Neutral Citation Number: [2019] EWCA Civ 818

Case No: A2/2018/0562

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Choudhury

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2019

Before:

LORD JUSTICE GROSS
LORD JUSTICE SINGH
and
LORD JUSTICE HADDON-CAVE

- -

Between :

KUTEH	**Appellant**
- and -	
DARTFORD AND GRAVESHAM NHS TRUST	**Respondent**

- -
- -

Paul Diamond (instructed under the Direct Access Scheme) for the **Appellant**
Cyril Adjei (instructed by **Capsticks**) for the **Respondent**

Hearing date: 28 March 2019

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Approved Judgment

Lord Justice Singh:

Introduction

1. This is an appeal from a decision of the Employment Appeal Tribunal ("EAT"), under Rule 3(10) of the EAT Rules 1993. The EAT considered that the grounds for an appeal to it were unarguable and so dismissed the Claimant's appeal from a decision of the Employment Tribunal ("ET") rejecting her claim that she had been unfairly dismissed. (For ease of exposition I will refer to the parties as Claimant and Respondent, as they were before the ET).

2. The Claimant, who was a nurse employed by the Respondent, was dismissed from her role for gross misconduct as a result of her initiating inappropriate conversations about religion with patients.

3. Permission to appeal to this Court was granted by Bean LJ on 14 August 2018 on two grounds only, which he considered raised issues of public interest which justified consideration by this Court; permission to appeal on all other grounds was refused.

Factual and Procedural Background

4. The Claimant was born on 14 September 1968. She is a committed Christian. On 1 April 2007, the Claimant commenced employment with the Respondent as a registered nurse. She worked as a Band 5 Junior Sister in the Intensive Therapy Unit ("ITU").

5. In November 2015, the Claimant was disciplined for a medication error, and she was given a final formal warning for a period of 24 months and transferred to work in a pre-operative assessment role.

6. In this role, the Claimant was responsible for carrying out between six and twelve assessments per day of patients who were due to undergo surgery in the near future. It was not in dispute that those patients would be worried, as well as possibly suffering from stress, and could potentially be vulnerable.

7. The Claimant used a pro forma document to carry out these assessments. There was a dispute before the ET as to which form the Claimant used with patients, but Employment Judge ("EJ") Kurrein determined that there was no material difference between the two. The important feature of these forms is that they asked about the patient's religion. The ET found that the forms required the Claimant to make a simple enquiry as to a patient's religion and to note the response. It did not open the door to further religious discussion.

8. In March and April 2016, staff in the Claimant's Department informed the Sister, Ms Putland, that patients had been complaining to them that, when they were undergoing assessments with the Claimant, she had raised matters of religion with them. Ms Putland made notes of these matters contemporaneously with the events under four headings.

9. The first, entitled "March 2016 complaints to HCA [healthcare assistant] Kim Auty", related to two patients. The first patient complained that she had been asked "what she thought Easter was about", and, anticipating where the conversation was going, the patient asked the Claimant to stop "because [she] wasn't there to talk about religion". The patient was described as "cross" and was told the Sister would be informed. The second patient told Ms Auty that the Claimant had asked him about his faith and what he thought being a Christian meant. He also stated that he did not wish to make a formal complaint, but he had felt awkward.

10. The second, entitled "April 2016", described a complaint being made to a RGN (registered nurse) relating to one patient, about to undergo major bowel surgery for cancer, who was told that if he prayed to God he would have a better chance of survival.

11. The third, entitled "5 April 2016", involved a complaint being made to a HCA by a patient that the Claimant had spent more time talking about religion than doing the assessment.

12. The fourth, entitled "7 April 2016", was a note made of a request by a patient that she should not see the Claimant as she "didn't like preaching".

13. The Claimant gave evidence before the ET that she would on occasion bring up religion with people "if that seemed an appropriate and helpful thing to say, in the light of a particular patient's demeanour and their apparent willingness to discuss religion".

