Appeal No. UKEAT/0157/15/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 February 2016
Judgment handed down on 7 April 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MISS V WASTENEY — APPELLANT

EAST LONDON NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL DIAMOND (of Counsel) Instructed by: Camerons Solicitors LLP 70 Wimpole Street London W1G 8AX
For the Respondent	MR BEN COLLINS QC (of Counsel) Instructed by: Hempsons Solicitors Hempsons House 40 Villiers Street London WC2N 6NJ

SUMMARY

RELIGION OR BELIEF DISCRIMINATION

Religion or belief - direct discrimination (section 13 ***EqA 2010****) - harassment (section 26)*

Article 9 ***European Convention on Human Rights***

Complaints had been made by a junior worker of Muslim faith against the Claimant, a more senior manager position who was a Christian. The complaints related to various interactions with the Claimant which the complainant characterised as "grooming"; these included the Claimant's praying with the junior worker and the laying on of hands, giving a book to that worker, which concerned the conversion to Christianity of a Muslim woman, and inviting her to various services and events at the Claimant's Church. The Respondent had investigated the complaints under its disciplinary procedure and had found the Claimant guilty of serious misconduct, namely the blurring of professional boundaries and the subjection of a junior colleague to improper pressure and unwanted conduct. The Claimant was given a final written warning, reduced on appeal to a first written warning.

The Claimant had complained to the ET of direct discrimination and harassment because of/related to her religion or belief. The ET had rejected those claims.

On the Claimant's appeal:

Held:

The Claimant's case was premised on a characterisation of the manifestation of her religious belief in "consensual" interactions with the junior worker. The ET's findings of fact did not, however, find that the Respondent had taken action against the Claimant on that basis. It had concluded that the Claimant was not subjected to disciplinary process or sanction because she manifested her religious belief in voluntary and consensual exchanges with a colleague but

because she subjected a subordinate to unwanted and unwelcome conduct, going substantially beyond "religious discussion", without regard to her own influential position. The treatment of which the Claimant complained was because of, and related to, those inappropriate actions; not any legitimate manifestation of her belief (**Chondol v Liverpool City Council** [2009] UKEAT/0298/08 and **Grace v Places for Children** [2013] UKEAT/0217/13).

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as below. This is the Claimant's appeal against a Judgment of the London (East) Employment Tribunal (Employment Judge Foxwell, sitting with members on 20-22 and 27 January and, in Chambers, on 10 February 2015; "the ET"), sent to the parties on 27 February 2015. Representation then was as now.

2. By its Judgment, the ET dismissed the Claimant's claims of unlawful discrimination and harassment because of religion or belief. After hearing from Mr Diamond, for the Claimant, at an Appellant-only Preliminary Hearing, I permitted this matter to proceed to a Full Hearing, identifying the principal issues raised to be as follows:

(1) Whether the ET erred in law in seeing the Claimant's religion or belief as "context" and not an exercise of her Article 9 **Convention** rights? and

(2) Whether it further erred in its failure to properly test the proportionality of the Respondent's response, in terms of disciplinary sanction and the failure to consider the alternative of mediation?

3. In arguing the case at Full Hearing, Mr Diamond has emphasised this case involved the Claimant's **Convention** right to manifest her religious belief, which the ET failed to properly accommodate within domestic law. For the Respondent, Mr Collins QC says the appeal is answered by the ET's findings of fact on the issues raised by the case as it was pursued below.

The Background Facts

4. I take this summary from the ET's findings. I make this observation, in particular, because the written submissions made by Mr Diamond, on the Claimant's behalf, sometimes stray from the ET's Decision, using language that might be contentious given its findings of fact. The Claimant must understand I am bound by the ET's findings of fact, unless and until it is established they are perverse (a high test; **Yeboah v Crofton** [2002] EWCA Civ 794).

5. The Respondent is an NHS Trust, which provides mental health and community healthcare services to the City of London and the London Boroughs of Hackney, Tower Hamlets and Redbridge. It is a public sector employer of some 3,800 staff. On 5 March 2007, the Claimant started working for the Respondent as Head of Forensic Occupational Therapy at a mental health services facility, which provided secure accommodation to which patients were admitted under the **Mental Health Act 1983**. Relevantly, the Claimant describes herself as a born-again Christian; she attends the Christian Revival Church ("the CRC"), which is characterised as an evangelical Church.

6. The Claimant's ET claim arose from disciplinary proceedings, which resulted in her being given a final written warning, subsequently reduced on appeal to a first written warning. The relevant chronology went back, however, to an initiative on the Claimant's part in 2011, whereby CRC volunteers provided religious services at the facility where she worked. The ET found the Respondent was receptive to the idea of establishing regular Christian worship at the centre but concerns arose about this initiative, with allegations of improper pressure on staff and service users in relation to how worship was conducted and also as to the Claimant's involvement. These concerns led the Respondent to suspend the services and, in March 2012, the Claimant's manager, Mr Wilson, counselled her and informally warned her as to the need

for boundaries between her spiritual and professional lives. The ET did not accept this showed conscious or subconscious anti-Christian animus on the Respondent's part.

