



Case Number: 2302764.2016

MK

## EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mrs S Kuteh

and

**Respondent**

Dartford & Gravesham NHS  
Trust

Held at Ashford on 30 March 2017

**Representation**

**Claimant:**

Mr P Stroilov, Representative

**Respondent:**

Mr C Adjei, Counsel

**Employment Judge** Kurrein

## JUDGMENT

1. The Claimant's claim alleging unfair dismissal is not well founded and must be dismissed.
2. The Respondent has not breached the Claimant's rights under Article 9 European Convention on Human Rights.

## REASONS

### The Claim and Response

- 1 On 1 December 2016 the Claimant presented a claim to the Tribunal alleging she had been unfairly dismissed.
- 2 On 29 December 2016 the Respondent presented a response in which it contended that the Claimant had been fairly dismissed for reasons relating to her conduct.

### Procedural Matters

- 3 At the start of the hearing a number of matters arose that I dealt with before hearing evidence. These were as follows.

### **Evidential matters**

- 4 The Claimant sought to adduce into evidence documents as follows: –
  - 4.1 An extract from the Journal of Advanced Nursing of December 2013 titled "Re-examining the Definitions of Spirituality in Nursing Research"
  - 4.2 A publication dated March 2017 by the Healthcare Chaplaincy Network and the Spiritual Care Association titled, "Spiritual Care and Nursing: A Nurses Contribution and Practice".

- 4.3 Extracts from the Daily Telegraph of February 2009 concerning a nurse who had come into conflict with her employer over her wish to offer spiritual comfort to her patients.
- 5 I concluded that these documents were not relevant to the issues before me. In particular: –
- 5.1 They appeared to breach the basic rule in *Devis v. Atkins* [1977] AC 931 in that neither they nor their content had been raised as issues in the course of the disciplinary proceedings;
- 5.2 There was no evidence concerning the distribution or standing of the first document and the relevance of the issues raised by the paper: it was not mentioned in the Claimant's witness statement.
- 5.3 The second document was only published this month, and by definition could not have been known to any of those involved in the case at the time of the relevant events. In addition, there was no evidence concerning its distribution or its standing.
- 5.4 The third documents, being simple extracts from news stories, did not appear to have any relevance to the case before me.

**Exclusions of a witness**

- 6 The Claimant's representative, who at that time I understood to be of Counsel, made an application that the second of the Respondent's two witnesses should be excluded from the tribunal while the first witness gave evidence.
- 7 The reasons for that application were rather vague. It appeared that the Claimant's representative was concerned that if the second witness heard his cross examination of the first witness the second witness might be tempted to tailor her responses to her answers to his questions to align with those of the first witness.
- 8 I took the view that was highly speculative and if it did occur it could be dealt with appropriately. In any event, I concluded that the principle of open justice should take precedence, and rejected the application.

**Timetabling**

- 9 In light of the limited time available, and on the basis that it was in the interests of justice not to go part-heard, I gave a timetable as follows:-
- 9.1 Two hours for the Claimant's cross examination of the Respondent's two witnesses.
- 9.2 One hour for the Respondent to cross examine the Claimant.
- 9.3 One half-hour each for submissions.

I also indicated that I would reserve my Judgment.

**Documents**

- 10 I then adjourned to consider the documents before me. I received a chronology and list of issues which were agreed. I received skeleton

arguments on behalf of each of the parties. I received a joint trial bundle of a little over 250 pages, a witness statement on behalf of the Claimant and two witness statements on behalf of the Respondent. I also received an almost full lever arch file of authorities relied on by the Claimant and copies of five authorities on behalf of the Respondent.

### **The Issues**

#### **INTRODUCTION**

1. The Claimant commenced employment with the Respondent on 1 April 2007.
2. With effect from November 2015, the Claimant was redeployed to the Surgical Pre-Assessment Unit.
3. The Claimant was dismissed with effect from 10 August 2016.