14. On 11 April 2016 the Matron, Ms Suki Gill, spoke to the Claimant to express her concern that the Claimant had been having unwanted religious discussions with patients whom she was assessing. Ms Gill confirmed the details of their discussion in a letter the next day, in the following terms:

> "Yesterday I had a conversation of concern with you in regards to discussions which you have had with a number of pre-operative patients. This incidence [*sic*] was brought to my attention via another member of staff who stated that you were discussing at length views about certain religions. A number of patients were offended that you spent a fair amount of the allocated pre-assessment time on the subject.
>
> I stated that it was not appropriate to discuss religious views, although I accept that a small part of the assessment may involve some religious discussion …
>
> After the discussion you gave me the assurance that you will not engage on the topic of religion unless a patient asked you to".

15. Subsequently, Ms Putland noted two further matters of concern. The first, entitled "16 May 2016", involved a patient complaining that the Claimant had given her a

bible and said that she would pray for her. The patient then returned the bible to another member of staff. The second, entitled "31 May 2016", involved a patient complaining that the Claimant was preaching at her and made her feel uncomfortable.

16. On 10 June 2016 Ms Gill sent the Claimant home and informed her that she should attend a meeting the following Monday at which she might be accompanied by a colleague or friend. That meeting took place on 13 June 2016 with Ms Costello, the General Manager. During this meeting, the Claimant was suspended from her duties, and this was confirmed in a letter from Ms Costello of the same date in which the Claimant was informed that the allegations to be investigated were:

    (1) Repeated misconduct in that she failed to follow a reasonable management instruction that was discussed with her on 11 April 2016.

    (2) Inappropriate behaviour/conduct that involved unwanted discussions on the topic of religion which resulted in verbal complaints from patients (on 16 May, 31 May and 3 June 2016).

    (3) Breach of para. 20.7 of the Nursing and Midwifery Council ("NMC") Code in relation to making sure that she did not express her personal beliefs (including political, religious or moral beliefs) to people in an inappropriate way.

17. On 20 June 2016, the Complaints Department noted a call from a patient being treated for cancer concerning his assessment by the Claimant on 3 June 2016. He had replied "open minded" to the question on the form concerning religion and alleged the Claimant had told him that the only way he could get to the Lord was through Jesus; told him she would give him her bible if he did not have one; gripped his hand tightly and said a prayer that was very intense and went "on and on"; and asked him to sing Psalm 23, after which he was so astounded that he had sung the first verse with her. He described the encounter as "very bizarre" and "like a Monty Python skit". (See para. 28 of the ET judgment).

18. Also on 20 June 2016, the appointed investigator, Ms Shephard, wrote to the Claimant to invite her to an investigation meeting on 30 June 2016. During the course of that meeting, the Claimant explained her actions as forming a permissible part of the pre-operation process, and while she did not deny that she had had discussions about religion, she stated that she did not always initiate them. I would note that the clear inference from that is that the Claimant admitted that *sometimes* she did initiate discussions about religion.

19. The Claimant told Ms Costello that she would speak to patients about religion, for example if someone said they were not religious, she would ask "why not?", or if someone stated that they were Christian, she would comment on this. She also said that in addition she would query it if a patient said they did not believe in God. She accepted that she should have kept her thoughts to herself and she could see how her actions could cause offence. She admitted that she did not follow reasonable management instructions, and that she had given a patient a bible.

20. The Investigation Report was completed on 22 July 2016. It concluded that there was evidence for a case to go to a disciplinary hearing.

21. The ET considered that Mrs Sarah Collins, who conducted that hearing with the assistance of her HR manager, gave considerable thought and care to the issues both during the hearing and afterwards. Mrs Collins upheld each of the three allegations made against the Claimant. First, in relation to the alleged failure to follow a management instruction, Mrs Collins wrote that, since the Claimant had continued to have inappropriate religious discussions, with no evidence of any change of behaviour after the instruction of 11 April 2016, this allegation was upheld. The second allegation, concerning inappropriate conduct, was upheld for the same reasons (since there had been repeated incidents and there had been no change in behaviour). The third allegation, concerning the breach of the NMC Code, was upheld in light of the fact that the first two allegations were made out.