7. Subsequently, in June 2013, a complaint was made about the Claimant by EN, an Occupational Therapist in her first 12 month placement post-training. EN had been with the Respondent since 30 July 2012 - apparently her first extended period away from home - and is described as being of Pakistani heritage and Muslim faith. She complained the Claimant had tried to impose her religious views on her: inviting her to services at the CRC, praying with her and, on one occasion, laying hands on her. EN detailed her complaints in an eight-page statement saying she felt "groomed" by the Claimant, who had abused her managerial position, and had begun to feel ill as a result. The complaint detailed how:

> **"63. … when [EN] had first [begun] working for the [Respondent] the Claimant had asked her if she was religious and she had said that she was a practising Muslim. She claimed that the Claimant had invited her to events at the Claimant's Church but she had never attended and always said that she was busy. … the Claimant's attention had [begun] to make her feel ill. She referred to receiving DVD's from the Claimant and tickets to Church events. EN also referred to an incident … when she alleged that the Claimant had discussed EN's health and said that she needed to "*invite Jesus to come into her spirit*" and told her to say the following words "*I believe you are the son of God Jesus, I believe in you and your power, come into me and heal me*". EN said that the Claimant told her to "*let Jesus in*" and that people "*have a choice but only one opportunity to be saved*". … when she told the Claimant that she had Crohn's disease the Claimant had replied that the disease did not exist because it was not in the Bible and that only Jesus could heal her. EN asserted that on 22 April 2013 the Claimant had given her a book about a Muslim Pakistani woman who had converted to Christianity … EN said that she accepted the book but did not read it. … on her return to work following surgery she had met the Claimant in her office and the Claimant had prayed over her and laid hands on her by touching her knee. EN said that the prayers lasted about 10 minutes and that the Claimant told her to "*ask Jesus to come into you*". EN said that she was upset by this and went to the toilet to hide her distress but was followed by the Claimant who asked if she was alright. EN alleged that the Claimant had "*completely ruined her first year of practice*". …"**

8. In forwarding the complaint, Mr Wilson summarised the allegations against the Claimant as "engaging in acts of proselytising". This led to an investigation by the Respondent, during which the Claimant was suspended. Her suspension continued (even after EN left the Respondent) due to the potential effect on witnesses if the Claimant returned to work and given the difficulty of finding suitable posts into which she could be redeployed. The Claimant was told of the nature of EN's allegations but not given the full statement until later in the

A disciplinary process. In any event, on 20 June 2013, the Claimant provided her own statement in response. From her perspective, conversations had been consensual and arose from EN's own expressions of interest. The ET was satisfied the response demonstrated a good understanding of the allegations even before the Claimant had seen EN's statement.

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9. The investigation report was published in early November 2013, significantly later than the time-frame laid down by the Respondent's procedure. It was thorough and advised there was a disciplinary case to answer, which was communicated to the Claimant in the form of eight separate allegations. At the subsequent disciplinary hearing, three allegations were upheld:

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(1) Giving EN a book promoting conversion to Christianity (this was the book referred to in EN's complaint about a Muslim Pakistani woman who had converted to Christianity, entitled "*I Dared to Call Him Father*");

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(2) Praying for EN during a 1:1 meeting and laying hands on her.

(3) Inviting EN, on several occasions from September 2012, to attend CRC functions.

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10. During the course of the disciplinary hearing, on the issue of touching EN whilst praying with her (the laying on of hands), the Claimant stated:

> **"Upon reflection and from my perspective, I made a judgement call at the time. I felt I wasn't in my senior role when I did this but I have learnt from this. I do not say that this was the right thing to do. I do not think this was appropriate given the circumstances." (ET Reasons, paragraph 84)**

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And continued:

> **"I was trying to offer reassurance. On reflection it was unhelpful and I would not do it again." (ET Reasons, paragraph 84)**

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11. Having found these three allegations proven, the disciplinary panel noted the Claimant had no previous disciplinary warnings but had received clear guidance from her manager in March 2012 as to how to conduct herself in connection with her personal spiritual beliefs when dealing with staff; this was not a one off incident. The panel explained:

> **"Everyone has their own beliefs; however the panel felt that given the seniority of your role, staff may find it difficult to refuse your invitations and discussions regarding your personal beliefs, as such professional boundaries should be maintained at all times within the workplace." (ET Reasons, paragraph 85)**

12. On the basis of the matters found, the disciplinary panel determined that the Claimant should be subjected to a final written warning, lasting 12 months.