#### **UNFAIR DISMISSAL**

4. The Respondent accepts that the Claimant's claim for unfair dismissal under the Employment Rights Act 1996 was brought in time.
5. Was the Claimant dismissed for a potentially fair reason? If yes, what was the potentially fair reason?
6. The Respondent contends that the reason for dismissal was conduct, which is a potentially fair reason within section 98(2)(b) of the Employment Rights Act 1996.
7. Did the Respondent act reasonably within the terms of section 98(4) of the Employment Rights Act 1996 in relying on conduct as being a reason justifying the Claimant's dismissal?
8. Did the Respondent follow a fair procedure when dismissing the Claimant?
9. The Claimant asserts that the procedure was unfair for the following reasons:
  - a. To interview the Claimant on 30 June 2016 prior to disclosing the details or records of the Substantive Allegations;
  - b. To rely on the Claimant's admissions in such an interview to arrive at a decision to dismiss her;
  - c. To make no further enquiries of the 'complainants', nor to call them as witnesses;
  - d. Not to record Mrs. Kuteh's evidence at the Disciplinary Hearing or the Appeal Hearing;
  - e. To rely on Mrs. Kuteh's alleged unrecorded admissions at the Disciplinary Hearing and the Appeal Hearing in arriving at a decision to dismiss her / uphold her dismissal;
  - f. To arrive at the conclusions that it did.
10. Did the decision to dismiss the Claimant fall within the band of reasonable responses open to a reasonable employer in the circumstances (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439)?

#### **REMEDY IF APPROPRIATE**

11. Is the Claimant entitled to a basic award and, if so, at what level?
12. If the Claimant is entitled to a basic award, should any reduction be made to reflect contributory fault on the part of the Claimant?
13. Is the Claimant entitled to a compensatory award and, if so, at what level?
14. In respect of any compensatory award made should any deductions or uplifts be made to reflect the following:
  - a. Whether the Claimant has complied with her duty to mitigate her loss under section 123(4) of the Employment Rights Act 1996.
  - b. To the extent that there was any procedural unfairness, whether the outcome of the dismissal process would have been the same in any event, *Polkey v A E Dayton Services Limited* [1987] ICR 142 applied.

- c. Whether either party failed to comply with the ACAS Code of Practice.
- d. Whether the Claimant's conduct contributed to her dismissal.
- e. The application of the statutory cap (if applicable)

### **The Evidence**

11 I heard the evidence of Mrs Sarah Collins, General Manager and Mrs Vicky Leivers-Carruth, Director of Nursing and Quality, on behalf of the Respondent. I heard the evidence of the Claimant on her own behalf. I considered the documents, in particular those to which I was referred, and read and heard the submissions on behalf of the parties. I make the following findings of fact.

### **Findings of Fact.**

12 The Claimant was born on 14 September 1968 and started her employment with the Respondent as a registered nurse on 1 April 2007. She is a committed Christian. In 2012 she was promoted to Sister, but was also the subject of a detailed performance action plan in mid-2014.

13 At that time the Claimant had been working in the ITU for some years. In November 2015, however, the Claimant was disciplined for a medication error and as a consequence was given a final formal warning for a period of 24 months and transferred to work in a pre-assessment role.

14 In that position the Claimant was responsible for carrying out between six and 12 assessments per day of patients who were due to undergo surgery in the relatively near future. It was not in dispute that those patients would be worried, as well as possibly suffering from stress, and be potentially vulnerable.

15 The Claimant used a pro forma to carry out those assessments.

15.1 It was the Respondent's case that the form the Claimant used was that at page 246 of the bundle. It was over two pages and as well as requiring the basic details relating to the patient, such as their name and address and relevant hospital and NHS numbers, posed a series of questions that required short, sometimes tick box, answers. In particular: –

15.1.1 Within the basic details area was a simple series of spaces preceded by statements of the information required:-

Occupation:

Marital status:

Religion:

15.1.2 At question 50 was the following,

“Do you have particular cultural or religious needs?”

Please state-

Yes No”

16 In the course of his cross examination of Mrs Collins, Mr Stroilov suggested that the form that the Claimant had actually used was that at page 245A. That form had questions relating to religion as follows:

- 17 A box stating,  
“Religion: Practising? Yes No”
- 18 It was Mrs Collins evidence that she believed she had been referring to the correct form, at page 246, she had not looked at the form at page 245a, and that forms of this nature were subject to regular changes
- 19 The differences between these forms was not an issue that had been raised by the Claimant in the course of the disciplinary or appeal hearings. It was not set out in her claim and was not raised in her witness statement.
- 20 I asked Mr Stroilov what the Claimant’s case was arising from any difference between the content of the relevant forms. He told me that it went to the adequacy of the investigation. I asked him what the Claimant’s case was as to how any difference between the forms might have affected the outcome of the investigation or hearings but he was unable to assist me. I directed that he should not pursue that line of cross-examination further, as it appeared unhelpful.
- 21 Unfortunately this was only one of several occasions on which I had difficulty in discerning the relevance of Mr Stroilov’s cross examination, which is what led to me asking him if he was, as apparently self-described to the Security Guard on Reception duty and my Clerk, a Barrister. He confirmed to me he was not.
- 22 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 their assessments with the Claimant she had raised matters of religion and faith with them. It appears Ms Putland made notes of these matters in manuscript relatively contemporaneously with the events under the following headings,
- 22.1 “March 2016 complaints to HCA Kim Auty” These related to two patients:-
- 22.1.1 The first 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.
- 22.1.2 The second told Ms Auty that the Claimant had asked him about his faith and what he thought being a Christian meant. He also stated he did not wish to make a formal complaint, but he had felt awkward.
- 22.2 “April 2016” a complaint to a RGN 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.
- 22.3 “5<sup>th</sup> April 2016” a complaint to an HCA by a patient that the Claimant had spent more time talking about religion than doing the assessment.
- 22.4 “7<sup>th</sup> April 2016” a request by a patient that she should not see the Claimant as she “didn’t like preaching.”

- 23 On 11 April 2016 the Matron, Ms Gill, spoke to the Claimant to express her concern that the Claimant had been having religious discussions with the patients she was assessing. She told the Claimant that such discussions were inappropriate and should not take place in the future. The Claimant assured Ms Gill that she would change her ways. Ms Gill confirmed that position 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.

I also reiterated and reinforced that your role in the pre-op assessment unit was that of a Sister performing assessments on patients prior to surgical interventions.

After the discussion you gave me the assurance that you will not engage on the topic of religion unless a patient asked you to.”

- 24 Subsequently Ms Putland appears to have noted two further matters of concern:-

24.1 “16 May 2016” a patient complained 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.

24.2 “31 May 2016” a patient complained that the Claimant was preaching at her and made her feel uncomfortable.

- 25 On 10 June 2016 Ms Gill asked the Claimant to come into her office and explained to her that she had received a number of complaints regarding the Claimant’s conduct. Ms Gill reminded the Claimant that she had previously been warned in writing about religious discussions with patients. The Claimant accepted that she had been warned before. Ms Gill then sent the Claimant home, while she considered the situation, and informed the Claimant she should attend a meeting the following Monday, at which she might be accompanied by a colleague or friend.

- 26 That meeting took place on 13 June 2016 with Ms Costelloe, General Manager. The Claimant was suspended from her duties in the course of it, and that 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:-

- Repeated misconduct in that you failed to follow a reasonable management construction that was discussed with you on 11 April 2016.
- Inappropriate behaviour/conduct that involved unwanted discussions on the topic of religion which resulted in verbal complaints from the patients (on 16<sup>th</sup> May, 31<sup>st</sup> May and 3 June 2016).

- Breach of the nursing and midwifery code in relation to making sure you do not express your personal beliefs (including political, religious or moral beliefs) to people in an inappropriate way (20.7 of the code).
- 27 The letter went on to tell the Claimant that an investigation meeting would take place at which she might be interviewed in the presence of a trade union representative or colleague, and the Claimant was offered the opportunity to make a written statement for that purpose. The Claimant was told of the arrangements relating to her suspension, provided with information about available counselling services and invited to raise queries with Ms Costelloe.
- 28 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 concerning religion and alleged the Claimant:-
- 28.1 told him that the only way he could get to the Lord was through Jesus;
- 28.2 told him she would give him her bible if he did not have one;
- 28.3 had gripped his hand tightly and said a prayer that was very intense and went “on and on”
- 28.4 asked him to sing Psalm 23, and he was so astounded he had sung the first verse with her;
- he described the encounter as “very bizarre” and “like a Monty Python skit.”
- 29 On 20 June 2016 the appointed investigator, Ms Shepherd, wrote to the Claimant to invite her to an investigation meeting on 30 June 2016. Once again, the specific allegations that were being investigated were set out, the Claimant was advised of her right to be accompanied and the possible outcomes of the investigation were detailed.
- 30 That meeting took place as planned. The Claimant was accompanied by a Unison representative. Notes were taken, transcribed, sent to the Claimant and corrected. No complaint has been made about the conduct of that meeting.
- 31 In the course of that meeting the Claimant: –
- Accepted that she had received the letter sent to her by Ms Gill outlining her concerns dated 11 April 2000, but did not think it reasonable as she felt she was “under some sort of watchfulness”
  - When asked why she had repeated her actions, stated that it was to do with pre-op questions. When she cared for patients in ITU who were mostly too critically unwell for religious discussion, she depended on relatives who may/may not know the answers.
  - Stated that she was not denying that she had discussions about religion, but she did not always initiate them.
  - Told Ms Costello that she would speak to patients about the question on religion: for example, if someone said that they were not religious she would ask “why not?”, or if someone stated that they were a Christian, she