22. Mrs Collins went on to consider the issue of mitigation and concluded that she had grave doubts that the Claimant's behaviour in the workplace would improve. She concluded that the Claimant had committed a fundamental breach of trust and confidence and that the Claimant should be dismissed with immediate effect.

23. The Claimant appealed against that decision by letter dated 25 August 2016. On 7 October 2016 Mrs Vicky Leivers-Carruth, the Respondent's Director of Nursing and Quality, wrote to the Claimant to inform her that her appeal had not been upheld. On 14 November 2016, in accordance with its obligation to do so, the Respondent referred the Claimant to the NMC.

24. Mrs Kuteh brought her claim in the ET on 1 December 2016. She alleged that she had been unfairly dismissed, and in passing made a reference to Article 9 of the European Convention on Human Rights ("ECHR") in the context of the NMC Code.

25. So far as material the NMC Code provides, in para. 20, which is headed "Uphold the reputation of your profession at all times":

> "To achieve this, you must:
>
> …
>
> 20.7 Make sure that you do not express your personal beliefs (including political, religious or moral beliefs) to people in an inappropriate way."

26. At para. 18 of the particulars of claim, filed with the Form ET1, it was submitted on behalf of the Claimant that:

> "The Code must be interpreted in a way compatible to the employee's rights under Article 9 ECHR."

27. The ET heard evidence from the Claimant, and from Mrs Collins and Mrs Leivers-Carruth. The ET dismissed the claim in a decision sent to the parties on 7 April 2017.

28. On 12 May 2017 the Claimant appealed against that decision to the EAT on five grounds. Upon an initial sift consideration on the papers under Rule 3(7) of the EAT Rules 1993, it was determined that no further action on the appeal would be taken because it had no reasonable prospects of success. The Claimant renewed her application to an oral hearing, as was her right. Giving judgment after the Rule 3(10) hearing on 16 February 2018, Choudhury J dismissed the Claimant's appeal on all five grounds. The Claimant now appeals against the EAT's decision with the permission of Bean LJ on two grounds only.

The decision of the Employment Tribunal

29. EJ Kurrein, sitting in the ET, dismissed the Claimant's claim alleging unfair dismissal, and in doing so rejected the complaint under Article 9: paras. 85-86.

30. The ET found that the Claimant was dismissed for the potentially fair reason of her conduct: para. 55. EJ Kurrein, at para. 62 of his judgment, found that the investigation leading up to the hearing had been entirely fair and reasonable. He also held at para. 67 that the disciplinary hearing process was reasonable.

31. In his view, there was clear and ample evidence that the Claimant's conduct had been inappropriate: paras. 68-70. The form used by the Claimant did not open the door to further religious discussion, and the Claimant was well aware of the Respondent's Chaplaincy Service, to which she could direct patients expressing religious needs, and was aware of the NMC Code of Conduct. In interview and at the hearing, she had admitted to having had religious discussions with the patients, accepting that she had gone too far, that the discussions were not appropriate and that she had breached her duty: para. 72.

32. The ET concluded that the overall sanction imposed, that of dismissal, was within the band of reasonable responses in the light of Mrs Collins' justified view that the incidents amounted to gross misconduct, particularly given that the incidents occurred only shortly after the instruction given at the meeting on 11 April 2016 and in the letter of the following day, and the Claimant's assurance that she would not repeat the behaviour: paras. 74-76.

33. Lastly, turning to Article 9, EJ Kurrein noted that the Claimant had framed her claim as an allegation of unfair dismissal, not as one alleging discrimination because of her religion or belief. Nevertheless the ET did consider Article 9, setting it out at para. 52 and returning to the issue at paras. 82-86. EJ Kurrein said that the decision of the EAT in *Chondol v Liverpool City Council* UKEAT/0298/08/JOJ (at para. 23) illustrated the distinction between inappropriately proselytising beliefs and being prevented from manifesting them. The Claimant's conduct fell into the former category, and therefore Article 9 had no application in the instant case: paras. 82-84. Accordingly, the ET dismissed the claim for unfair dismissal.

The judgment of the Employment Appeal Tribunal

34. Giving judgment after the Rule 3(10) hearing, Choudhury J addressed the issues underlying the two present grounds of appeal at paras. 4-12 of his judgment.

