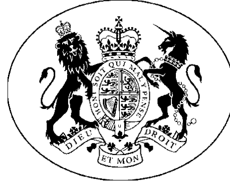

EMPLOYMENT TRIBUNALS

Claimant: Dr F Butt

Respondent: Airedale NHS Foundation Trust

Heard: in Leeds and, on 1 March 2024, via CVP

On: 28 and 29 February and 1 March 2024

Before: Employment Judge Ayre
Mr J Rhodes
Ms J Hiser

Representation

Claimant: Ms R Kight, counsel
Respondent: Mr C Riley, solicitor

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claim for direct discrimination on the grounds of religion or belief is not well founded. It fails and is dismissed.

2. The claim for harassment related to religion or belief is not well founded. It fails and is dismissed.

REASONS

Background

1. The claimant is employed by Bradford Teaching Hospitals NHS Foundation Trust and works one day a week as a visiting Consultant Ophthalmologist at the Airedale

General Hospital which is operated by the respondent. Early Conciliation started on 3 March 2023 and ended on 6 March 2023. The claim form was presented on 5 April 2023.

2. The claim is one of discrimination relying on the protected characteristic of religion or belief. The claimant is a practising Muslim and alleges that she has been directly discriminated against and harassed because of her religion. The claim relates to an altercation that the claimant says took place on 6 December 2022 when she was challenged at work about not having her sleeves rolled up, and events following that altercation. There are, in summary, two allegations that are being made:

    1. Allegation one which relates to the incident on 6 December 2022; and

    2. Allegation two which relates to events on 13 December 2022.

3. A Preliminary Hearing took place on 4 September 2023 before Employment Judge Rogerson. At that hearing:

    1. The issues in the claim were discussed;

    2. The former second respondent (Mary Hytch) was removed as a party to the proceedings;

    3. The case was listed for final hearing; and

    4. Case Management Orders were made.

The hearing

4. We heard evidence from the claimant and, on behalf of the respondent, from:

    1. Mary Hytch, Divisional Director of Nursing for Surgery and Diagnostics;

    2. Claire Tilley, Clinical Theatre Manager;

    3. Joshua Harris, Lead Pharmacist – Clinical Services; and

    4. Sherie Herpe, Theatre Matron.

5. There was an agreed bundle of documents running to 442 pages. Both representatives produced written submissions, for which we are grateful.

6. The hearing was listed as an attended hearing in the Leeds Employment Tribunal. With the agreement of the parties, the hearing was converted to CVP on the final day (1 March) due to industrial action on the railways that day.

The issues

7. The issues that fell to be determined at the final hearing were identified at the Preliminary Hearing on 4 September 2023 and set out in an agreed List of Issues

prepared by the parties. During submissions Ms Kight indicated that the claimant was no longer pursuing a claim for an uplift in compensation for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

8. The issues that fell to be determined are as follows:

<u>Direct religion/belief discrimination</u>

1. Did the respondent do the following things:

    i. On the 6 December 2022 did the respondent question the claimant as to why her sleeves were not rolled up and engage in an altercation with the claimant about the issue?

    ii. Following the incident on 6 December 2022 did the respondent instruct less senior staff to challenge the claimant on how she chooses to cover herself?

2. Was that less favourable treatment? The claimant says that she was treated worse than Ms S Herpe and a hypothetic comparator, namely a visiting consultant who is not a Muslim, who was wearing long sleeves in the corridor.

3. If so, was it because of religion or belief?

<u>Harassment related to religion or belief</u>

4. Did the respondent do the following things:

    i. On the 6 December 2022 did the respondent question the claimant as to why her sleeves were rolled up and engage in an altercation with the claimant about the issue? The claimant alleges that she was less favourably treated by Mary Hytch:

        1. Challenging the claimant's actions and her compliance with the bare below the elbows policy;

        2. The language used by Mrs Hytch;

        3. The tone of Mrs Hytch's voice, which the claimant says demonstrates a lack of respect towards the claimant;

        4. The volume of the altercation in a public space; and

        5. Mrs Hytch not being interested in the claimant's clarification, explanation or views

    ii. Following the incident on 6 December 2022 did the respondent instruct less senior staff to challenge the claimant on how she chooses to cover herself?

5. Is so, was that unwanted conduct?

6. Did it relate to religion or belief?

7. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8. If not, did it have that effect, taking account of the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

Remedy for discrimination

9. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect of the discrimination on the claimant? What should it recommend?

10. What financial losses has the discrimination caused the claimant?

11. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

12. If not, for what period of loss should the claimant be compensated?

13. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

14. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

15. Is there a chance that the claimant's employment would have ended in any event? Should her compensation be reduced as a result?

16. Should interest be awarded? How much?

Findings of fact

9. We make the following findings of fact on a unanimous basis.

Background

10. The claimant is employed by Bradford Teaching Hospitals NHS Foundation Trust as a consultant ophthalmologist. One day a week, by arrangement between her employer and the respondent, the claimant works at Airedale General Hospital which is operated by the respondent. Whilst working at Airedale General Hospital the claimant remains an employee of Bradford Teaching Hospitals NHS Foundation Trust and paid by that Trust.

11. On the days that she works at the respondent's hospital, the claimant carries out ophthalmic surgery, usually in operating theatre number three. The hospital has a theatre department, the entrance to which is restricted. There is a door at the entrance to the department which can only be opened via a swipe card. By the door

are supplies of PPE such as masks and theatre hats, although the hats only have to be worn inside operating theatres.

12. There are a number of theatres in the department, which are joined by corridors. Also within the department are recovery rooms, where patients are cared for immediately after an operation, store rooms and anaesthetic rooms. The corridors within the department are not accessible by the general public. On occasion patients are treated in the corridors if they wake up earlier than expected from an operation, and staff need to remove a special airway used during surgery, known as a supraglottic airway, suction secretions from the patient's mouth and put on an alternative oxygen mask. This can be an aerosol generating procedure because it often makes patients cough. Due to the nature of the procedures that can be carried out on patients in corridors within the theatre department, the respondent considers those corridors to be a clinical area.

13. The respondent has an Infection Prevention and Control ("**IPC**") Policy, which is mandatory and which all employees and contractors, including the claimant, are expected to comply with. The policy includes Hand Hygiene Guidelines, which provide that:

"*2**.2 Promoting Good Standards of Hygiene***

All staff entering or working within clinical areas and/or providing direct patient care are required to be 'bare below the elbows' to facilitate effective hand hygiene.

Whilst, we expect all members of staff in clinical areas to be 'bare below the elbows' we also recognise the specific needs of our staff on cultural, religious or disability grounds. Therefore disposable sleeves are available through the Supplies Department; these must be disposed of in the same way as disposable gloves."