would comment on them being a Christian. She also said that in addition she would query it if a patient said they did not believe in God.

- She accepted, in hindsight, she should have kept her thoughts to herself as she could see how her actions could cause offence and, thinking of the position from the patient's point of view, she would say that she would not want to have such a conversation.
- She admitted that she did not follow reasonable management instructions, and that she had given a patient a bible.

32 Mrs Sheppard also carried out other interviews as follows:-

32.1 Ms Lyons, a RGN, who confirmed that she had raised an issue with Ms Putland about a patient being "preached to ."

32.2 Ms Putland, a Sister, who confirmed that she had since learned of complaints dating as far back as January 2016, but had first reported them to Ms Gill in March 2016. Patients had not been happy and she had apologised to them.

32.3 Ms Auty, who confirmed she had reported complaints, although she had only recently put them in writing, and that a patient was "very angry" about the religious discussions.

32.4 Ms Gill, who confirmed that she had been told of the issues concerning the Claimant having discussions relating to religion by Ms Putland and other staff. She also confirmed that the Claimant was aware and had acknowledged that Ms Putland was the Senior Sister.

33 The Investigation Report was completed on 22 July 2016. It set out the allegations against the Claimant, the background to them and full details of the interviews that had been conducted. In respect of each allegation Ms Sheppard set out a statement of her findings. The report recorded mitigation in favour of the Claimant to the effect that she accepted her wrongdoing and promised it would not happen again. It concluded that there was evidence for a case to go to a Disciplinary Hearing. No issue was raised regarding its content.

34 By a letter of 22 July 2016, which set out the allegations against the Claimant in the same terms as they had been identified on each earlier occasion, Mrs Collins invited the Claimant to a disciplinary hearing to take place on 2 August 2016, subsequently re-arranged at the request of the Claimant's Unison representative. The Claimant was advised of her right to be accompanied and provided with a copy of the Investigation Report, its Appendices and a copy of the Disciplinary Policy.

35 I accepted that Mrs Collins was specifically chosen to chair the panel because, unlike Ms Costello, she had not previously been involved in any disciplinary matter concerning the Claimant. The Claimant was informed of this.

36 That hearing took place as re-arranged, and the Claimant was accompanied as before. Notes were taken in a largely "bullet point" form. In the course of that meeting the Claimant:-

- said that in ITU patients had been too unwell to talk about religion;
- stated she felt compelled by her passion to comfort patients;
- asserted that she didn't initiate the discussions;
- accepted she had given a patient a bible because they had been discussing religion;
- said she recognised she was in breach;
- alleged there was a degree of repetition in the allegations;
- acknowledged she was too serious about religion;
- said she was deeply sorry;
- recognised she had been imposing her views.

37 I accepted that Mrs Collins and her HR member gave considerable thought and care, both during the hearing and afterwards, to the issues before her. She informed the Claimant of her decision in a letter date 18 August 2016 in which she set out the allegations, the management case and the Claimant's and her representative's responses to it. She then set out, after each of the allegations, her conclusions in respect of it, as follows:-

37.1 **Repeated misconduct in that you failed to follow a reasonable management construction that was discussed with you on 11 April 2016.**

- It is clear that you understood the expectations as outlined in that meeting on 11 April 2016.
- There is evidence that there was no change in behaviour and that there were repeated incidents where you discussed religion with patients in an inappropriate manner.
- You accepted that you continued to have inappropriate religious discussions with patients after 11 April 2016.
- There was no insight on your behalf of the consequences of not changing your behaviour.

