 and 2 roles to be sympathetic to the Christian ethos of the organisation. Such a measure would have been rationally connected to the objective of upholding the ethos, and would have been no more than was necessary for accomplishing that objective – the third requirement of the proportionality test set out in Elias, paragraph 165".
- 4.3 The Tribunal unanimously accept that all of the recitals relating to the evidence referred to in Mr Boddy's submissions are indeed factually accurate. We have not necessarily included them all in our findings of fact as they arise out 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 Boddy's submissions in respect of his application of the law to the facts.

4.4 Accordingly, in summary, the Tribunal considers that it does have jurisdiction to entertain the claimant's claim and that the 2003 Regulations do protect an individual who was subjected to discrimination on the grounds of the religion or belief of third parties (namely the non-Christians who he was not allowed to employ or promote). 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 by subjecting him to a detriment, namely requiring him to adhere to the recruitment policy and/or dismissing him (see our comments as to constructive dismissal later). The respondent has not made out its GOR defence. Subscribing to Prospects' basis of faith was not a GOR for Support Level Worker 1 and 2 posts. It was not proportionate to apply that requirement to applicants for Level 2 posts. We have reached this decision having regard to Prospects' ethos and having regard to the nature of the employment of a Support Worker Level 1 and 2 in the context in which the work was carried out. 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 consider that that was sufficient to comply with the 2003 Regulations. We agree with Mr Boddy that that approach was fundamentally flawed.

4.5 In respect of the constructive unfair dismissal claim Mr Halden stated:

"4.5.1 There was no fundamental breach of contract. It is the claimant's case that he was subjected to a detriment by reason of being required to apply the respondent's policy; and was constructively dismissed as a breach of the implied term.

4.5.2 In any event, the claimant did not resign in response to the alleged breach. He resigned by letter dated 26th September 2005 [450], and withdrew his resignation on 4th November [454]. He affirmed the contract after discussion with Jan Groat: see her email dated 1st October [451-452].

4.5.3 Between the first and second resignations, the claimant confirms that nothing changed.

Q: ... by time you withdrew (resignation), what you had not been told was that policy or implementation were going to change?

A: Yes, agree.

Q: ... whether right or wrong – no change since first resignation in Sept 2005?

A: No change

Q: None between Sept – Nov and Nov – Jan.
A: Yes

Q: Resignation on 24/1/06 – same reasons as for one in Sept 2005?
A: Yes

4.5.4 The claimant had acknowledged the sincerity of the respondent's response to his first resignation. Asked about Jan Groat's email [451]:

Q: Right concern of Jan Groat that did not attend meetings help with ethos etc?
A: Yes

Q: ... Having spoken with Jan Groat by beginning Nov 2005, willing to commit working for the respondent without changing anything?
A: Yes

Q: Genuinely want you to succeed. Did you perceive genuineness?
A: Yes

Q: That's what you resolved to do?
A: Yes

4.5.5 The claimant does not say he withdrew his resignation and waited (with or without explanation) for change on the part of the respondent.

Q: Did you expect them to set it as a genuine settled decision rather than plea to change?
A: Considered decision, not a plea.

4.5.6 Re-examined, he qualified that position slightly:

Q: Resigning second time – you said immediately after meeting with Paul Ashton and Rose-Marie Edwards – had to go. What was it told you had to go?
A: Before meeting hoped make some small headway and maybe some offer of compromise in what was viewed by them as special situation.

4.5.7 The claimants have included *Reid v Camphill Engravers* in the bundle of authorities. That case, it is submitted, has but arguable relevance to the present dispute. It was an unlawful deduction case, involving a continuing series of deductions. Where the

employee brought his claim 3 years after the first in the series of breaches, he was held not to have affirmed the contract.

4.5.8 The issue of continuing breach was, however, revisited by the Employment Appeal Tribunal in *New Southern Railway Ltd v Quinn*: another case of repeated unlawful deductions. At paragraph 78, per HHJ Serota QC:

... the respondents continued from month to month right up until the last minute to make unlawful deductions. This constituted a continuing breach of contract which continued and for that reason alone the claimant was certainly entitled to treat her contract of employment as having been repudiated [at the end of the period].

4.5.9 Health is referred to by the claimant. He does not seek to support that, either as a fact or as a factor in making his decision."

4.6 In response to that Mr Boddy stated:

"4.6.1 "For the reasons detailed above and in the submissions advanced on behalf of Mrs Hender, it is submitted that Prospects discriminated against Mr Sheridan on grounds of religion or belief. Given (i) the serious impact of this discrimination on Mr Sheridan's health and well-being, and (ii) the fact that Prospects continued to insist that Mr Sheridan applied the recruitment policy despite Mr Sheridan's repeated complaints about this, it is clear that Prospects also committed a fundamental breach of Mr Sheridan's contract of employment, which Mr Sheridan was entitled to accept by resigning. In the circumstances, Mr Sheridan was constructively dismissed. There was no fair reason for this dismissal.

4.6.2 Prospects now suggest that Mr Sheridan waived any breach of contract by retracting his initial resignation. That contention is not sustainable either in fact or in law. As to the law, *Reid v Camphill Engravers* [1990] ICR 435 makes clear that an employee does not waive a continuing breach of contract by continuing to work under that contract. It is open to the employee to react to the further breaches, if necessary by resigning.

4.6.3 As to the facts, Mr Sheridan's evidence under cross-examination and re-examination was that he continued to hope and expect that a compromise could be reached (given the particular circumstances of his case) until his meeting with Mr Ashton on 18th January 2006. At this point it became clear to Mr Sheridan that there would be no solution to the problem and that he would have to resign. Thus Mr Sheridan's second resignation was not for the same reasons as his first resignation."

- 4.7 Again, the Tribunal unanimously prefer the arguments of Mr Boddy to those of Mr Halden, apart from some aspects relating to the claimant's health. First, the mere fact that the respondent discriminated against the claimant contrary to the 2003 Regulations in the Tribunal's view was a breach of a fundamental term of the contract of employment with the claimant undermining trust and confidence. We do not entirely accept Mr Boddy's arguments that he has established that there was necessarily such a serious impact on the claimant's health and well-being. Frankly, although we accept that it may well have had some impact on the claimant's health, because of the absence of any detailed medical evidence we are unable to accept the extent to which Mr Boddy urges it upon us. However, the fact that the respondent continued to insist that the claimant apply the recruitment policy, despite the claimant's repeated complaints about that, that that amounted to a fundamental breach of the claimant's contract of employment, which the claimant was entitled to accept by resigning. There can be no excuse for the breach, as in the Tribunal's view it was contrary to the 2003 Regulations, and from that point of view must be outside the range of reasonable responses of a reasonable employer, and accordingly the constructive dismissal was undoubtedly unfair in the tribunal's view.
- 4.8 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 he was also 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