14. The respondent also has a Uniform & Workwear Policy which applies to all staff working in the Trust. The policy in force at the time of the events of this claim, contains the following:

UNIFORM POLICY FOR STAFF WEARING UNIFORM WORKING IN A CLINICAL ENVIRONMENT

….

'**Bare below the elbows'**

- Clinical staff who wear uniform must be 'bare below the elbows' when undertaking clinical duties and in a clinical area

- We also recognise the specific needs of our staff on cultural, religious or disability grounds. Therefore disposable sleeves are available through the Supplies Department; these must be disposed of in the same way as disposable gloves.

15. There is a separate section of the policy which applies to staff not working in a clinical area. That defines a non-clinical area as "*office only areas, where no clinical treatments are performed and no patients present*". There is no definition of clinical or non-clinical area in the section of the policy that applies to staff wearing uniform and working in a clinical environment.

16. The policy also contains a section on uniforms which provides that "*Vests, T-shirts or under garments should not be visible"* and a section on finger nails which states that "*Short, clean and neat finger nails are required*" and that "*Nail varnish, false and acrylic nails, nail extensions or nail jewellery/gems are not permitted on fingers".*

17. At the time of the matters that this claim relates to there was no clear definition of clinical and non-clinical areas in the respondent's policies.

18. If a member of staff sees a colleague who appears not to be complying with the Infection Prevention and Control or Uniform & Workwear policies, they are expected to challenge them. This is particularly so for senior members of staff such as Mary Hytch. Ms Hytch's evidence to the Tribunal, which we accept, was that she regularly challenges colleagues on IPC and uniform, if she observes them, for example, not wearing a mask or not being bare below the elbows in a clinical area. There was no evidence before us as to the religions of the other people she challenged other than the claimant and no evidence to suggest that she only challenged Muslim workers.

19. Claire Tilley, as Clinical Theatre Manager, also had responsibility for ensuring compliance with the IPC and Uniform policies and regularly challenges those who she considered not to be complying. For example she recently signalled to a consultant in an operating theatre to remove a necklace that she had forgotten to remove. Challenges to colleagues to ensure compliance with the respondent's policies are, we find, made irrespective of the seniority of the individual who is perceived to be in breach of the policy.

20. Often the challenge or reminder of the policy takes the form of the member of staff pointing or gesturing to the colleague – for example to put on a mask or remove any forearm coverings such as a watch or sleeves.

21. Such reminders are normally well received and result in the member of staff who has been challenged / reminded immediately taking steps to comply with the IPC or Uniform Policy. Staff are also reminded of the Infection Prevention Control and Uniform policies in staff huddles.

22. The claimant is a practising Muslim who wears a hijab and covers up her body apart from her hands, feet and face whilst in public.

23. It is well known within the respondent that clinical staff must be 'bare below the elbows' when in clinical settings, and the claimant was very familiar with that policy. When she is working in what she considers to be a clinical area, she ensures that her arms are bare below the elbow. It is her practice however, upon leaving what she considers to be clinical areas, to roll her sleeves down so that her forearms are

covered.

24. The claimant wears a full sleeved elastic and tight fitted body top, known as a scrub under top, underneath her scrubs when at work. The top looks similar to a T-shirt but has sleeves that can be rolled up and down, and because the sleeves are tight, when they are rolled up there is no risk of them rolling back down.

Allegation One

25. On 6 December 2022 the claimant was working at Airedale General Hospital supervising a more junior colleague in preparation for an operation in theatre 3. The claimant left the operating theatre to go to the bathroom and make a telephone call. She walked through the anaesthetic room, which is still a clinical area, and on to the corridor which links the various operating theatres in the department.

26. As the claimant left the anaesthetic room she rolled her sleeves down and by the time the claimant arrived in the corridor her sleeves were fully down.

27. On the day in question the Care Quality Commission ("**CQC**") was due to visit Airedale Hospital to carry out an inspection of the maternity services, which would include inspecting the theatre department.

28. On the morning of 6 December Mary Hytch visited the theatre area of the hospital in preparation for the CQC visit. One of the purposes of her visit was to ensure staff were complying with the IPC and Uniform policies. She challenged another member of staff who was not bare below the elbows and, when she met Claire Tilley in the department she challenged her because Ms Tilley was not wearing a mask. Ms Tilley immediately apologised and explained that she had just come out of her office which was not a clinical area. Ms Tilley then put on a mask as requested.

29. At some point Ms Tilley and Ms Hytch met Sheree Herpe in the department. It was unclear whether Ms Hytch met Ms Tilley or Ms Herpe first, and nothing turns on that for the purposes of the issues that we have had to determine.

30. The three individuals then met the claimant in the corridor and there was an altercation that took place. There was a significant conflict of evidence as to what happened during the altercation. In her witness statement the claimant said that Mary Hytch had loudly stated "excuse me, oi! Excuse me, yes, I was talking to you. Why are your sleeves not rolled above the elbows' and that Ms Hytch was accompanied by Ms Herpe who was not wearing a mask. The claimant described Ms Hytch as shouting loudly in the corridor and said that she had firmly and calmly explained to Ms Hytch that her sleeves were not rolled up because she was not in a clinical area. She said that Ms Hytch continued to demand that she rolled them up, and then asked who the claimant was and said she would write her name down.

31. The claimant acknowledged that there had been a verbal altercation during which she kept restating that she was not in a clinical area and that therefore the 'bare below the elbows' policy did not apply. The claimant also said that she did not feel comfortable having this interaction in such a public setting, as there were patients in

the vicinity. She said Ms Hytch asked again who she was and who was responsible for the claimant, and subsequently the claimant and Ms Hytch exchanged email addresses and the names of their managers.

32. The claimant's evidence was that she told Ms Hytch that her treatment of the claimant was totally disrespectful and asked her to maintain professional standards and show respect. She said that Ms Hytch rolled her eyes at her and continued raising her voice. Ms Herpe had then joined the conversation and said it was inappropriate given that patients could overhear them.

33. The claimant said that she had explained she was getting wound up and did not want to risk not being able to supervise her junior effectively. She said that Ms Herpe had then said, 'so what, are you leaving your junior' and 'well clearly you are not doing what you are supposed to be doing here, you can't leave him in there alone'. The claimant also said that Ms Herpe took issue with the length of her finger nails and commented "I will be making sure that next time I see you your nails are going to be short and your elbows bare" which the claimant found intimidating.

34. The claimant did not suggest that she, or indeed anyone else, had raised the issue of religion during the altercation.

35. Ms Hytch's evidence was that she saw the claimant leaving the anaesthetic room with her sleeves already rolled down and decided to challenge her because she believed she was in breach of the respondent's policies. She told the Tribunal that she said "excuse me" to get the claimant's attention in a slightly raised voice, because the claimant was using her mobile phone, so she was unable to make eye contact with her.