13. Relevantly the panel did not uphold another allegation concerning a DVD the Claimant had given to EN, which concerned human trafficking. It was accepted the Claimant and EN had a shared interest in campaigns relating to this; in context, it was not unwanted conduct.

14. The Claimant appealed, but the earlier decision was not overturned albeit the sanction was reduced to a first written warning with a recommendation of training. In giving its decision, the appeal panel expressed sympathy with the Claimant's complaint that the investigation had been over-long and criticised the failure to redeploy her. It did not accept, however, that the disciplinary panel had been wrong to uphold the three allegations: the Claimant was a senior member of staff in a position of authority and it was important that her interaction with subordinate staff should not give rise to calls for concern or place her in what she had acknowledged were "*vulnerable circumstances*".

The Proceedings before the ET and the ET's Decision

15. The nature of the claims pursued by the Claimant in the ET proceedings, and the issues to which these gave rise, were the subject of careful consideration. Following two earlier telephone Preliminary Hearings, the parties had agreed the issues requiring determination which can be summarised (so far as relevant) as appears below.

16. Under the heading "Harassment", it was asked whether specific procedural breaches or failings by the Respondent in the disciplinary process amounted to "unwanted conduct" for the purposes of section 26 **Equality Act 2010** ("the EqA"). Relevantly, for the purposes of this appeal, the Claimant complained that the Respondent had applied an oppressive sanction.

17. Under the heading "Direct Discrimination" (section 13 of the **EqA**), comparing herself with an employee (hypothetical) of a different or no faith who enters into consensual discussions with/provides support to a colleague of a different or no faith, the Claimant again relied on the matters complained of as harassment but added three further procedural matters, including a complaint that the Respondent had failed to implement its mediation process.

18. There was then a heading of "Indirect Discrimination", under which the Claimant relied on a provision, criteria or practice ("PCP"), namely the Respondent's disciplinary policy and procedure, alternatively its "unwritten policies" that:

> **"a. A religious discussion between a staff member on the one hand, and staff member of a different or no faith, is not permitted;**
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> **b. That invitations to a service or event at a place of worship by a staff member of one faith to a staff member of another faith are prohibited;**
>
> **c. That the dissemination of any literature or other media that promotes the Christian religion is prohibited."**

19. The list of issues separately included a heading "Human Rights" under which it was asked (relevantly) whether the Respondent had infringed the Claimant's rights in breach of Article 9 of the **European Convention on Human Rights** ("the Convention"); specifically, the Claimant's right to manifest her belief by sharing her faith with a consenting colleague, which had been breached by disciplinary action being taken against her and a sanction imposed.

20. The ET had regard to the **Convention** and the case law of the ECHR cited to it but considered this took matters no further than ordinary domestic principles in this case. Noting the Article 9 right to manifest religion or belief was qualified, the ET opined:

> **"106. … We do not accept, therefore, that the Convention gave the Claimant a complete and unfettered right to discuss or act on her religious beliefs at work irrespective of the views of others or her employer. In fact, we do not think that the Claimant believes that she has this right. In our judgment this case is simply about what happened and why …"**

21. The ET did not find there was any basis to support the Claimant's complaints of direct discrimination or harassment because of or related to religion or belief. It observed:

> **"108. … The context of the disciplinary process against the Claimant was religious acts but the reason for her treatment was because these acts blurred professional boundaries and placed improper pressure on a junior employee rather than that they were religious acts. We have no doubt that the employer would have taken a similar approach had, for example, the Claimant been pressing a particular political point of view. We note in passing that the distinction between cases where religion is the reason for the treatment and cases where it is merely the context was confirmed by the EAT in the case *of Chondol v Liverpool City Council* [2009] UKEAT 0298. It is clear to us that this distinction is one that the Claimant has difficulty understanding: we have no doubt that she felt and feels that what she did was in EN's best interest at heart and that she was simply sharing with EN her positive experience of Christian belief."**

22. The ET then went on to consider the specific allegations of harassment and direct discrimination, but rejected each. It further considered whether it was an act of harassment or direct discrimination for the Respondent to have instigated disciplinary proceedings based on EN's complaint. That was not an act complained of in the list of issues under the headings of harassment or direct discrimination (save insofar as it might have been relied on in support of

A the alternative of the mediation process) and it seems the ET took this from the issues identified under the sub-heading "Human Rights" (see above). In any event, it concluded:

> **"110. … EN's complaint was a serious one on any view and there was some evidence to support it. Subsequently the Claimant made some admissions consistent with the complaint. The Respondent would have been rightly criticised if it had not taken the complaint seriously and investigated it. …"**

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23. More specifically, as to whether it was directly discriminatory to pursue a disciplinary process rather than mediation under the Dignity at Work policy, the ET noted the reference in that Policy to mediation as "*particularly appropriate where there is a willingness to resolve the issues by both parties and when there is an ongoing working relationship*", observing:

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> **"127. Those conditions did not apply here. EN complained shortly before she was due to leave the Respondent. She described considerable distress and characterised her treatment as "*grooming*". In those circumstances … we do not find that it was unreasonable to treat this as a disciplinary issue rather than a workplace grievance to be resolved by discussion. We bear in mind that the Claimant had been counselled about what was appropriate in the workplace before. We reject the claim therefore that this was less favourable treatment of her because of religion or belief or that a hypothetical comparator of a different or no faith would have been treated differently in similar circumstances."**

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E 24. As for the various procedural complaints, the ET concluded there was no basis for finding these constituted treatment of the Claimant because of religion or belief. The Claimant has not sought to pursue these points on this appeal and I have, therefore, not descended further into the detail of the ET's findings in these respects.

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25. On the complaint that the sanction imposed was "oppressive", the ET disagreed:

> **"122. We reject this allegation on the facts: the sanction was not oppressive, the Claimant had been accused of serious misconduct amounting to a misuse of power. Furthermore we reject the Claimant's case that the imposition of a final written warning or its replacement with a first written warning was treatment of her because of religion or belief."**

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26. The ET also rejected the Claimant's complaints of indirect discrimination. No appeal is now pursued in respect of those matters but it remains instructive to consider the ET's findings in this regard. Although it allowed that the disciplinary policy was a PCP, it found no evidence

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A that it put Christians or, more generally, people of faith at a disadvantage. It specifically found that there was no PCP in the form of the "unwritten policy" asserted by the Claimant:

> **"131. … the Claimant was not disciplined simply for having a discussion about faith with EN; she was disciplined for subjecting a subordinate to unwanted conduct which went substantially beyond a "*religious discussion*" without having regard to her influential position and despite previous counselling and instruction to the contrary."**

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27. The ET also rejected the contention that there had been an unwritten policy that prohibited invitations to a service or event at a place of worship by one staff member of one faith to a staff member of another faith and found no evidence to support the existence of a PCP prohibiting the dissemination of literature/other media promoting the Christian religion.

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D **The Appeal and the Claimant's Submissions**

28. The first three grounds of appeal address the ET's approach as a matter of law; the Claimant's contentions in these respects underpin the remaining grounds of appeal.

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29. First (ground A), the Claimant contends the ET failed to protect her **Convention** rights or gave inadequate reasons for dismissing her case. Specifically, she submits she was disciplined for three acts that were clearly protected by Article 9, as manifestations of religious belief. By merely applying the domestic tests of causation ("*because of*" (direct discrimination) or "*related to*" (harassment)), the ET failed to ask whether there had been an interference with the Claimant's right to manifest her religious belief and, if so, whether that was necessary and proportionate for Article 9.2 purposes (the issue addressed by ground B).

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30. The applicability of Article 9 in the workplace had been recognised, where there is "*a sufficiently close and direct nexus between the act and the underlying belief*" (**Eweida v UK** [2013] 57 EHRR 8, at paragraph 82); it expressly protected the manifestation of religion or

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belief in the workplace and, consistent with this, cases such as **Eweida** and **Mba v Merton LBC** [2014] 1 WLR 1501 CA, required that there should be a reasonable accommodation of religious speech, subject to Article 9.2.

31. Accepting an employer has a legitimate interest in preventing harassment of co-workers, Article 9.2 was not engaged in the present case: the matters leading to the disciplinary sanction were voluntary and consensual and there was no legitimate aim underpinning any interference by the employer; Article 9 allowed a right to proselytise and to try to change the religion of another (see **Kokkinakis v Greece** [1994] 17 EHRR 397 and note the implied acceptance of religious free speech in a non-military employment context in **Larissis v Greece** [1999] 27 EHRR 329). Moreover, the ET had failed to assess whether there had been - and, if so, to what extent - an interference with the Claimant's **Convention** rights and that, in itself, amounted to an error of law; **Schuth v Germany** [2011] 52 EHRR 32 (ground C).

32. Leading on from these points, the Claimant objects that the ET misdirected itself in finding that her religion was merely a context of the Respondent's actions and not the reason for those actions in itself (ground D): if religion or belief informed the Claimant's conduct, Article 9 was engaged and the question was whether the Respondent's actions - which placed a restriction on that belief - were justified (**Thlimmenos v Greece** [2000] 31 EHRR 15).

