Appeal No. UKEAT/0217/13/GE

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 November 2013

Before

THE HONOURABLE MR JUSTICE MITTING

MRS M V McARTHUR FCIPD

MR P M SMITH

MS ANNA GRACE — APPELLANT

PLACES FOR CHILDREN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR L OGILVY (Representative) Ogilvy & Ogilvie Associates 253 McLeod Road London SE2 0YJ
For the Respondent	MR D BARNETT (of Counsel) Instructed by: DAC Beachcroft LLP 3 Hardman Street Manchester M3 3HF

SUMMARY

RELIGION OR BELIEF DISCRIMINATION

Whether Employment Tribunal entitled to find that C was not dismissed or treated less favourably because of her religion – on the facts, it was. There is, however, no clear dividing line between holding and manifesting a religious belief, as para 2.61 of the EHRC Code 2011 makes clear.

THE HONOURABLE MR JUSTICE MITTING

1. The Claimant is now 48. From 28 February 2011 until 16 November 2011 she was employed as a nursery manager at the employer's Islington Nursery. On 16 November she was summarily dismissed by the employer's managing director, Carol Jenkins. The reasons stated in the dismissal letter of the same date were as follows:

(1) The Claimant had held an unauthorised training session for staff members, which gave rise to complaints by some of those who attended it.

(2) As a result of the Claimant's reaction to a pregnant staff member's revelation of the contents of a dream to her, the staff member had gone away extremely scared, believing she would suffer a miscarriage.

(3) The Claimant told a member of staff that something was going to happen in the nursery which would have a massive ripple effect, which left staff members uneasy and scared.

2. In conclusion, Miss Jenkins stated the reason for dismissal as follows:

> **"You have behaved extremely unprofessionally in your role as a Nursery Manager. Your actions and behaviour in regards to the training session and your discussions with staff members within the nursery have damaged the trust and confidence we have in you, to the extent that we are no longer able to trust you to act in a professional manner.**
>
> **In the light of all these factors my decision is to uphold the allegation that your behaviour towards other members of staff at the Islington Nursery is deemed as inappropriate and harassment. In view of the seriousness of your actions, my decision is to dismiss you from the organisation on the grounds of gross misconduct."**

3. The Claimant claimed that she had been subjected to unlawful discrimination because of a protected characteristic, her religion, and sought compensation of £500,000 so that she could buy a family home and care for her two children. Her complaints were summarised in paragraph 2 of the judgment and reasons of the Employment Tribunal, as follows. Having asked the question whether she had been treated less favourably than others:

> **"ii. If so, was such treatment because of a protected characteristic?**
>
> **The protected characteristic being relied on is religion or belief and there were four allegations of detriment.**
>
> **a. The first is dismissal on 16 November 2011.**
>
> **b. Second is that on or about September Ms Pardeep Deol of Human Resources said it was not company policy for the Claimant to hold Bible Sessions with individuals who had consented to it.**
>
> **c. Third, that Miss Carol Jenkins on or about 2 November said to the Claimant, "don't you think it is unsuitable to have discussions about God in the workplace" and**
>
> **d. Fourth, that Miss Jenkins said, on or about 2 November: "your conversations with members of staff during break times about God are unsuitable".**

4. On those issues, the Employment Tribunal made the following findings in its judgment and reasons sent to the parties on 29 November 2012. We leave (a) dismissal to last. As to (b) Miss Deol said to the Claimant words to the effect that the employers were under a duty to afford a time and place for individuals to pray but not facilitate group prayer sessions but did not say, as the Claimant had claimed, that they were opposed to groups meeting to discuss the Bible. Further, the employers did not have a policy of restricting the times when staff could discuss religious matters during their break. That can be discerned from paragraph 6.3 of the reasons. There was therefore no unfavourable or different treatment because of her religion. As to (c) and (d) the Claimant, as the Tribunal found, did not say these were verbatim quotes, but an indication or gist of Carol Jenkins' approach to her faith. The Tribunal's conclusion was that Miss Jenkins considered that the Claimant's actions, especially the two relied on in the dismissal letter, blurred the boundaries between the Claimant's work and matters which were not work-related and had an adverse effect on the well-being of staff. That is set out in clear terms in paragraphs 6.7 and 6.9 of the reasons. As to the dismissal, the Tribunal observed that if the unfair dismissal claim could have been made, the Tribunal would have had concerns about the lack of warning about her behaviour and the lack of an opportunity for her to correct it. The overall conclusion was set out in paragraph 7.4:

> **"We conclude however, as did the tribunal in the case of *Chondol*, that the Claimant in this matter was not treated as she was because of her religion, but rather because of the way in**

which she manifested or shared it. This indeed was the Claimant's own conclusion. She agreed that she would have been treated in the same way regardless of her particular religion or had she had no religion at all. This cannot therefore constitute direct discrimination because of her religion and in the circumstances the claim fails."

5. The reference to **Chondol** was a reference to **Chondol v Liverpool CC** [2009] UKEAT 0298/08/1102. Mr Chondol was a social worker and a committed Christian. He was dismissed because, in the Employment Tribunal's words, he had improperly foisted his Christian beliefs on service users. The Employment Tribunal's conclusion in paragraph 7.4 in this case might be read as drawing a distinction in principle between holding a religious belief and manifesting it. If so, it would not be, in our judgment, a sound distinction. Article 9 of the **European Convention on Human Rights** recognises both the absolute right to religious freedom and the qualified right to manifest religion. Both rights are referred to in paragraphs 2.50 to 2.61 of the guidance given in the Code of Practice on Employment 2011 issued by the Equality and Human Rights Commission. An Employment Tribunal must take into account the provisions of that code in any case in which it appears to the Employment Tribunal to be relevant (see the **Equality Act 2010**, section 15(4)). Paragraph 2.61 of the Code contains sensible guidance:

"Manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or belief and the manifestation of that religion or belief. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination; this would usually amount to indirect discrimination.

Example:

An employer has a 'no headwear' policy for its staff. Unless this policy can be objectively justified, this will be indirect discrimination against Sikh men who wear the turban, Muslim women who wear a headscarf and observant Jewish men who wear a skullcap as manifestations of their religion."

6. We agree with the thrust of that paragraph of the Code, namely that there is no clear dividing line between holding and manifesting a belief and that an unjustified unfavourable treatment because an employee has manifested his or her religion may amount to unlawful discrimination. Mrs Eweida would surely now succeed under sections 13 or 21(3) of the 2010 Act against her employers in an Employment Tribunal as well as under Article 8 before the

Strasbourg Court. If therefore paragraph 7.4 of the Tribunal's reasons were to be read as drawing a clear dividing line between holding a belief and manifesting it, the former prohibiting unfair detriment, the latter permitting it, we would not agree. However, we do not read the Tribunal's reasoning in that sense. What the Tribunal was careful to say was:

> **"...the Claimant in this matter was not treated as she was because of her religion but rather because of the way in which she manifested or shared it."**

That is a shorthand summary for the findings set out earlier in the reasons, namely that it was because the Claimant had manifested her religion in a way in which was inappropriate and which upset members of staff. So the dismissal was not for an impermissible reason and she was not subjected to less favourable treatment for an impermissible reason.

7. Accordingly, in our view, there was no error of law in the Tribunal's reasoning. Mr Ogilvy appeared in part below and before us for the Claimant. This case was allowed to proceed to a full hearing on the issue of whether or not the facts were distinguishable from those in **Chondol** and so whether, by relying on **Chondol**, the Tribunal may have made an error of law. The facts are readily distinguishable. All facts in cases of this nature are likely to differ from other cases. What is required is a careful examination of the facts and the reaching of sustainable conclusions upon those facts. The fact that the facts of this are distinguishable from those of **Chondol** does not however mean that, because the Tribunal made a reference to **Chondol** it made an error of law. For the reasons which we have explained, it made no such error. It reached the conclusion we have identified for sustainable reasons.

8. For those reasons this appeal is dismissed.