36. Ms Hytch said that she began to say that the claimant needed to change what she was wearing so that she was bare below the elbow, but that the claimant interjected with "don't you know who I am" and then said that she had no intention of removing or rolling up her long sleeves, that she needed to cover her forearms for religious reasons and that she had experienced similar discrimination from other organisations.

37. Ms Hytch also said that she reminded the claimant that she needed to be bare below the elbow in a clinical setting in order to comply with the respondent's policies. She described the claimant as angry, talking loudly and rapidly, and making it clear she had no intention of rolling up her sleeves. Ms Hytch felt that she was being attacked by the claimant. She said the claimant told her that she was not performing surgery and was supervising, and that that was why she had not rolled up her sleeves.

38. Mary Hytch's view was that both the anaesthetic room and the corridor where the altercation took place were clinical areas and that the claimant should have her sleeves rolled up whenever she was in a clinical area. Mary Hytch also gave evidence that Ms Herpe had then joined the conversation and suggested that the conversation be taken away from the corridor because people were trying to see what was happening. She also gave evidence that Ms Herpe made a comment about the

claimant's fingernails being too long. She said the claimant said that she was upset and could not continue with the conversation.

39. Sheree Herpe's account of the incident was that she was walking down the corridor with Mrs Hytch and Ms Tilly when the claimant came out of the recovery room onto the corridor with long sleeves and a mobile telephone in her hand. She said she heard Mary Hytch say, 'excuse me' and 'would you mind' to the claimant, and that Mary approached the claimant in a calm and professional manner.

40. Ms Herpe said that the claimant had then become "wild", by which she meant the claimant had an excessive reaction, that she had gone into an outburst and said she was supervising, which made it difficult for Mary to speak. Ms Herpe said that Mary Hytch had referred to being in a clinical area, and that she (Ms Herpe) agreed with that view. She described the claimant as becoming louder and said that she had stepped forward to try and take the conversation away from the main corridor because it was escalating and people had started to come from the recovery room to the door to see what was happening. She went to close one of the doors to the corridor to try and prevent others hearing what was being said.

41. Ms Herpe said Mrs Hytch asked the claimant who she was, and the claimant replied that she was a consultant. Ms Herpe then pointed out to the claimant that her nails were long. She denied telling the claimant that she was not doing her job properly. She said the claimant was pointing at her when she was shouting, and that was why she noticed the nails. She also said that the claimant was not open to discussing the matter, kept repeating that she was a consultant and wanted to know who Mary Hytch and Ms Herpe were. According to Ms Herpe as the claimant was walking away from her Ms Herpe said that the claimant needed to be bare below the elbows and her nails needed to be short. The claimant replied that she would not be cutting her nails.

42. Ms Tilley was less involved in the incident. She said that Mrs Hytch had called after the claimant using the words "excuse me" to gain her attention when the claimant came out of the anaesthetic room with her sleeves rolled down. She described the claimant as being taken by surprise by the interaction and that the situation escalated very quickly. She said that Mary was polite and calm, and that the claimant had said that they were not in a clinical area and that she had been supervising a junior in the anaesthetic room. She said the claimant told Mary she would not be taking her T-shirt off or rolling her sleeves up, and that during the conversation Mrs Hytch referred to challenging others regarding 'bare below the elbow' on the same day.

43. Ms Tilley did not recall Ms Hytch shouting, getting angry or being aggressive, but said that she was surprised at the level of aggression of the claimant, and that there was some talking over each other. She described Ms Herpe as stepping in calmy and shutting the door to stop colleagues listening in and said that she had gone to close another door to the corridor. She said the claimant had refused to take the conversation to a quieter area when asked to do so.

44. The three respondent witnesses gave slightly different accounts of the altercation,

and Ms Kight suggested that this should cause us to doubt their credibility and to prefer the claimant's account of the altercation. We do not find that to be the case. The discrepancies between their accounts are in keeping with different individuals having slightly different memories of an incident, which indicates in our view that there was no collusion between them.

45. Ms Kight also suggested that Ms Tilley and Ms Herpe gave evidence in support of Ms Hytch because she was more senior than them. Ms Herpe reported directly to Ms Hytch and Ms Tilley reported to Ms Herpe. All three work closely together and were supporting each other on the day. All three were consistent in their evidence that the claimant was aggressive during the altercation, and Ms Kight suggested that the fact they were consistent on this evidence suggested some form of collusion. We find that they did work closely together and were supportive of each other during the incident. It is understandable that the claimant perceived them all to be backing each other up on the day, although Ms Tilley played little part in the incident. On the evidence before us, however, we do not find that there was collusion between Mrs Hytch, Ms Herpe and Ms Tilley when it came to giving evidence to this Tribunal. Their witness statements all gave slightly different versions of the incident, which m.

46. We accept that both parties genuinely believe their version of what happened to be true and we find that what actually happened was a combination of both parties' evidence.

47. We find that there was a genuine difference of opinion as to whether the corridor was a clinical area or not. The claimant genuinely believed that she was in a non-clinical area and compliant with the respondent's policies that she was not required to be bare below the elbows in that area. The respondents' witnesses genuinely believed that the corridor was a clinical area, and that the claimant should have been bare below the elbow. The lack of any clarity on what is and what is not a clinical area in the respondent's policies at the time was not helpful.

48. The incident began when Mary Hytch saw the claimant with long sleeves. She believed the claimant had been in the anaesthetic room without her sleeves rolled up. The claimant was on her telephone so Mrs Hytch could not make eye contact with her. To get the claimant's attention, Mrs Hytch raised her voice slightly and said, 'excuse me'. She then asked the claimant to roll her sleeves up. The claimant was upset at being challenged and this showed in her reaction to what Mrs Hytch said.

49. There was then an altercation which escalated very quickly and during which voices were raised on both sides. The claimant was not happy at being challenged because she believed she was complying with the respondent's policy. She reacted differently to others who Mrs Hytch had challenged in relation to uniform policy and became upset.

50. Mrs Hytch and Ms Herpe both accepted that, once it became apparent that the claimant was upset about being challenged and indicated firmly that she believed she was complying with the policy, they could have dealt with the situation differently. They were very surprised by the claimant's reaction and could have handled the situation better. For example, Miss Herpe's comments about the claimant's nails

were not helpful.

51. It is clear that the claimant was very upset by what happened. She perceived that she was being challenged by three colleagues who were supporting each other and that she had done nothing wrong. Both she and Mrs Hytch became heated and talked in loud voices. The claimant suggested that Mrs Hytch called out to her 'oi' – on balance we find that Mrs Hytch did not do so, but rather that she initially approached the claimant politely. It is clear that Mrs Hytch did not accept the claimant's explanation as to why her arms were covered, namely that the claimant considered herself to be in a non-clinical area.