33. Ground F (ground E having been withdrawn at an earlier stage) returned to the issue of interference with the Claimant's **Convention** rights, now looking at this under EU law and **Directive 2000/78**, which underpins the relevant provisions within the **EqA**. The ET failed to apply the test of proportionality under EU law: "*The interest of the employer in workplace efficiency cannot extend to take account into account the grumblings of, and opposition of, co-*

workers to a manifestation of faith" (I take this wording from the grounds of appeal). In support of this (not perhaps entirely neutrally expressed) contention, the Claimant draws an analogy with the case of **IB v Greece** Appl 552/10 of 7 October 2013, where it was held that the adverse reaction of co-workers (in that case towards someone who was HIV positive) could violate the respect needed for a **Convention** right. In applying the test of proportionality, the ET needed first to determine whether the restriction on the Claimant's right was necessary and then, if so, to review whether it was proportionate. In this respect, the Claimant makes complaint about what she would characterise as the oppressive nature of the disciplinary investigation. Whilst accepting the ET made specific findings on these points - rejecting her case - she contends this was insufficient when considering an overall proportionality approach.

34. Descending into domestic law, by ground G, the Claimant contends the ET misdirected itself as to the burden of proof under section 136 **EqA**. Where there was evidence of religious animus, the burden shifted to the Respondent to prove the decision was in no way related to a prohibited ground; where a **Convention** right was engaged, that could only be if the reason was both relevant and compelling.

35. Related to this, by ground H, the Claimant complains the ET failed properly to engage with her case that the Respondent had wrongly applied its disciplinary policy as opposed to the Dignity at Work policy.

36. Finally, by ground I, the Claimant complains that the ET's conclusion was perverse in respect of the DVD allegation. Specifically, her answer to all the allegations had been the same: the interactions were consensual. Apart from Christianity, the nature of the allegations

was also the same and the similarity of allegations in relation to giving a book (one of the charges upheld against the Claimant) and giving a DVD (not upheld) was especially striking.

37. In summary, whilst accepting that the Claimant's claims had to be brought under domestic law, if Article 9 was engaged, the national Courts had to slot the case into domestic law, using whatever provision of the **EqA** was appropriate.

The Respondent's Submissions

38. By way of preliminary observation, the Respondent noted that, whilst the Court was required to have regard to the **Convention**, that gave no freestanding right. In the employment context, the **Convention** was given effect by the **EqA**, which had provided the legal basis for the Claimant's claims: section 13 (direct discrimination) and section 26 (harassment). It was important to note that the **EqA** also implemented the **Convention** by providing protection against indirect discrimination; albeit not a basis of claim now pursued on this appeal.

39. Turning to the points raised on the appeal, the Respondent contended that the Claimant was seeking to pursue what were said to be points of law when, in truth, the matters raised simply did not arise given the ET's findings of fact on the issues before it. Specifically, it was not in issue before the ET as to whether the Respondent was entitled to find the Claimant had misconducted herself; the Claimant's complaints had related to the procedural aspects of the disciplinary process. That infected the matters raised by the appeal. On the issue of sanction, that only arose given the Respondent's finding of misconduct, which was itself not challenged (save by reference to procedural matters, all of which had been rejected by the ET). As for mediation, that could not be implemented in the absence of a complainant to mediate with and

EN had left the Respondent's employment by the relevant time. It was important that these points were kept in mind when addressing the individual grounds of appeal.

40. Ground A was premised on the proposition that the decision to find misconduct was itself unlawful. That, however, was not an allegation made by the Claimant below. Had she done so, she would have been faced by her admission (in the internal process) that her conduct had been "*inappropriate and unhelpful*". The Respondent's conclusion was that the Claimant had harassed a co-worker and, as the Claimant had recognised, an employer has a legitimate right to protect and limit harassment of co-workers. The ET - after proper scrutiny of the facts of this case - had accepted that the reason for the Claimant's treatment was because she had blurred professional boundaries and put improper pressure on a junior colleague. On that basis, on the Claimant's own case, the finding of misconduct was not contrary to Article 9.

41. As for the case as it had been put before the ET, on each of the procedural complaints the ET had found there was simply no basis on which it could conclude that the treatment in question was "because of" or "related to" the Claimant's religion or belief. Even if one considered the decision to pursue the disciplinary process, the ET had correctly considered this under domestic law and reached a permissible conclusion this was not because of, or related to, the Claimant's religion or belief. It had applied the appropriate test: if the treatment was because of something other the Claimant's protected characteristic, it would not amount to discrimination for section 13 purposes or harassment contrary to section 26. Specifically, where the disciplinary process was pursued because of the Claimant's *inappropriate* manifestation of religious belief, an ET was entitled to find it was because of the inappropriate behaviour and not the manifestation of the religious belief (**Chondol v Liverpool City Council** [2009] UKEAT/0298/08); that was a matter of assessment for the first instance Tribunal.

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42. Similar points could be made in respect of ground B. Again, this attempted to question whether the ET had been entitled to find misconduct when that had not been raised as an issue below. The principles laid down in **Eweida** and **Kokkinakis** did not assist the Claimant; none of the cases suggested that where a manager acted inappropriately towards a subordinate she could not be disciplined if religion formed part of the context of the inappropriate actions (again, see **Chondol**; which had been followed by the EAT in **Grace v Places for Children** [2013] UKEAT/0217/13, a case which post-dated the judgment of the ECHR in **Eweida**).