35. On the question of whether the ET had erred in failing to consider the correct interpretation of para. 20.7 of the NMC Code, in particular the distinction between appropriate and inappropriate expressions of belief, Choudhury J, at para. 5 of his judgment, considered this to be unarguable. The issues in an unfair dismissal case were: whether the employer had a genuine belief that misconduct occurred, whether there were reasonable grounds for that belief and whether there had been a reasonable investigation in all the circumstances. The ET had made findings in favour of the Respondent on each of these issues. The Claimant had been clearly told that initiating discussion of religious beliefs with patients was inappropriate, and she had admitted many of the allegations complained of, including not following a management instruction despite having given an assurance that she would do so. It was equally unarguable to suggest that the ET erred in not further analysing what was meant by "inappropriate" in this case. On the ET's findings, there was no doubt that the conduct identified had been inappropriate, and the questions on the pro forma document did not provide an excuse or an explanation for all of that conduct: para. 8.

36. As to Article 9, it could not be said that the Tribunal had considered that Article to be *irrelevant*. In substance it found that Article 9 had not been *breached* in this case: paras. 9-10. Further, the distinction referred to in *Chondol* between manifesting one's belief and improper proselytisation of beliefs was one to which the ET was entitled to have regard. The Claimant was only being required not to do the latter, and the response by the Respondent was permissible under Article 9(2): paras. 11-12.

Grounds of Appeal

37. On behalf of the Claimant, Mr Paul Diamond advances two grounds of appeal:

    (1) Ground 1: The EAT failed to consider the correct interpretation of para. 20.7 of the NMC Code and the distinction between appropriate and inappropriate expressions of religious beliefs.

    (2) Ground 2: The EAT erred in failing to acknowledge that Article 9 was applicable and to consider the fact-sensitive distinction between true evangelism and improper proselytism, and to carry out a proper analysis under Article 9(2).

38. Mr Diamond argues under Ground 1 that, in order to act reasonably, an employer in these circumstances must consider the principled distinction between inappropriate and appropriate expressions of religious belief in a clinical setting, and to investigate the facts on that basis. This distinction is warranted by the wording used in the GMC guidance documents *Good Medical Practice* (para. 54), and *Personal Beliefs and medical practice* (paras. 29-31). Yet the Respondent here failed to do this, and failed to recognise the genuine attempts to comfort patients made by the Claimant.

39. Turning to Ground 2, Mr Diamond submits that EJ Kurrein's reliance on *Chondol* was misconceived, since the dismissal of the employee in that case was justified only on grounds unrelated to religion, and that case concerned religious discrimination rather than Article 9 rights. Mr Diamond submits that Article 9(1) plainly does protect proselytism. A limitation on that right, as imposed by paragraph 20.7 of the NMC Code, may well be legitimate, but only where the facts showed that the proselytising had been *improper* would the Article 9(2) exception be made out here.

40. The Claimant's initial skeleton argument, dated 27 March 2018, was filed for the purpose of the application for permission to appeal. After permission had been granted, the Court would normally expect a replacement skeleton argument to be filed in support of the appeal. That was not done in this case and so enquiries were made on behalf of the Court. Those enquiries prompted Mr Diamond to file a supplemental skeleton argument dated 27 March 2019. I will return to that supplemental skeleton argument later when I address the substance of Mr Diamond's submissions.

Submissions for the Respondent

41. On Ground 1, Mr Cyril Adjei, counsel for the Respondent, argues that the ET did not err in not analysing the meaning of "inappropriate" because it was obvious that the Claimant's conduct was inappropriate. It did not matter whether the NMC Code permitted "appropriate" religious discussions, since the Claimant was given a direct management instruction not to initiate religious discussions with patients, which she disobeyed (as the Claimant herself accepted). In any event, under that Code and all other guidance documents cited by the Claimant, the conduct of the Claimant would plainly be considered to be inappropriate.