52. There was a conflict of evidence as to whether religion was mentioned at all during the incident. The claimant, whose case would have been assisted by giving evidence that she raised the issue of her religion at the time, did not suggest in her evidence that religion had been raised. Rather she said that it would have been obvious from the fact that she was wearing a hijab that she is a practising Muslim. We accept her evidence on that point and find that, there was no express mention of religion during the conversation, but that Mrs Hytch knew that the claimant was a practising Muslim because she was wearing a hijab. Only Ms Hytch suggested that religion was mentioned during the conversation and we find that she is mistaken in her recollection. None of the others present at the time suggested that religion had been discussed.

53. The claimant said that Ms Herpe was not wearing a mask during the incident in the corridor on 6 December. The respondents' witnesses said that she was. We find on balance that Ms Herpe was wearing a mask that day. The respondents' witnesses gave consistent evidence on that issue. It is clear that compliance with the IPC and Uniform policies were high on everyone's mind during the incident. We find it unlikely that, having challenged Ms Tilley on not wearing a mask, Ms Hytch would not have challenged Ms Herpe if she were not wearing a mask. We also find it likely that had Ms Herpe not been wearing a mask, the claimant would have raised that during the conversation given that she was being challenged for not complying with the uniform policy).

54. The claimant was very upset by the incident on 6 December. She felt unable to continue at work and had to cancel her operating list for the day so that she could go home.

<u>Events following the incident on 6 December</u>

55. After the incident on 6 December, Mary Hytch filed an incident report. In the report she described the incident as follows:

"*observed clinical colleague leaving a theatre anaesthetic room wearing long sleeve top underneath theatre blues. I asked the individual to change to be compliant with uniform and IPC policy. The individual refused to change, described my approach as rude and that there was no evidence to support bare below the elbow as a policy. Also noted long fingernails which again they declined to alter.*

56. On 7 December 2022 Ms Tilley wrote a reflective statement in which she set out her recollection of events on 6 December. She referred in the statement to having been reminded by Mary Hytch that she (Claire) wasn't wearing a face mask, and that Mary had "*remarked I wasn't the first and had reminded several people including asking 3 other people to be bare below the elbow on her visit to theatre in the hospital*".

57. The day after the incident the claimant sent an email to the respondent complaining about it. In the email she described the incident, from her perspective, and stated that she believed that she had been racially profiled and bullied into rolling her sleeves up. She explained that she covered her forearms out of a religious obligation which she chooses to follow. At the end of the email she wrote that she "*would like a formal investigation and be notified of the outcome. I would like all my patients who suffered as a result of this altercation to be contacted and apologised to in writing and I would like to see a copy of the letter….."*

58. Julie O'Riordan, the respondent's Deputy Medical Director, replied to the claimant's email on 14 December. She explained that Mary Hytch had also spoken to her about the incident and told her that she had not intended to upset the claimant but understood that the claimant was very upset about what happened. Dr O'Riordan commented that Ms Hytch had been trying to explain and ensure compliance with the IPC policy. She referred to the existence of disposable sleeves, although she had never come across these. She offered to look into their availability and said that she would be really interested to look at resources the claimant had from the British Islamic Medical Association. She finished by suggesting that the two of them meet and commented that "*It may be that our policy needs reviewing in this regard so it would be helpful to see some information on this.*"

59. The claimant agreed with this approach at the time, and in an email sent to Dr O'Riordan on 22 December 2022 she wrote: "*….I am happy to discuss the policy and specifically the incident that has made me feel targeted. Happy to have an informal chat in the first instance, I was not intending on making this formal….*"

60. The claimant and Dr O'Riordan met to discuss the claimant's complaint. On 13 January the claimant sent an email to several senior managers at the respondent, headed 'Discriminatory incident outside theatre 6/12/2022'. In the email she described the incident and wrote:

"*I have spoken to Julie O'Riordan without an outcome and strongly feel that due to the gravity of the situation this cannot be justified by an informal process therefore I have involved the BMA and taken a formal route. ..*"

61. The matter was escalated to HR and the claimant was invited to a meeting with Alexis Brown, Head of the respondent's People Partnering team. That meeting took place on 24 January 2023. During the meeting the claimant said that she felt she had been racially profiled and wanted lessons learned from what had happened. She stated that she believed she was targeted by Sheree Herpe, had not been treated fairly and that the situation had not been handled professionally or appropriately.

62. Alexis Brown suggested mediation, as others involved in the altercation had indicated they would be willing to mediate. The claimant refused and said she wanted the matter taking seriously.

63. Joshua Harris, the respondent's Lead Pharmacist, was appointed to carry out an independent investigation into the claimant's complaint. Mr Harris has previously carried out many investigations into adverse events relating to medication and patient safety. This was the first investigation of this nature he had carried out, and he made that clear at the start.

64. HR had originally suggested that Dr O'Riordan carry out the investigation, but Dr O'Riordan felt uncomfortable doing so because Mary Hytch is a direct colleague of hers and she was concerned that the claimant or Ms Hytch may perceive her to be biased. Dr O'Riordan suggested finding someone else to do the investigation, "*maybe someone who is female and from a BAME background.*" It was subsequently decided to appoint Mr Harris. There was no evidence before us as to why that decision was made.

65. Mr Harris met with the claimant on 7 March 2023 and subsequently interviewed Claire Tilley, Sherie Herpe and Mary Hytch. He then reported his findings.

66. On 16 May 2023 Amanda Stanford, Executive Chief Nurse, wrote to the claimant setting out the findings of Mr Harris' investigation. The conclusions of the investigation were that the request for the claimant to be bare below the elbows was not racially motivated but was rather a request made to ensure adherence to the respondent's policies. It was however recognised that the incident had been stressful for the claimant, and it was found to be disappointing that the discussion had escalated so quickly.

67. One of the issues raised by the claimant was that the respondent had 'deep rooted problems' with discrimination. The letter of 16 May addressed this as follows:

"*As part of your complaint you have referred to a view that the Trust has deep rooted problems with regard to discrimination within the workplace. I understand that part of the rationale for this point of view comes from speaking with colleagues. No such views have been shared with the Trust despite encouragement to raise matters with us, including from Joanne Harrison, Director of People and Organisational Development. In the absence of evidence to support your comment, I am unable to agree with you. However, please see Recommendation 10 below.*

Further, if you are speaking with colleagues who indicate that they believe there are issues of discrimination, please do remind them that they are encouraged to report them through the usual channels."