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43. The Claimant's Article 9 rights had been protected by sections 13 and 26 of the **EqA 2010**, which made unlawful less favourable treatment or harassment which was "because of" or "related to" religious belief. In a case where the ET had concluded that the treatment was not because of or related to the religious belief, however, there could be no complaint that Article 9 rights had been engaged. That, it should be noted, was different to section 19 (indirect discrimination) cases. In those cases, where disadvantage to those with a religious belief was found, it would be necessary to go on to consider whether the treatment was justified and proportionate. The observations made in this respect also went to ground D of the appeal.

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44. As for ground C, the **Convention** did not give the Claimant a complete and unfettered right to discuss or act on her religious beliefs at work. The ET had not been required to undertake the analysis now effectively urged by the Claimant (a task required in an indirect discrimination case) of identifying the PCP applicable to the Claimant and others of a protected characteristic. The ET had carried out that task in respect of the Claimant's indirect discrimination claim, which it had rejected and against which decision there was no appeal. The factual enquiry the ET was required to make in the context of the direct discrimination

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A claim was into the basis of the treatment of the Claimant. It had done so and had concluded that it was not because of, or related to, her religious belief.

B 45. Ground F was premised upon an inaccurate statement of the facts. The ET had not found the Respondent was responding to "grumblings" of a co-worker but had expressly found it had faced a serious complaint. Having considered the process followed in detail - on the basis of the issues identified by the Claimant - the ET did not find it had been oppressive and C had concluded that the nature of the enquiry was appropriate. Ground G was also based on a false premise. The ET had not found religious animus; the ground assumed what the Claimant had been required (but failed) to prove.

D 46. By ground H, the Claimant contended the ET failed to consider the applicable policy. This point had been raised late but, in any event, the ET had reached a permissible view as to the applicable policy and had not accepted the Claimant's argument.

E 47. Lastly, ground I sought to challenge a permissible finding of the ET which was not properly open to challenge on appeal.

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The Relevant Legal Principles

48. It is common ground that whilst the ET did not have jurisdiction (as it correctly G recognised) to determine self-standing claims under it, the **European Convention on Human Rights** can be relevant in that the ET (and this Court) has a duty under section 3 of the **Human Rights Act 1998** to interpret and give effect to domestic legislation in a way which, so far as possible, is compatible with **Convention** rights.

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49. The domestic statutory provisions underpinning the Claimant's claims (as relevant to this appeal) were sections 13 and 26 of the **Equality Act 2010**, which provide as follows:

> **Section 13(1):**
>
> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**
>
> **Section 26(1):**
>
> **"A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
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> **(b) the conduct has the purpose or effect of -**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**

50. The Claimant further relies on the right to freedom of thought, conscience and religion provided by Article 9 of the **Convention**:

> **"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. The 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."**

51. An important aspect of the Claimant's case is that Article 9 does not merely protect the right to hold a particular belief but also to manifest it. That is obviously right: without the right to express and practise beliefs, the freedom of religion guaranteed by Article 9 would be rendered hollow. Seeking to translate that principle into the language of domestic law, in **Grace v Places for Children** UKEAT/0217/13/GE the EAT (Mitting J presiding) observed:

> **"6. We agree … there is no clear dividing line between holding and manifesting a belief and … an unjustified unfavourable treatment because an employee has manifested his or her religion may amount to unlawful discrimination. …" (Original emphasis)**

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52. I do not read the EAT's Judgment in that case as intending to extend the statutory language by its use of "unfavourable" but it is of interest to note that it apparently considered that some ability to justify the treatment (presumably, consistent with Article 9.2) must be implied, notwithstanding it was concerned with a case involving claims of direct - rather than indirect - discrimination. Ultimately, however, the EAT in **Grace** upheld the ET's decision because it had found that the action taken against the Claimant had not been because of her religion "*but rather because of the way in which she manifested or shared it*".

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53. Decisions of the European Court of Human Rights, interpreting the right under Article 9, have shown that the freedom to manifest religion or belief can extend, in principle, to the right to attempt to convince others of the tenets of that religion or belief (**Kokkinakis v Greece** [1993] 17 EHRR 397); to bear witness in words and deeds (**Eweida v UK** [2013] 57 EHRR 8). That said, the freedom to manifest one's religion or belief as guaranteed by Article 9 is qualified and may be limited in accordance with Article 9.2.

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54. In domestic law, the expression of right and limitation - as allowed by Article 9 of the **Convention** - is most easily discernible when addressing cases of indirect discrimination under section 19 **EqA** (which may be the more obvious route of challenge in most cases involving the manifestation of a religious belief). Whilst there is no statutory means of "justifying" direct discrimination or harassment, however, the Claimant accepts that the limitations permitted by Article 9.2 are relevant to the approach to be adopted to claims brought under sections 13 (direct discrimination) and 26 (harassment). Although the Claimant relies on the protection of the right to manifest religious belief in the workplace, as recognised by the ECHR in **Eweida**, she (correctly) does not seek to suggest that right cannot be subject to limitation.