**We uphold this allegation**

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

- As previously, there is evidence that there was no change in behaviour and that there were repeated incidents where you discussed religion with patients in an inappropriate manner.
- Again you accepted that you continued to have inappropriate religious discussions with patients after 11 April 2016.

**We uphold this allegation.**

37.3 **Breach of the nursing and midwifery code in relation to making sure you do not express your personal beliefs (including political, religious or moral beliefs) to people in an inappropriate way (20.7 of the code).**

in light of the fact that we have upheld the first two allegations, it is evident there has been a breach of the NMC Code of Conduct.

**We uphold this allegation**

- 38 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.
- 39 The Claimant appealed that decision by letter of 25 August 2016, and set out her grounds in a further letter of 9 September 2016. In the interim she requested a transcript of the notes of the hearing. She has alleged she only received these shortly before this hearing. That was disputed by the Respondent.
- 40 The Claimant's grounds of appeal, in summary, were as follows:-
- 40.1 The decision was unfair and potentially discriminatory because:-
- 40.1.1 there was no evidence she had breached the duty of trust and confidence
- 40.1.2 she had always sought a patient's consent before discussing religion with them;
- 40.1.3 those conversations were protected by Article 9 ECHR;
- 40.1.4 the conversations arose from the questionnaire she was required to use;
- 40.1.5 she should have been redeployed, not dismissed
- 40.2 She was denied a fair investigation and a fair disciplinary hearing because:-
- 40.2.1 she was not allowed to bring her own witnesses;
- 40.2.2 she had not seen all the notes of evidence of the complaints.
- 40.3 The Respondent had ignored character evidence:-
- 40.3.1 statements from her colleagues regarding her abilities and character had not been given appropriate weight;
- 40.3.2 apart from one instance, she had a clean disciplinary record
- 40.4 She had not been provided with a copy of the notes of the disciplinary hearing so was disadvantaged.
- 41 By letter of 12 September 2016 the Claimant was invited to attend an appeal hearing before Mrs Leivers-Carruth and Mr A Brown, Director of HR, on 28 September 2016. She was told Mrs Collins would present the management case and of her right to be accompanied.
- 42 That hearing took place as intended. It was not a full re-hearing, but by way of review. The Claimant was accompanied by a Unison representative. At the outset the panel questioned Mrs Collins at some length, in particular

concerning the attendance of patients as witnesses and whether the Claimant had been given the opportunity to ask for witnesses. The Claimant was also given the opportunity to question her.

43 I accepted the evidence of Mrs Leivers-Carruth that in the course of that hearing the Claimant:-

43.1 stated that she was not alleging that anything a patient had said was untrue;

43.2 accepted that the patients she spoke to were potentially vulnerable and that her conversations had caused distress and were inappropriate.

In her view the Claimant, in the course of the hearing, made clear admissions to the acts founding the charges against her.

44 I thought Mrs Leivers-Carruth to be a particularly impressive witness. She had trained as a RGN, was clearly highly intelligent and had thought deeply about the appeal process. She accepted the forms used by the Claimant required answers to questions concerning religion but, as she said in cross-examination,

“A nurse should be personable, not personal.”

“The form is for the patient to provide information, not for the nurse to express their beliefs.”

45 She stated that there was no need for the patients to be called as witnesses. The notes of what took place were short, but unchallenged. She had never known patients to be called as witnesses before. In her experience most patients were extremely tolerant of problems that arose and were reluctant to complain. She thought that if they did so it was because of the distress that something had caused them.

46 On 7 October 2016 Mrs Leivers-Carruth wrote to the Claimant to inform her that he appeal had not been upheld. She set out each of the Claimant's grounds of appeal and gave detailed reasons why it had been rejected.

47 On 14 November 2016, in accordance with its obligation to do so, the Respondent referred the Claimant to the NMC.

### **Submissions**

48 I received written and oral submission on behalf of each party. It is neither necessary nor proportionate to set them out here.

### **The Law**

#### **Unfair Dismissal**

49 I have had regard to the terms of S.98 Employment Rights Act 1996:-

##### **98 General**

(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,
- (c) .....
- (3) .....
- (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."