68. The letter finished by thanking the claimant for raising her concerns, and setting out ten recommendations, including:

1. A review of the Hand Hygiene Guidelines;

2. Defining or identifying clinical areas in which the bare below the elbow policy

applies;

3. Reviewing the Uniform Policy;

4. Considering signage at the entrance to clinical areas specifying the IPC requirements before entering the area; and

5. Reviewing the respondent's culture, specifically relating to 'deep rooted problems'.

The Second Allegation

69. The claimant gave evidence that on 13 December 2022 a nurse called Louise approached her and instructed her to roll up her sleeves. At the time they were walking in the main hospital corridor which is not a clinical area. The claimant said that she explained to Louise that they were not in a clinical area, and therefore the bare below the elbows policy did not apply. Louise told the claimant that more senior members of management, particularly someone called Claire, had told her to challenge the claimant on rolling her sleeves up. The claimant described Louise as looking uncomfortable and stating that she did not want to get involved.

70. The respondent adduced limited evidence in response to this allegation. Claire Tilley stated in her witness statement that she had not been asked by anybody to challenge the claimant and did not believe that such an instruction would have been given by senior management. She did not however address the specific allegation that she had told Louise to challenge the claimant in her witness statement. In cross examination she said that there had been a general conversation at a safety briefing at which staff were told to challenge others who were not complying with the IPC Policy. Sheree Herpe said that she was unaware of any such instruction and that it would in any event be unrealistic. Mary Hytch said that she had not instructed any of the respondent's employees to challenge the claimant directly in respect of how she chooses to cover herself. There was no evidence from the 'Louise' in question, who Ms Tilley identified as being the Ophthalmic Team Lead.

71. We accept the claimant's evidence in relation to this incident, which was largely unchallenged. We find that during a conversation on 13 December that took place on the main hospital corridor, which is not a clinical area, when Louise, the Ophthalmic Team Lead and the claimant were walking towards the theatre area, Louise told the claimant that she had been asked to challenge the claimant on rolling her sleeves up. The reason for this was that there had been a recent reminder to all theatre staff, by Claire Tilley, of the importance of complying with IPC and of challenging colleagues who were not complying.

72. We find on balance that Claire Tilley did request that Louise pay particular attention to the claimant's compliance with the policy as a result of the recent incident.

73. It is the respondent's normal policy to carry out random and anonymised World Health Organisation ("**WHO**") audits in theatres on a regular basis. 20 audits are normally carried out each month, and the results of the audits, which are considered

part of Key Performance Indicators, go to the respondent's Board of Directors and Senior Management team. The audits are normally carried out by a junior member of the operating team such as a healthcare support worker, who will observe several different theatres and different operations. It is up to the person carrying out the audit to decide which theatres to audit.

74. Karen Taylor is Theatre Governance Lead and responsible for collating the results of the audits and producing a report which then goes to the senior management team.

75. The claimant alleges that on 13 December an employee wearing a light blue uniform, usually worn by a healthcare assistant or technician, arrived in her operating theatre unannounced with a checklist and proceeded to conduct an audit. The claimant said that the audit on this particular day was different to other WHO audits that she had experienced because the audit was not recorded electronically. The claimant said that she had never been subject to an audit by the respondent before, and that when she had been subject to audits elsewhere in the NHS she had been informed in the advance, and the audit was conducted differently.

76. We accept the claimant's evidence that there was an audit that took place whilst she was operating on 13 December. There was evidence in the bundle of 9 theatre audits taking place that day. Two of those audits were in theatre 5, two were in theatre 1 (urology), two were in theatre 3 which is where the claimant normally operates, and there was one audit in each of theatres 2, 6 and 7.

77. We find that the audits that took place on 13 December, including the audit of the theatre where the claimant was operating, were part of the respondent's normal and regular audit process. There was no evidence before us to suggest that the claimant was specifically targeted with the audit or that she was treated differently from anyone else. Whilst it is understandable that, in light of recent events, and particularly the discussion with Louise that day, the claimant felt that she was being targeted, we find that was in fact not the case.

The Law

Contract Workers

78. Section 41 of the Equality Act 2010 provides that:

"*(1) A principal must not discriminate against a contract worker –*
- *(a) as to the terms on which the principal allows the worker to do the work;*
- *(b) by not allowing the worker to do, or to continue to do, the work;*
- *(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*
- *(d) by subjecting the worker to any other detriment.*

(2) A principal must not, in relation to contract work, harass a contract worker.

Direct discrimination

79. Section 13 of the Equality Act states that:

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

80. Section 23 of the Equality Act deals with comparators and states that: "*there must be no material difference between the circumstances relating to each case."* *Shamoon v chief Constable of the Royal Ulster Constabulary [2003] ICR* is authority for the principle that it must be the relevant circumstances that must not be materially different between the claimant and the comparators.

81. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:

a. Was there less favourable treatment?
b. The comparator question; and
c. Was the treatment 'because of 'a protected characteristic?

Harassment

82. Harassment is defined in section 26 of the Equality Act:

"*(1) A person (A) harasses another (B) if –*
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of –
(i) Violating B's dignity, or
(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect…"

83. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

d. Was the conduct complained of unwanted:
e. Was it related to religion; and
f. Did it have the purpose or effect set out in section 26(1)(b).

Richmond Pharmacology v Dhaliwal [2009] ICR 724.

84. The two-stage burden of proof set out in section 136 Equality Act (see below) applies equally to claims of harassment. It is for the claimant to establish facts from which the Tribunal could conclude that harassment had taken place.

85. In ***Hartley v Foreign and Commonwealth Office Services [2016] ICR D17*** the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (***Warby v Wunda Group plc EAT 0434/11***).

Burden of proof

86. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

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

87. There is, therefore, in discrimination cases, a two-stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205*** which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to. In ***Igen v Wong*** the Court of Appeal endorsed guidelines set down by the EAT in ***Barton v Investec***, and which we have considered when reaching our decision.

88. In the first stage, the claimant has to prove facts from which the Tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. This two-stage burden applies to all of the types of discrimination complaint made by the claimant.

89. In ***Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913*** the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

90. The Supreme Court has more recently confirmed, in ***Royal Mail Group Ltd v Efobi [2021] ICR 1263**,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

91. In ***Glasgow City Council v Zafar [1998] ICR 120***, Lord Browne-Wilkinson recognised that discriminators 'do not in general advertise their prejudices: indeed, they may not even be aware of them'.

92. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

93. It is not sufficient for a claimant merely to say, 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In ***Madarassy v Nomura International plc [2007] ICR 867*** Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

94. Unreasonable behaviour is not, in itself, evidence of discrimination (***Bahl v The Law Society [2004] IRLR 799***) although, in the absence of an alternative explanation, could support an inference of discrimination (***Anya v University of Oxford & anor [2001] ICR 847***).

