Appeal No. UKEAT/0106/09/DA

# EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 9 & 10 September 2009
Judgment handed down on 30 November 2009

**Before**

**THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)**

**MS V BRANNEY**

**MR G LEWIS**

MR G G McFARLANE

APPELLANT

RELATE AVON LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

# APPEARANCES

| | |
|---|---|
| For the Appellant | MR PAUL DIAMOND<br>(of Counsel)<br>and<br>MR THOMAS CORDREY<br>(of Counsel)<br>Instructed by:<br>Messrs Camerons Solicitors<br>70 Wimpole Street<br>London<br>WIG 8AX |
| For the Respondent | MR KEITH KNIGHT<br>(of Counsel)<br>Instructed by:<br>Messrs Lyons Davidson Solicitors<br>51 Victoria Street<br>Bristol<br>BS1 6AD |

## SUMMARY


**RELIGION OR BELIEF DISCRIMINATION**

**UNFAIR DISMISSAL – Reason for dismissal**

Christian counsellor dismissed by Relate for failing to give an unequivocal commitment to counsel same-sex couples.

Held: Tribunal right to dismiss claims of discrimination (direct and indirect) contrary to the **Employment Equality (Religion or Belief) Regulations 2003** and of unfair dismissal –

**London Borough of Islington v Ladele** [2009] ICR 387 followed

**THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)**

## INTRODUCTION

1. This is an appeal against the judgment of an Employment Tribunal sitting at Bristol, chaired by Employment Judge Toomer, dismissing the Appellant's claims of unfair dismissal and of discrimination contrary to the **Employment Equality (Religion or Belief) Regulations 2003**. The claim was heard over two days in December 2008 and the Judgment and Reasons were sent to the parties on 6 January 2009.

2. The Appellant has been represented before us by Mr Paul Diamond and Mr Thomas Cordrey and the Respondent by Mr Keith Knight, all of counsel. Mr Diamond and Mr Knight also appeared before the Tribunal.

## THE FACTS

3. The Respondent is part of the Relate Federation, a well-known national organisation which provides relationship counselling services: although the Federation is made up of distinct constituent bodies, for most purposes we can refer to the Respondent and the Federation without differentiation as "Relate". Relate is a member of the British Association for Sexual and Relationship Therapy. The Association has a Code of Ethics and promulgates Principles of Good Practice. Counsellors employed by Relate are required to be members of the Association.

Paragraphs 18-19 of the Code read as follows:

> **"18. Respecting the autonomy and ultimate right to self-determination of clients and of others with whom clients may be involved. It is not appropriate for the therapist to impose a particular set of standards, values or ideals upon clients. The therapist must recognise and work in ways that respect the value and dignity of clients (and colleagues) with due regard to issues such as religion, race, gender, age, beliefs, sexual orientation and disability.**
>
> **19. The therapist must be aware of his or her own prejudices and avoid discrimination, for example on grounds of religion, race, gender, age, beliefs, sexual orientation, disability. The therapist has a responsibility to be aware of his or her own issues of prejudice and stereotyping and particularly to consider ways in which this may be affecting the therapeutic relationship."**

The Respondent itself also has an equal opportunities policy. Part of that reads:

> **"Relate Avon is committed to ensuring that no person – trustees, staff, volunteers, counsellors and clients, receives less favourable treatment on the basis of personal or group characteristics, such as race, colour, age, culture, medical condition, sexual orientation, marital status, disability [or] socio-economic grouping. Relate Avon is not only committed to the letter of the law, but also to a positive policy that will achieve the objective of insuring equality of opportunity for all those who work at the Centre (whatever their capacity), and all our clients."**

In accordance with the Code and the Policy, Relate offers its services to same-sex couples in precisely the same way as to heterosexual couples, and counsellors employed by it will in the ordinary course of events sometimes have same-sex couples assigned to them to counsel.

4. The Claimant is a Christian and the former elder of a large multicultural church in Bristol. He believes that it follows from Biblical teaching that same-sex sexual activity is sinful and that he should do nothing which endorses such activity. He joined the Respondent in May 2003 as a volunteer counsellor, and after undergoing basic training he became a paid employee in August of that year. He was required to, and did, sign up to its equal opportunities policy. He initially worked

in marital and couples counselling (sometimes referred to simply as "couples counselling" or "relationship counselling"). The main object of such counselling is to improve the relationship between the client couple; the issues covered might, but need not, cover sexual issues, but such counselling is not intended to cover cases of specific sexual dysfunction or disorder. In December 2005 the Claimant was asked to assist a lesbian couple. He was concerned about this and discussed his concerns in supervision with Ms Bloomfield, his counselling supervisor. As a result of the discussion, he accepted that counselling such a couple did not involve endorsement of any sexual relationship between them and he was prepared to proceed. He subsequently counselled parties to two other lesbian relationships without any difficulty, although it appears that in neither case did any specifically sexual issues arise.