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55. The concession is in some senses easier to state than apply, but the task will always be made easier by having a clear understanding of the nature of the claim and how it is being put. If the case is one of direct discrimination then the focus on *the reason why* the less favourable treatment occurred should permit an ET to identify those cases where the treatment is not because of the manifestation of the religion or belief but because of the inappropriate manner of the manifestation (where what is "inappropriate" may be tested by reference to Article 9.2 and the case-law in that respect); see **Chondol v Liverpool City Council** [2009] UKEAT/0298/08 and **Grace v Places for Children** [2013] UKEAT/0217/13. Similarly, whilst the definition of harassment permits the looser test of "related to", a clear sense of what the conduct did in fact *relate to* should permit the ET to reach a conclusion as to whether it is the manifestation of religion or belief that is in issue or whether it is in fact the complainant's own inappropriate conduct (and that must be right, otherwise an employer's attempt to discipline an employee for the harassment of a co-worker related to (e.g.) the co-worker's religion or belief could itself be characterised as harassment related to that protected characteristic).

Discussion and Conclusions

56. Against that background, I turn to the grounds of appeal. It is possible to deal with some of the points raised fairly shortly, because ultimately they do not withstand proper scrutiny (and, to be fair, were not greatly pursued by Mr Diamond in oral argument on the appeal). Thus, ground G - premised on the basis that religious animus had been established sufficient to shift the burden of proof on to the Respondent - is undermined by the fact that the ET did not find there to have been any such animus but expressly rejected the Claimant's case that there was evidence of a hostility towards Christianity in general and the CRC in particular. Similarly, where, at ground F, the Claimant complains that it cannot be legitimate for an employer to take into account the "grumblings" of co-workers to a manifestation of faith, that is

answered by the ET's finding of fact that here the Respondent was faced with a serious complaint and acted on what it found to be the Claimant's blurring of professional boundaries and placing of improper pressure on a junior colleague. Her further argument under ground F - as to the oppressive nature of the disciplinary investigation - also falls away once regard is had to the ET's findings rejecting each of the procedural complaints had made.

57. Moreover, where the Claimant has pursued a perversity appeal - under ground I - her arguments have failed to engage with the ET's reasoning; significantly that the Respondent had found the gift of the DVD (consistent with the Claimant's and EN's shared interest in campaigns against human trafficking) not to have been unwanted, whereas in relation to the gift of the book (concerned with the conversion of a Muslim woman to Christianity) the evidence did not support a conclusion that this reflected a similarly shared interest; from EN's perspective, it was unwanted.

58. More generally, the Claimant's arguments as presented on the appeal have slipped between different ways of putting her claims (not always as put before the ET) and between different potential statutory bases of claim (although only the claims of direct discrimination and harassment have actually been pursued on the appeal). Mr Diamond does not see any great difficulty with this approach. He contends that once Article 9 is engaged, the obligation on the Court is to find a route for a claim to be pursued in domestic law without being overly technical as to how this is done. I have more difficulty with that. As I have sought to explain when considering the relevant legal principles, I consider that it is essential to have a clear understanding of the way in which a case is being pursued and, more specifically, I do not accept that it is open to a Claimant to move between different ways of putting her claim and

A then to criticise an ET for failing to specifically address a particular point when that was not part of the case before it.

B 59. With that in mind, I consider that the starting point for my deliberations on the central arguments raised by the appeal is to be clear as to the case that the ET had to determine (in so far as those points remain live on the appeal).

C 60. The Claimant had certainly complained that the sanction (the disciplinary warning) was "*oppressive*" - putting that matter both as a claim of direct discrimination and as an act of harassment. She had also claimed it was direct discrimination for the Respondent to have failed D to implement its mediation process. Although the list of issues before the ET had not made the point particularly clear, I can allow that complaint of a failure to implement the Respondent's mediation process might be seen as another way of putting the more general complaint (made under the sub-heading "Human Rights") about the pursuit of disciplinary action (so, the E decision to utilise the disciplinary policy rather than the Dignity at Work policy). And, although the specific issues identified as engaging the Claimant's Article 9 rights unhelpfully failed to indicate how the ET was to approach these complaints under domestic law, I can see F how, more generally, the Claimant was saying that the pursuit of disciplinary action and the imposition of a sanction was a breach of her right to manifest her religious belief.

G 61. It is, however, important to note the manifestation of religious belief that the Claimant was relying on in this regard, namely the "*sharing of her faith with a consenting colleague*"; a way of characterising the manifestation of religious belief that also underpinned Mr Diamond's H submissions, describing the Claimant's and EN's interactions as "*consensual*" and "*voluntary*".