50 I have also had regard to the principles to be derived from the following authorities:-

British Home Stores Ltd v. Burchell [1978] IRLR 379

Iceland Frozen Foods v. Jones [1982] IRLR 439

Sainsbury's Supermarkets Ltd v. Hitt [2003] IRLR 23

Taylor v OCS Group Ltd. [2006] IRLR 163

Newbound v. Thames Water Utilities Ltd [2015] IRLR 734

### **Human Rights Issues**

51 The Claimant sought to persuade me that this was a case in which Article 9 of the European Convention on Human Rights was invoked because, he said, I was obliged to ensure that the application of S.98 Employment Rights Act 1996 did not infringe the Claimant's Article 9 rights under S.3 Human Rights Act 1998. I accept that may in principle be correct.

52 That Convention provision is in the following terms:-

Article 9 – Freedom of thought, conscience and religion

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.

### **Further Findings and Conclusions**

53 My principal findings of fact are set out above, and there is no need to repeat them.

54 I deal with each of the issues in turn.

### The Reason

55 The Respondent has satisfied me on the balance of probabilities that the Claimant was dismissed for a reason relating to her conduct. That is a potentially fair reason.

### The Investigation

56 I accept that as a general principle the more serious the consequences for the employee are the more thorough the investigation should be: A v. B [2003] IRLR 405. The potential consequences for the Claimant in this case were extremely serious. However, that principle is somewhat diluted in light of the Claimant's clear admissions at the investigatory meeting and thereafter to the conduct alleged against her: Gray Dunn & Co v Edwards [1980] IRLR 23.

57 I did not accept that the charges of which the Claimant was informed prior to being interviewed were "inadequately vague, legalistic or uninformative". In many cases intended charges will not have been formulated before such a meeting. These charges were clear and to the point and were provided to the Claimant and her Unison representative before the investigation interview.

58 In addition, the Claimant was well aware of the facts that had given rise to both her suspension and these potential charges as a consequence of:-

58.1 the content of the letter of concern from Ms Gill of 12 April 2016;

58.2 the meeting with Ms Gill on 10 June 2016;

58.3 the meeting with Ms Costelloe of 13 June 2016; and

58.4 the letter of the same date confirming her suspension.

59 I am also quite satisfied there was no requirement for Ms Sheppard to interview the patients, far less to call them to a hearing. The Claimant did not challenge the accuracy of the notes when she was provided with copies before the disciplinary hearing or thereafter, and their provenance was never put in question: the Claimant made clear admissions to having inappropriately discussed religion with patients after she had been told not to do so.

60 In all the circumstances there was no need for the Claimant to be given copies of the notes of the patients' complaints at the time of the investigation interview: in light of my above findings it was more than adequate that she knew the basic details of the matters being investigated. She was provided with copies of these notes prior to the disciplinary hearing.

61 There was no suggestion that the investigation should have interviewed anyone, other than the patients, it did not, and no assertion that irrelevant material had been considered.

62 In all the circumstances of the case this investigation was entirely fair and reasonable.

### The Hearing

63 Save as is set out above, in respect of the patients not being witnesses, there has been no complaint regarding the manner in which this hearing was conducted.

- 64 It is my experience, over many years, that it is very rare for an end-user, whether they be a patient, customer or service-user, in whatever setting, to be called as a witness in disciplinary proceedings which that person may have put in train by making a complaint. In most cases it will simply not be practical to do so. If the complaint is pure hearsay, with no other evidence, the employer will have to proceed with great care. However, where, as here, the employee concerned has made clear admissions that corroborate the complaint, far less suggested that the complainant is not being truthful, I cannot see any impropriety arising from a failure to call a complainant.
- 65 It is also of note that the Claimant was advised of her right to call any witnesses she wished to at this hearing and did not raise an issue concerning the non-attendance of any patients as witnesses prior to or during the hearing.
- 66 As noted above, in the course of this hearing the Claimant made further admissions and stated that she “felt compelled to act.” It was entirely reasonable for Mrs Collins to rely on the Claimant’s admissions, both those made in the investigation meeting and those at this hearing.
- 67 Having considered all the evidence I can find nothing in what is advanced by the Claimant to render this hearing in any way unreasonable.