95. In harassment cases the shifting burden of proof rules will apply in particular where the conduct complained of is not obviously discriminatory, and the Tribunal has to consider whether the reason for the conduct is related to the protected characteristic relied upon by the claimant – in this case her religion.

Submissions

96. The submissions of the parties are summarised briefly here. The fact that a point raised in submissions is not mentioned here does not mean it has not been considered.

Claimant

97. Ms Kight submitted that, when determining the disputes of fact, the Tribunal should prefer the evidence of the claimant to that of the respondent's witnesses because:

1. The claimant's evidence was consistent, and her evidence about what happened on 6 December had gone largely unchallenged; and

2. The respondent's evidence showed confirmation bias, a lack of credibility and was riddled with inconsistencies.

98. The Tribunal must, in Ms Kight's submissions, examine the respondent's grounds for treating the claimant as it did. Her religion need not be the only reason, but it must have played a part. In relation to the burden of proof, Ms Kight referred us to ***Igen v Wong***, ***Hewage v Grampian Health Board [2012] IRLR 870*** and ***Royal Mail Group v Efobi [2021] ICR 1263***. Where the claimant has proved facts from which inferences of discrimination could be drawn, she says, the respondent must prove, on the balance of probabilities that the treatment was in no sense whatsoever on the proscribed ground.

99. Ms Kight also referred to ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor [2010] IRLR 495*** as authority for the proposition that 'related to' is a broad concept and that a finding about the motivation of the alleged discriminator is not necessary. The Tribunal must however articulate what evidence led it to the conclusion that the conduct is related to religion.

100. It is, Ms Kight submits, common ground that the treatment of the claimant was unwanted, and that the claimant felt offended and humiliated by it. The respondent does not seek to argue that the impact of the unwanted treatment was unreasonable in the circumstances and it is not disputed that the claimant wears long sleeves for religious reasons. It is, in Ms Kight's submissions, for the Tribunal to determine, from the claimant's perspective, whether there is a clear connection between the conduct and religion.

101. Ms Kight also submits that the Tribunal should draw an inference of discrimination from the way in which the respondent dealt with the complaint raised by the claimant after the incident on 6 December 2022. The Tribunal should conclude that the conduct in question was related to religion because:

1. Those involved knew the claimant was Muslim and that the reason she covered her arms was her religion;

2. The claimant was not in breach of the Uniform and Workwear Policy when she was challenged; and

3. Of the manner of Mary Hytch's challenge and the fact she acknowledged she may have unconscious bias against Muslims.

Respondent

102. Mr Riley submitted that the claimant had not discharged the burden of proof in relation to the claims. The claimant has not, he argued, established even primary facts to shift the burden of proof to the respondent. Even if she has, he said that the claimant's religion had no relevance whatsoever to the decisions to challenge the claimant on her compliance with the IPC and Uniform policies.

103. Mr Riley referred so ***Laing v Manchester City Council [2006] ICR 1519*** in which Mr Justice Elias held that the focus of the Tribunal's analysis must be on whether it can properly and fairly infer discrimination, and that if the Tribunal is satisfied that the reason given by the employer for the treatment is a genuine one and does not disclose conscious or unconscious discrimination, that is the end of the matter.

104. The respondent's witnesses were, in Mr Riley's submissions, consistent in that they were not aggressive or confrontational in their approach to the claimant, and there was no evidence that less junior staff were instructed to challenge the claimant.

105. The proper approach to determining whether there had been direct discrimination, in Mr Riley's submission, is to ask what the reason for the treatment was, and in particular whether religion had a significant influence on the outcome. The claimant has, he says, failed to establish any causal link between her religion and the treatment complained of, which is based solely on the claimant's failure to comply with the respondent's policies.

106. Mr Riley also submitted that Ms Herpe could not be an actual comparator because she was wearing a mask at the material time and was not challenged for being bare below the elbow.

107. In relation to the harassment complaint, Mr Riley submitted that it is not sufficient for the claimant to believe that the conduct relates to a protected characteristic, but rather it is for the Tribunal to decide whether it does or not. There was, he says, no purpose to create the proscribed effect for the claimant, but rather the respondent's aim in acting as it did was to ensure compliance with the respondent's policies.

Conclusions

108. The following conclusions are reached on a unanimous basis having considered carefully the evidence before us, the relevant legal principles, and the submissions of the parties.

General

109. When reaching our conclusions we have reminded ourselves of the burden of proof provisions contained in section 136 of the Equality Act 2010 and in the dicta of cases such as ***Igen Ltd v Wong***, ***Hewage v Grampian Health*** and ***Royal Mail Group v Efobi***. We have asked ourselves whether the claimant has proved facts from which inferences could be drawn that the respondent treated the claimant as it did because of her religion or, in the harassment claim, for a reason related to religion. We accept Ms Kight's submission that if the claimant discharges the 'first stage' of the burden of proof, it falls to the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the ground of or related to religion.

110. We have considered whether to draw an adverse inference as to the real reason for the treatment. Ms Kight suggests that we should draw an adverse inference of discrimination because of the respondent's apparent reluctance to investigate and

determine the claimant's complaint. On the evidence before us, we find that there was no reluctance on the part of the respondent to investigate the claimant.

111. The context to the complaint was that the claimant was not an employee of the respondent, but rather of another NHS Trust. When she raised her complaint a senior member of staff, the Deputy Medical Director, responded promptly and offered to meet with the claimant. She showed interest in looking at the resources the claimant had from the British Islamic Medical Association, and an openness to reviewing the respondent's policy. It cannot be said that Dr O'Riordan ignored the complaint, delayed or did not take it seriously. Importantly, the claimant initially agreed with the approach proposed by Dr O'Riordan, when, in her email of 22 December she wrote that she was happy to have an informal chat in the first instance and was not intending on making things formal.

112. When the claimant did not get the outcome she was looking for from Ms O'Riordan's intervention, and escalated the complaint, an independent and senior employee was appointed to carry out an investigation. It did take some weeks for the investigation to be concluded and a response sent to the claimant, but it is clear from the outcome letter and the number of recommendations that came out of the investigation that the complaint was considered carefully and taken seriously.

113. No adverse inference can in our view be drawn from the delay, which is not out of the ordinary in any way. Nor, in our view, can any adverse inference be drawn from the fact that there was a suggestion to appoint a female from a BAME background to investigate the complaint, and that in the end that suggestion was not followed through. Having heard the evidence of Mr Harris, we are satisfied that he was an appropriate person to conduct the investigation. He had experience of conducting investigations in the past, even if he had not conducted one of this nature. It is clear that he took his responsibilities seriously.