42. On Ground 2, Mr Adjei notes that the claim before the ET was one of unfair dismissal and it has no jurisdiction to hear a free-standing claim that a Convention right has been breached: *Wasteney v East London NHS Foundation Trust* (UKEAT 157/15); [2016] ICR 643, at para. 48 (HHJ Eady QC). The ET correctly found that the Respondent was entitled to treat the Claimant's conduct as amounting to "improper proselytising", thus constituting an improper manner of manifestation of religious belief (as discussed in *Chondol*).

The law of unfair dismissal

43. Section 94 of the Employment Rights Act 1996 provides:

> "(1) An employee has the right not to be unfairly dismissed by his employer."

44. Section 98 of that Act provides:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> > (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> >
> > (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> > (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> >
> > (b) relates to the conduct of the employee,
> >
> > …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> > (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> >
> > (b) shall be determined in accordance with equity and the substantial merits of the case."

45. In *British Home Stores v Burchell* [1980] ICR 303, at 304, Arnold J, sitting in the EAT, stated (in a well-known passage that has often been cited with approval by this Court):

> "What the tribunal have to decide … is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to

> sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances".

46. In *Orr v Milton Keynes Council* [2011] EWCA Civ 62, at para. 78, Aikens LJ stated that:

> "… the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. … The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.

Article 9 of the ECHR

47. Article 9 of the ECHR, which is one of "the Convention rights" set out in Sch. 1 to the Human Rights Act 1998 ("HRA"), provides that:

> "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Relevant authorities on Article 9

48. In *Kokkinakis v Greece* (1994) 17 EHRR 397, at para. 31, the European Court of Human Rights stated that:

> "According to Article 9, freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching,' failing which, moreover, 'freedom to change [one's] religion or belief,' enshrined in Article 9, would be likely to remain a dead letter."

49. At para. 48 of the judgment the Court said:

> "First of all, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for freedom of thought, conscience and religion of others.
>
> Scrutiny of section 4 of Act 1363/1938 shows that the relevant criteria adopted by the Greek legislature are reconcilable with the foregoing if and in so far as they are designed only to punish improper proselytism, which the Court does not have to define in the abstract in the present case."

50. At para. 49 the Court stated:

> "The Court notes, however, that in their reasoning the Greek courts established the applicant's liability by merely reproducing the wording of section 4 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. None of the facts they set out warrants that finding."

51. On behalf of the Claimant Mr Diamond submits that, when one goes back to the summary of the facts by the Crete Court of Appeal, as set out at para. 10 of the European Court's judgment, in fact there was quite a lot of detail about what the applicant in that case had done on the facts of the case. Nevertheless, Mr Diamond submits, the European Court held there to be a violation of Article 9 of the ECHR.

52. On behalf of the Respondent Mr Adjei submits that it is the clear effect of *Kokkinakis* that "improper proselytism" falls outside the scope of Article 9(1). I acknowledge that that is one possible reading of para. 48 in the judgment of the European Court. However, in my view, when that passage is read as a whole and in the context of what follows in para. 49, it is clear that what the Court was saying was that, even if it falls within the scope of Article 9(1), the interference with those rights will be justified as being proportionate to a legitimate aim, under Article 9(2). It was because, on the particular facts of *Kokkinakis*, that the Court was not persuaded that it had been demonstrated that the means used by the Applicant were "improper" that the Court found there to be a breach of Article 9.

53. In my view. it is clear from the decision in *Kokkinakis* that proselytism as such can fall within the rights protected by Article 9(1). However, it is also clear that *improper* proselytism is not protected by Article 9.

54. Mr Diamond also reminded this Court of the decision of the European Court of Human Rights in *Eweida and Others v United Kingdom* (2013) 57 EHRR 8. In particular he cited paras. 79-94, which have been considered by the courts of this country in subsequent caselaw. I do not find anything of assistance in those passages, important though they are in setting out the general principles which apply in Article 9 cases.