#### **Honest Belief**

- 68 I was entirely satisfied that Mrs Collins held an honest belief based on reasonable grounds that the Claimant was guilty of these charges.
- 69 It was not suggested, directly or otherwise, that Mrs Collins was anything other than entirely honest.
- 70 There was ample evidence to sustain a finding of there being reasonable grounds for that belief.
- 71 I did not accept Mr Stroilov’s position that consideration of these issues required a deep philosophical enquiry as to what precisely was meant by the word “inappropriate” in the NMC Code of Conduct.
- 72 In particular I accepted the evidence for the Respondent that:-
- 72.1 The forms used by the Claimant required her to make a simple enquiry as to a patient’s religion and to note the response. It did not open the door to a religious discussion as to, if that was the case, how the patient understood Easter, or why they did not believe in God.
- 72.2 The Claimant was well aware of the Respondent’s Chaplaincy Service and that patients expressing religious needs should be referred to it.
- 72.3 The Claimant was aware of the NMC Code of Conduct in general, and in particular, the specific provision relied on.
- 72.4 The Claimant had only recently been the subject of a letter of concern regarding her inappropriate discussions of religion with patients.
- 72.5 She had admitted, in interview and at the hearing that:-
- 72.5.1 she had continued to have such discussions;

- 72.5.2 she had gone too far;
- 72.5.3 the discussions were not appropriate;
- 72.5.4 she had breached her duty.
- 72.6 The complaints themselves were clear evidence that the Claimant's conversations had been inappropriate.

### **Sanction**

- 73 It was not suggested that Mrs Collins' decision that the Claimant be dismissed was disproportionate to the charges she found proved.
- 74 I accepted her evidence, that she concluded that each of the eight events giving rise to the charges was itself an act of gross misconduct, as being within the band of reasonable responses. Mrs Collins started her employment with the Respondent as a RGN and is well aware of the provisions of the NMC Code of Conduct and the proper boundaries of a nurse's conduct.
- 75 The fact that the Claimant held these conversations only shortly after the letter of concern and her promise not to repeat the behaviour was clearly of significant concern, as was the Claimant's lack of insight into the effect of her conduct on patients. Mrs Collins was not persuaded that she could rely on the Claimant's assurances that she would not repeat this behaviour in the future. That appeared to me to be entirely reasonable in the circumstances
- 76 In all the circumstances of the case I am satisfied that Mrs Collins' finding that the relationship of trust and confidence had broken down because of the Claimant's misconduct, and that she should be dismissed, falls fairly and squarely within the band of reasonable responses in a case such as the present.

### **Appeal**

- 77 It was only at this stage that the Claimant raised the issue of the patient complainants being witnesses.
- 78 I accepted Mrs Leivers-Carruth's evidence that she did not think it necessary to do so, it being something she had never known to be done, and, in any event:-
  - 78.1 The Claimant only said she would have wished to call the patients as witnesses so as to explore the extent to which they had valued her discussions about religion.
  - 78.2 The patients had provided their views of the discussions by complaining about them.
  - 78.3 The Claimant did not suggest that there were any witnesses to support her case regarding the discussions in question.
  - 78.4 It was neither necessary nor appropriate to hear directly from the patients.
- 79 Other than in the above respect there has been no criticism of the manner in which the appeal hearing was conducted. The Claimant and her

representative were free to raise the grounds of appeal and to say what they wished in respect of them.

- 80 As noted above, Mrs Leivers-Carruth's letter of outcome was detailed and gave full reasons for each of the conclusions she reached in rejecting the appeal. They were entirely reasonable in light of what was considered at the appeal hearing.
- 81 I have concluded that there were no grounds on which the appeal process could be impugned: it was thorough, fair and reasonable. In my view the outcome, that the original decision should stand, is unimpeachable.

### Article 9

- 82 In this context I note that the Claimant's only claim is one alleging unfair dismissal. At the time she presented her claim she could have, but did not, make a claim alleging discrimination because of religion or belief.
- 83 In light of all my above findings I draw the important distinction, illustrated in the case of Chondol v. Liverpool City Council (1999) UKEAT/0298/08/JOJ, that in this case the Claimant was prevented from inappropriately proselytising her beliefs, as opposed to being prevented from manifesting them. I am entirely satisfied that was the true reason that the Respondent decided to dismiss the Claimant.
- 84 In those circumstances Article 9 has no application to the facts of the present case.

### Conclusions

- 85 The Claimant's claim alleging unfair dismissal is not well founded and must be dismissed.
- 86 I declare that the Respondent has not breached the Claimant's rights under Article 9 European Convention on Human Rights.

-----  
Employment Judge Kurrein

5 April 2017