114. It was suggested on behalf of the claimant that the respondent failed to investigate her allegation that there were deep rooted problems within the organisation. The claimant did not however provide any evidence to support this contention, despite having the opportunity to do so. In addition, Mr Harris recommended at the end of the investigation that there should be a review of the respondent's culture, specifically relating to deep rooted problems. It cannot therefore be said that the respondent failed to consider or address this allegation.

115. Ms Kight suggested that the fact those involved knew the claimant to be Muslim, the manner of Mrs Hytch's challenge to the claimant and the fact that Mrs Hytch accepted she may have unconscious bias against Muslims should lead us to conclude that the treatment was because of or related to religion. We do not accept her submissions on this point. Not everything that happens in the workplace to a Muslim worker will be related to religion, and the claimant's own evidence was that religion was not discussed on the day. Rather, the claimant gave another reason at the time for not rolling her sleeves up, rather that she believed she was in a non-clinical area of the hospital.

116. The fact that Mrs Hytch was willing to acknowledge that she may have

unconscious bias is, in our view, to her credit. We all have unconscious biases and it is, in our view, more likely that those who do not recognise their potential unconscious biases or are not willing to acknowledge that they may have them, who are more likely to be influenced by them.

117. In relation to the manner of Mrs Hytch's challenge of the claimant, it cannot in our view be said that it was discriminatory. We accept the respondent's evidence that the initial challenge was polite and find that the reason matters subsequently became heated was because of the claimant's response to being challenged, combined with Mrs Hytch's response to the claimant not doing as she was asked.

118. This is therefore not a case in which the evidence before us supports the drawing of inferences adverse to the respondent.

119. In reaching our conclusions we have considered carefully the motivation, conscious and unconscious, of the alleged discriminators. We have reminded ourselves that those who discriminate seldom admit to doing so, and that it is open to us to find that the real reason the alleged discriminators acted as they did was not the one put forward in their evidence.

120. We have therefore considered carefully what motivated Mary Hytch, Sheree Herpe and Claire Tilley to act as they did. When considering whether the conduct amounts to harassment we have taken account of the judgment of the EAT in ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor*** and in particular paragraphs 24 and 25 of that judgment, to which we were referred by Ms Kight:

"*….the broad nature of the "related to" concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question….*

25. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

Status

121. We are satisfied that the claimant is, and was at the material time, a contract worker and the respondent a principal for the purposes of section 41 of the Equality Act 2010. The claimant is not employed by the respondent but works for the respondent one day a week under the terms of an agreement between the claimant's employer and the respondent. She therefore falls within section 41 and is able to

pursue a complaint of discrimination against the respondent. There was no suggestion by the respondent that section 41 did not apply.

Allegation One

Direct discrimination

122. The first question we have to consider in any complaint of direct discrimination is whether the claimant was treated less favourably than her comparators. The claimant relies upon two comparators in relation to Allegation One – Sheree Herpe and a hypothetical comparator, namely a visiting consultant who is not a Muslim and was wearing long sleeves in the corridor.

123. The claimant says that Sheree Herpe was a comparator because she was in the same corridor as the claimant at the same time and was not wearing a mask but was not challenged by Mary Hytch. In our findings of fact we have concluded that Sheree Herpe was wearing a mask at the time of the altercation on 6 December. She was therefore not in actual or perceived breach of the respondent's IPC policy or of its Uniform Policy, and there was no suggestion that she was not bare below the elbows. There was, therefore, a material difference between the circumstances of the claimant and of Ms Herpe and Ms Herpe was not an appropriate comparator for the purposes of the direct discrimination claim.

124. We have then considered whether a hypothetical comparator would have been treated more favourably than the claimant. There was ample evidence before us of Mary Hytch challenging not just the claimant but others who she perceived to be in breach of the IPC Policy and the Uniform Policy. On the morning of the incident she had challenged at least one other member of staff who was not bare below the elbow, as well as Claire Tilley for not wearing a mask. Claire Tilley's evidence, which we accept, was that she also challenges people for noncompliance with the IPC and Uniform policies, and that staff have been reminded to challenge anyone who is not complying.

125. We find that a visiting consultant who was not Muslim and who was wearing long sleeves in the corridor would not have been treated differently. Mary Hytch would have challenged anyone who she perceived not to be complying with the IPC Policy or the Uniform Policy. We accept the respondent's evidence that challenges about perceived noncompliance with the IPC and Uniform policies are common within the respondent's organisation.

126. We also find that the reason Mary Hytch initially challenged the claimant was because she genuinely believed that the claimant was in breach of the respondent's IPC and Uniform Policies. She had challenged others, including Claire Tilley, and there was no evidence before us to suggest that Ms Tilley is a practising Muslim. The initial challenge was therefore not because of religion.

127. The subsequent altercation that ensued was a result of the way in which the claimant responded to being asked to roll her sleeves down, combined with the way in which Mary Hytch responded when the claimant did not do as she was asked. The

situation was not handled well by either party and as a result it escalated quickly. It cannot however be said that the escalation was because of religion. There are plenty of altercations that take place in the workplace because both parties become angry and upset, and we find that was the case here. Ms Hytch and Ms Herpe wanted to get the claimant to comply with the IPC and Uniform Policies and were not happy when she, as they saw it, refused to comply. That was the reason they acted as they did.

128. We therefore find that the treatment of the claimant on the 6 December was not because of religion.

129. For these reasons the allegation of direct discrimination in relation to allegation one is not well founded. It fails and is dismissed.

Harassment

130. We have then considered whether it can be said that the treatment of the claimant on 6 December amounts to harassment contrary to section 26 of the Equality Act.

131. We accept that the respondent's conduct on 6 December 2022 was unwanted by the claimant. She believed that she was complying with the respondent's policies and was not happy with the suggestion that she was not. The claimant's reaction on the day, becoming distressed, cancelling her operating list and going home, combined with the complaints that she subsequently made about the incident, make it clear that the conduct of Mary Hytch and Sheree Herpe on 6 December was unwanted.

132. It cannot in our view be said that the purpose of the respondent's conduct on 6 December was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. The purpose of the conduct that day was to seek to enforce the IPC and Uniform policies. We do however find that the conduct on 6 December had the proscribed effect set out in section 26(1)(b) of the Equality Act. The claimant felt intimidated and humiliated by what happened, to the extent that she had to go home and was not able to work for the rest of the day. Given that she believed that she was complying with the respondent's policies and that the reason she had rolled her sleeves down was her religious belief, it was in our view reasonable for the conduct to have that effect on her.

133. We have therefore considered whether the conduct was related to religion, which is a wider and less stringent test than the 'because of' test that applies in direct discrimination. We find, on balance, that the way in which the claimant was treated on 6 December was not related to religion.