62. That characterisation of the Claimant's case exposes, however, the real difficulty that she faces on this appeal: it assumes a factual basis that the ET's findings reject. The ET did not find that the Respondent had pursued disciplinary action against the Claimant and imposed a warning on her *because of* or *for reasons related to* her *sharing of her faith with a consenting colleague*. It expressly found that the Respondent took the actions it did because the colleague in question had made serious complaints about acts which blurred professional boundaries and placed improper pressure on that colleague.

63. Mr Diamond has submitted that there "*was not even a balance of* ***Convention*** *rights to be considered*" in this case: Article 9.2 simply did not arise. In support of this argument, he has contended that there was no basis for the Respondent to interfere where "*EN receives a book without complaint; … EN voluntarily receives prayer (and touching) without complaint; and … EN texts messages (with encouragement) about visiting the Church of the [Claimant]*".

64. Whilst no doubt representing the Claimant's case below, those contentions simply cannot stand given the ET's findings. Although the ET allowed that some of EN's responses to the Claimant's texts (inviting her to CRC events) were friendly in tone, they were also consistent with her finding excuses not to accept those invitations. EN's complaint had described how the Claimant's attention had begun to make her feel ill and had "*completely ruined her first year of practice*". During the disciplinary hearing, the Claimant had accepted that her conduct had been inappropriate. As the ET's findings make clear, the Respondent had been careful to distinguish between that conduct which might have been wanted (i.e. received by a "consenting colleague"; such as the DVD) and that which was unwanted (i.e. the gift of the book and the Claimant's praying over EN and laying on of hands). The evidence that the Respondent had (legitimately, on the ET's findings) accepted just did not support the

characterisation of the exchanges as the sharing of faith "*with a consenting colleague*". The way in which the Claimant behaved engaged EN's rights and that was the issue with which the Respondent had to engage.

65. In oral argument, Mr Diamond cautioned against Courts or Tribunals seeking to form a view as to whether a person might be too vulnerable to be a proper recipient of the sharing of religious faith. That is, however, not what the ET purported to do in this case. The evidence was that EN (who, the Claimant had accepted, might properly be described as "*vulnerable*") had herself complained about the Claimant's conduct, characterising it as inappropriate; something the Claimant had accepted might have been so in certain respects. Keeping its focus firmly on the reasons why the Respondent had taken disciplinary action against the Claimant, the ET was clear that it did so because of, or for reasons related to, the Claimant's blurring of professional boundaries and placing of improper pressure on a junior colleague. The Claimant was not subjected to disciplinary process or sanction because she manifested her religious belief in voluntary and consensual exchanges with a colleague but because - as the ET expressly found - she subjected a subordinate to unwanted and unwelcome conduct, going substantially beyond "religious discussion", without regard to her own influential position. The treatment of which the Claimant complained was because of, and related to, those inappropriate actions; not any legitimate manifestation of her belief.

66. And that is also the answer to the claim that the sanction imposed by the Respondent was "oppressive". The Claimant does not say (and could not reasonably say) that a final written warning, reduced to a written warning on appeal, was an oppressive sanction when an employer has made a finding of serious misconduct. I have already considered the way that the Claimant sought to attack the basis for the disciplinary process; an attack premised on a finding

of consent on the part of EN that the Respondent had not found. Once that fails, there is no basis for the complaint that the sanction was "oppressive"; as the ET concluded:

> **"122. … the sanction was not oppressive, the Claimant had been accused of serious misconduct amounting to a misuse of power. …"**

67. It is also part of the answer to the other way of putting the Claimant's case on appeal: that the Respondent directly discriminated against her by pursuing the disciplinary process rather than mediation under the Dignity at Work policy.

68. EN's complaint was - as the ET accepted - serious in nature; it warranted investigation. The ET considered the content of the investigation report and was:

> **"76. … unsurprised that the investigators concluded that there was a disciplinary case to answer."**

69. The ET also considered the mediation procedure under the Dignity at Work policy and noted that the conditions identified as making that "particularly appropriate" had not existed at the relevant time: EN left the Respondent shortly after making her complaint (so, there was no "*ongoing working relationship*") and she had described considerable distress and characterised the treatment as "grooming". On the evidence, the ET's conclusion was plainly permissible:

> **"127. … In those circumstances [i.e. as described by EN's complaint], and given the corroboration found in the Claimant's admissions … we do not find that it was unreasonable to treat this as a disciplinary issue rather than a workplace grievance to be resolved by discussion. We bear in mind that the Claimant had been counselled about what was appropriate in the workplace before. …"**

70. For all those reasons, I am satisfied that the ET approached its task correctly and provided a proper and adequate explanation of its reasons. I duly dismiss this appeal.