

# Discrimination – Religion and belief – removal for expressing faith-based objection to same-sex adoption

By [Sarah Bowen](#)

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3PB Barristers

**Mr Richard Page v NHS Trust Development Authority UKEAT/0183/18/DA**

*The Honourable Mr Justice Choudhury (President), Ms. K. Bilgan, Mr. M. Worthington*

*Reference to paragraph numbers are a reference to the EAT judgment.*

## The Facts

1. Mr. Page (“P”), who is a practicing Christian, held the position of Non-Executive Director of the Kent and Medway NHS and Social Care Partnership NHS Trust (“the Trust”). He was also a lay magistrate which included sitting on family cases involving adoption decisions.
2. P holds the firm faith-based belief that it is “not normal” for a child to be adopted by a single-parent or a same-sex couple.<sup>1</sup> P publicly expressed those views and was subject to disciplinary action in respect of his Magistracy.
3. The disciplinary action took place in 2014. P had sat on a panel considering an application for adoption from a same-sex couple. The application was unopposed and accompanied by a comprehensive social worker report in support. P was reported to have expressed views to his fellow magistrates that made it clear he had a problem with the notion of a same-sex couple adopting a child. He was reprimanded for this.
4. The disciplinary action was reported in the national press and online. P consequently participated in media interviews about that action without informing the Trust of the

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<sup>1</sup> Confirmed in P’s evidence before the Tribunal.

disciplinary action or interviews. The Trust instructed C to inform it before contacting the media.

5. P was subsequently removed from his Magistracy. That removal is the subject of other Tribunal proceedings which were also appealed to the EAT (*Page v Lord Chancellor* *UKEAT/0304/19/LA*).
6. Before the Trust could speak to him about that removal he took part in a further televised interview with BBC Breakfast News and other media outlets. During the BBC interview he expressed the view that he could not see how adoption by a same-sex couple could ever be in the interests of the child. Further interviews were conducted with ITV News and Good Morning Britain. P was thereafter suspended by the Trust and his term as Non-Executive Director was not renewed.

## ET Decision

7. P issued claims of direct and indirect discrimination because of religious belief, victimisation and harassment. He sought to rely on Articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression) of the European Convention of Human Rights (“ECHR”). All claims were dismissed.
8. The Tribunal concluded that the reason for the Trusts actions were not because of P’s beliefs but because of the manner in which he expressed those beliefs. In particular, accepting invitations to appear, and then appearing, in the media compounded by the fact that he did so without informing the Trust when he had expressly been told to do so. Expressing views in that manner was not sufficiently close or interlinked with the underlying belief itself. The actions went further than attempting to convince others of the merit of the religion or belief. Accordingly, there was no conflict with Article 9 ECHR and the Article 10 claim added nothing to the argument.
9. This therefore meant that the direct discrimination claim failed because the reason for the treatment was not P’s belief. Likewise the reason for the treatment was therefore not a protected act and the victimisation claim could not succeed.
10. As to the claim of indirect discrimination the ET concluded that a PCP was applied namely, *“in assessing the suitability of any D for the office, the Respondent gives a high*

priority to securing the confidence and/or approval of the so-called “LGBT community”.<sup>2</sup> However, it concluded that there was insufficiently cogent evidence of any group disadvantage. In any event, it held that the Trust’s actions would have been objectively justified on the basis of the legitimate aims of protection of health and the protection of the rights of others.

11. The harassment claim was also dismissed and appears not to have been actively pursued at hearing.<sup>3</sup>

## EAT Decision

12. The EAT dismissed the appeal and in doing so has been quite damning of P’s appeal grounds. There was no error of law by the ET.
13. The Tribunal’s conclusion in respect of the reason for the treatment was a finding of fact that could not be said to be perverse.
14. The Tribunal did not make any error of law in concluding that the various reasons relied upon by the Respondent for its treatment of P were properly separable from the allegations of discrimination which P was making against the Lord Chancellor and others in respect of his removal from the Magistracy – applying the principles established in **Martin v Devonshires Solicitors [2011] ICR 352**.
15. P argued that by concentrating on the reason why and not identifying an appropriate comparator there was an error of law in respect of the direct discrimination claim. The EAT rejected this noting that the reason why test is well-established and that the need to consider any comparator was obliterated on the facts of this case. There is no obligation to identify a comparator in every case (per **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285**).
16. In respect of the s19 claim the EAT concluded that the ET had correctly applied the Court of Appeal’s decision in **Mba v Merton London Borough Council [2014] 1 WLR 1501**. P was not able to show group disadvantage.

## Comment

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<sup>2</sup> The EAT noted that the phrased “so-called LGBT community” appeared to be used in a pejorative way (paragraph 22).

<sup>3</sup> Paragraph 25.

17. The ET stated that in principle manifestation of religion or belief for the purposes of Article 9 ECHR could extend in a suitable case to the right to attempt to convince others of the merit of the religion or belief. This point has already been endorsed by HHJ Eady QC in *Wasteney v East London NHS Foundation Trust* 2016 ICR 643, EAT.
18. Importantly, Article 9 EHCR is qualified by 9(2) i.e. such limitations prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or for the protection of the rights and freedoms of others. Therefore, employers may seek to rely on that qualification in contextualising any treatment of staff. For example, in the present case, the ET concluded that, even if Article 9 was engaged, then the health, rights and freedoms of others meant that limitations would have applied. Importantly, the Trust is subject to the Public Sector Equality Duty under s149 Equality Act 2010. These factors could have been very important had the Trust needed to rely on their defence of objective justification.
19. This case does not change the importance of the well-known decision in *Eweida v UK* (2013) EHRR 8 in which it was held that where there is a “sufficiently close and direct nexus” between a claimant’s religious views and the reason for the treatment Article 9 will be invoked. In order to count as a manifestation of religious belief under Article 9 the act must be intimately linked to the religion or belief such as an act of worship or devotion which forms part of the practice of religion or belief in a generally recognised form. But in the present case, P could not show that the reason for the treatment related to his religious belief. In any event this would be a question of fact in each case and therefore difficult to appeal on the grounds of perversity or otherwise.
20. In defending victimisation claims employers often seek to argue that it is not the fact of a protected act which causes action but its tone. On the face of it the present case would support a distinction between tone and the protected act. However, some caution may be necessary. In its parting comment the EAT emphasised that a Tribunal would “*exercise great caution*” in separating the making of a comment from the manner in which it was made because it would diminish the protection conferred by the legislation if employers could take action against an employee with impunity just because an allegation was made adopting a tone to which the employer takes objection.<sup>4</sup> However, on the facts of this case the Trust’s reasons for taking action were not about the tone but the failure to follow instructions and the failure to consider the potential impact of the

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<sup>4</sup> Paragraph 54.

remarks on vulnerable sections of the public with which the Trust needed to engage.  
Each case will be determined on its own facts.



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