134. The encounter started because Mary Hytch saw someone who she believed was not compliant with the IPC and Uniform Policies. It then escalated because of the way in which the claimant reacted to being challenged, and the way in which Mary Hytch reacted in response. Whilst we accept that it ought to have been obvious to all three of the respondent's witnesses who were present that the claimant is a

practising Muslim because she was wearing the hijab, the claimant's evidence, which we accept, was that religion was not mentioned during the altercation.

135. We accept that Mary Hytch and Sheree Herpe's behaviour on 6 December was not related to religion, but rather was at the start of the incident because they genuinely believed the claimant was in breach of the respondent's policies, and subsequently because of the way in which the claimant reacted to being challenged. It is, in our view, fair to say that both the claimant and Mrs Hytch were not used to being challenged and did not respond well to it. The mere fact that someone who, in the reasonable perception of Mrs Hytch and Ms Herpe, was refusing to comply with the respondent's IPC and uniform policies, was wearing a hijab is not in our view sufficient to mean that the conduct of Mrs Hytch and Ms Herpe related to religion.

136. There was, in our view nothing untoward in the initial challenge by Mary Hytch. We accept however that pressing the claimant in the way that Mrs Hytch and Ms Herpe did could be perceived as low level intimidation. Ms Herpe joined in, and there were three of the respondent's employees present during the altercation. The claimant was outnumbered, and the doors to the corridor were closed. It was understandable that the claimant felt intimidated. That said, however, the claimant was not being asked to do anything that she would not do willingly in a clinical area.

137. In relation to the comment made by Sheree Herpe about the length of the claimant's nails, whilst misplaced at the time as it only served to make an already tense situation worse, we find that comment was not related to religion. By that time the situation was inflamed and Ms Herpe was seeking to assert authority over the claimant who was, in her eyes, refusing to comply with the respondent's policies.

138. It is disappointing that three of the respondent's managers who have all apparently had diversity and equality training, did not approach the issue with more sensitivity when it became apparent that the claimant, who was clearly very upset at being challenged, and who clearly believed that she was not in breach of the respondent's policies, did not want to uncover her forearms in the corridor. Had they done so the whole incident and this claim may have been avoided.

139. We do not accept Ms Kight's submission that the question of whether the conduct related to religion should be judged purely from the perspective of the claimant. The Tribunal must consider this question in the round and can take account of the motivation (conscious and unconscious) of the alleged discriminators. We have asked ourselves whether, looking at matters objectively, it can be said that the conduct related to religion. We find, for the reasons set out above, that it did not.

140. The alleged discriminators' knowledge or perception of the claimant's religion is relevant to the question of whether the conduct relates to religion but is not conclusive of the question. Nor is the alleged harassers' view as to whether the conduct relates to religion.

141. The Equality and Human Rights Commission Code of Practice on Employment (2011) notes that 'related to' a protected characteristic "*has a broad meaning in that the conduct does not have to be because of the protected characteristic.*" It gives

the following examples:

1. Where conduct is related to the worker's own protected characteristic; and

2. Where there is any connection with a protected characteristic.

142. In reaching our decision we have considered the decision of ***Omar v London United Busways Ltd ET Case No. 330153/10*** although, as a first instance decision it is not binding on us. That case involved a bus driver who was a practising Muslim and who claimed that the actions of a colleague, in allowing passengers on to a bus whilst he was praying, amounted to harassment related to religion. The Tribunal found that the colleague's conduct was not related to religion, because the colleague's focus was on the needs of the bus service. The bus was delayed and she wanted to board passengers so that the bus could leave as soon as the claimant had finished his prayers.

143. Whilst the existence of a 'business' or service related reason for the treatment of a claimant does not in itself preclude the treatment also being for a region related to religion, in this case, we find that the sole reason for the conduct of Mrs Hytch and Ms Herpe on 6 December was to seek to enforce the respondent's policies, and their reaction to the claimant's perceived refusal to comply.

144. The allegation of harassment therefore fails and is dismissed. We would however comment that our decision on this issue was finely balanced.

<u>Allegation two</u>

Direct discrimination and harassment

145. There are two parts to this allegation. The first relates to the conversation that the claimant had with 'Louise' on 13 December 2022, and the second to the audit carried out of in the theatre where the claimant was operating on the same day. The claimant relies upon a hypothetical comparator in relation to both parts.

146. We find that a hypothetical comparator, namely a visiting consultant who was wearing long sleeves in the corridor, would not have been challenged in the way that the claimant was on 13 December. We accept the claimant's evidence that Louise, the Ophthalmic Team Lead, told the claimant that she had been told to challenge her, and find that Louise would not have said the same thing to a hypothetical comparator.

147. The claimant was therefore treated less favourably by Louise than a hypothetical comparator would have been treated.

148. We also find that the conduct of Louise on 13 December was unwanted by the claimant, and that it had the proscribed effect required by section 26(1)(b) of the Equality Act. It was clearly upsetting and humiliating for the claimant to be challenged in an area of the hospital that was clearly not a clinical area, and to be told by a colleague that she had been told to check up on her. This would have been distressing for anyone and was for the claimant. There was no evidence however,

nor did the claimant suggest, that Louise had made the comment with the purpose of humiliating the claimant.

149. We find on balance that this treatment was neither because of nor related to religion. Rather it was because the respondent wanted to ensure compliance with its IPC and uniform policies and perceived that the claimant was refusing, without justification, to comply. We accept Claire Tilley's evidence that all theatre staff were told to ensure compliance with the IPC and uniform policies and to challenge colleagues who they believed not to be complying.

150. The instruction given by Claire Tilley to challenge the claimant was, in our view, ill-advised and very poor management, but was not made because of religion. Rather it was given because Ms Tilley had recently been present during an altercation when the claimant had, in Ms Tilley's belief, refused without good reason to comply with the IPC and uniform policies.

151. Both the allegations of direct discrimination and of harassment related to the conversation between Louise and the claimant therefore fail and are dismissed.

152. The second part of allegation two is about an audit that was carried out on 13 December in the theatre where the claimant was operating. There was no evidence before us to suggest that a hypothetical comparator would not have been subject to an audit. We accept the respondent's evidence that WHO audits are carried out every month, are random and are carried out in different theatres. Had a visiting consultant who was not Muslim been operating that day, he or she may very well also have been audited. There were a number of audits carried out on 13 December, the majority of which were in theatres where the claimant was not operating.

153. In any event, there was no evidence before us from which we could conclude or draw an inference that the decision to audit theatre 3 (where the claimant was working) on 13 December was either because of or related in any way to race. Rather the respondent has adduced evidence of a non-discriminatory reason for the audit, namely the regular audit process.

154. The claims of direct discrimination and harassment in relation to allegation two therefore fail and are dismissed.

155. In light of our findings above, it has not been necessary for us to consider issues of remedy.

Employment Judge Ayre

Date: 7 March 2024

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