55. Mr Diamond also placed particular reliance on what the Court said at para. 92:

> "In common with a large number of Contracting States (see paragraph 47 above), the United Kingdom does not have legal provisions specifically regulating the wearing of religious clothing and symbols in the workplace. Ms Eweida brought domestic proceedings for damages for direct and indirect discrimination contrary to regulation 3 of the 2003 Regulations (see paragraph 41 above). It was accepted before the Employment Tribunal that it had no jurisdiction to consider any separate or free-standing claim under Article 9 of the Convention. The applicant was able to invoke Article 9 before the Court of Appeal, although that court held that there had been no interference with her rights under Article 9. Nonetheless, while the examination of Ms Eweida's case by the domestic tribunals and court focused primarily on the complaint about discriminatory treatment, it is clear that the legitimacy of the uniform code and the proportionality of the measures taken by British Airways in respect of Ms Eweida were examined in detail. The Court does not, therefore, consider that the lack of specific protection under domestic law in itself meant that the applicant's right to manifest her religion

> by wearing a religious symbol at work was insufficiently protected."

56. Again, for my part I do not find anything in that passage of assistance to Mr Diamond's case in the present appeal.

57. In his written submissions Mr Diamond also cited the judgment of Elias LJ in *Mba v Merton London Borough Council* [2013] EWCA Civ 1562; [2014] 1 WLR 1501, at para. 34, where it was said:

> "However, in my judgment the same analysis does not hold sway where the right to religious freedom under article 9 is engaged, as it directly is in this case, given that the council is a public body. The protection of freedom of religion conferred by that article does not require a claimant to establish any group disadvantage; the question is whether the interference of that individual right by the employer is proportionate given the legitimate aims of the employer: see the analysis of the Strasbourg court in *Eweida v United Kingdom* …, paras 79-84. In substance the justification is likely to relate to the difficulty or otherwise of accommodating the religious practices of the particular individual claimant."

58. It is also important to have in mind what followed at para. 35, where Elias LJ said:

> "Article 9 cannot be enforced directly in employment tribunals because claims for breaches of Convention rights do not fall within their statutory jurisdiction (although the Strasbourg court in *Eweida* does not seem to have appreciated that fact): see *X v Y* [2003] ICR 1138. The *Eweida* decision in Strasbourg has not, and could not, affect the reach of the statutory jurisdiction, and therefore the claimant's article 9 right is incapable of direct enforcement in the employment tribunal. However, domestic law must be read so as to be consistent with Convention rights where possible, in accordance with section 3 of the Human Rights Act 1998. …"

59. In *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932; [2005] ICR 1789, at para. 8, Mummery LJ helpfully summarised some of the relevant principles in the following way:

> "At the outset the limited context in which the Article 9 point arises should be stressed. It is an unfair dismissal claim brought in an Employment Tribunal against a private sector employer under the Employment Rights Act 1996. The

> dismissal arose out of a dispute with the employer about the employee's working hours. In view of some of the sweeping submissions made to the Tribunal below and to this Court, it should be made clear what the case is *not* about."

60. Thereafter Mummery LJ set out in a number of sub-paragraphs some important legal principles. I would particularly note sub-paras. (1) and (2) where he said:

> "(1) Although it is in a sense a 'human rights case', the claim is not made under the 1998 Act. Such a claim would face two difficulties: (a) the employment tribunal has no jurisdiction to entertain claims for breach of the 1998 Act; and (b) no such claim could be made by the employee in the ordinary courts in this case under the 1998 Act, as the employer is not a 'public authority' within the meaning of section 6 of the 1998 Act.
>
> (2) The case is not about the incompatibility of the unfair dismissal provisions of the 1996 Act and article 9. In that respect it differs from the claim in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 that primary legislation should be declared to be incompatible with article 9 (in an unsuccessful challenge to section 548 of the Education Act 1996 prohibiting corporal punishment by staff in schools, the House of Lords held that interference with the article 9 right was justified under article 9(2)."

61. It is also important to note what Neuberger LJ said, at para. 89:

> "In a case where it would, as a matter of ordinary language, be unfair for an employer to dismiss an employee because he would not work on a Sunday for religious reasons, I find it hard to see why, as a matter of principle, law or practice, the employee should not be able to complain of his dismissal as being unfair under the 1996 Act. Having said that, it is important to emphasise that the 1996 Act should not be invoked in such a case so as to impose unreasonable stringency or impractical constraint on the way in which an employer runs his business."

62. In the present case both the Employment Tribunal and the EAT referred to the decision of the EAT in *Chondol v Liverpool City Council* (judgment of 11 February 2009). The judgment was given by Underhill J, the then President of the EAT. At para. 23 Underhill J noted that the ET in that case had made an explicit finding that it was not on the ground of the applicant's religion that he received the treatment

complained of, rather on the ground that he was improperly foisting it on service users. Underhill J said:

> "… That distinction between, on the one hand the appellant's religious belief as such and, on the other, the inappropriate promotion of that belief is entirely valid in principle (though of course in any case in which such a distinction is relied on it will be necessary to be clear that it reflects the employer's true reason). …"

63. Although it is true, as Mr Diamond has pointed out, that that passage appeared in the context of a discrimination case, hence the reference elsewhere in para. 23 to comparators, the point of principle which Underhill J was making there is one which can clearly be read across to Article 9 issues. Furthermore, in my view, it reflects what the European Court of Human Rights had held in *Kokkinakis*, drawing a distinction between the manifestation of a religious belief and *improper* proselytism on the other hand. The approach taken in *Chondol* has been followed in subsequent decisions of the EAT, for example *Wasteney v East London NHS Foundation Trust* [2016] ICR 643, in particular at para. 55 in the judgment of HHJ Eady QC.

64. Mr Diamond submits that the EAT was wrong in law in cases such as *Chondol* and *Wasteney* and invites this Court to overrule those decisions. I am not prepared to accept that invitation. In my view, those cases correctly set out an important principle, namely the distinction between the manifestation of a religious belief and the inappropriate promotion of that belief, which in turn reflects the jurisprudence of the European Court of Human Rights.

Application of the above principles to the present case

65. It should be noted that this claim was at all material times a claim for unfair dismissal. There was no claim made for discrimination on grounds of religion. Nor was this a claim directly for breach of the HRA.

66. In his supplemental skeleton argument and at the hearing before us Mr Diamond suggested that the present case raises an important question on the correct approach to the manifestation of religion in the workplace. He made wide-ranging submissions including by reference to international materials and caselaw. However, in my view, it is unnecessary to address every aspect of those arguments in detail, although this Court has of course considered them in full. This is because the conclusion, at para. 23 of the supplemental skeleton argument, is manifestly wrong. In that passage Mr Diamond submitted that:

> "There is, simply, no authority for Ms Kuteh's employers to have a *blanket ban* on religious speech. …" (emphasis in original)

That is not what the present case is about. The Respondent employer did not have a blanket ban on religious speech at the workplace. What was considered to be inappropriate was for the Claimant to initiate discussions about religion and for her to disobey a lawful instruction given to her by management.

67. It is important that cases such as this should not become over-elaborate or excessively complicated.

68. The essence of this case can be summarised as follows:

(1) The Claimant accepted that on at least some occasions she initiated conversations with patients about religion.

(2) On 11 April 2016 the Claimant gave an assurance to Ms Gill that she would not initiate such discussions.

(3) Despite that assurance, given in response to a lawful management instruction, the Claimant continued to do so. In particular the incident on 3 June 2016, described at para. 28 of the ET judgment, which the patient concerned described as "very bizarre" and "like a Monty Python skit", was on any view clearly inappropriate. When asked about that incident at the hearing before us Mr Diamond fairly had to acknowledge that fact.

(4) The Respondent conducted a fair procedure, by way of investigation, at the disciplinary hearing and at the subsequent appeal.

(5) The decision to dismiss the Claimant for misconduct was one which the ET concluded fell within the band of reasonable responses open to the Respondent in this case.

69. Even having regard to the importance of the right to freedom of religion, it was plainly open to the ET to conclude that this dismissal had not been unfair.

70. Similarly, the EAT was plainly correct, in my view, to regard the appeal as having no reasonable prospect of success and therefore in dismissing it.

Conclusion

71. For the reasons I have given I would dismiss this appeal.

Lord Justice Haddon-Cave:

72. I agree.

Lord Justice Gross:

73. I also agree.