5. In September 2006 the Claimant said that he wanted to undertake a diploma course in psycho-sexual therapy ("PST"). Such therapy is concerned specifically with problems of sexual dysfunction and may include a directive approach designed to facilitate and encourage greater satisfaction in a couple's sexual activity. It is thus very different in character from the work which the Claimant had previously been doing in couples counselling. Such work was, inevitably, liable to give rise to a much more intractable conflict with the Claimant's religious beliefs. The issue was discussed between him and various managers within Relate. There may be some difference between the parties as to the extent to which the Claimant expressed a settled unwillingness to counsel same-sex couples, either specifically in the context of PST work or more generally in couples counselling; but it is clear that he raised the possibility of his being exempted from any obligation to work with same-sex couples where specifically sexual issues were involved.

6. On 12 December 2007, Mr Bennett, the Respondent's General Manager, wrote to the

Claimant making it clear that any such stance would be in conflict with Relate's equal opportunities policy, to which he had expressly agreed to adhere when he joined. He added that acceding to any such request from the Claimant would reduce the amount of work that he would be able to do and was likely to lead to similar requests from other counsellors. He continued:

> **"I am sorry, therefore, but in view of the above, I cannot agree to your request not to see such same-sex clients in PST. Further, I must seek your agreement that you will carry out relationship counselling work, where it involves same-sex sexual issues.**
>
> **Therefore, I must ask you to confirm to me that you will continue to counsel same-sex clients in both relationship counselling and PST with regard to all the sexual issues they may bring. Further I must ask you to confirm to me that you will agree to carry out relationship work where it involves same-sex sexual issues. Please will you confirm both of these to me in writing by 9am on 19th December 2007.**
>
> **If you are unable to do so, it may be necessary to take disciplinary action against you in accordance with Relate's disciplinary policy on account of a failure to follow a reasonable instruction and Relate's procedures and regulations, which could result in acts of discrimination. In addition it may be necessary to consider the withdrawal of your placement at this Centre for your psychosexual therapy training. However, I hope you will recognise the importance of complying with Relate's Equal Opportunities Policy and Professional Ethics Policy and that you will provide the confirmation I have asked for."**

7. The Claimant asked for more time to reply, and eventually did so on 2 January 2008, insisting that his only difficultly was about offering PST – as opposed to couples counselling – to same-sex couples or individuals. As to that, he said that his views were "evolving"; that no specific problem had yet arisen; and that any disciplinary action was premature.

8. Mr Bennett regarded that reply as a refusal by the Claimant to confirm that he would undertake PST work with same-sex couples and accordingly initiated the disciplinary procedure. However, at the investigatory meeting on 7 January which was the first stage of that procedure, the Claimant said that if he were asked to do PST work with same-sex couples he would do so and that if any problems arose he would then raise them with his supervisor. Mr Bennett regarded that as

satisfactory and brought the disciplinary proceedings to a halt.

9. However, in a conversation on 18 January between the Claimant and Ms Bloomfield, Ms Bloomfield understood the Claimant, notwithstanding the assurance he had given to Mr Bennett, to be continuing to maintain the position which had led to the disciplinary investigation. On her account of the conversation, as the apparent contradiction emerged he became defensive and refused to discuss the issue further with her. In a memo to Mr Bennett she said:

> **"This conversation on 18 January has considerably reduced my confidence in [the Claimant] as a counsellor. I feel he is either split or internally confused or possibly manipulative on this issue. He seems to be fudging his position, but in trying to avoid telling a lie, he opens up more and more questions about authenticity and honesty. In order to maintain the quality and safety of our services to clients it is of fundamental importance that the counsellor maintains an open and honest relationship with the supervisor, otherwise the supervisor is unable to have trust in the counsellor or in her/his practice."**

10. Ms Bloomfield's report of this conversation re-opened the issue. Mr Bennett called the Claimant to a disciplinary hearing, which took place on 17 March. The Claimant's position was essentially that he had nothing to add to what he had said on 7 January. Mr Bennett formed the view that his true position was indeed as Ms Bloomfield had reported it rather than as the Claimant had stated it at the earlier hearing. On the following day he wrote to the Claimant telling him that he was being summarily dismissed. The reason for his dismissal was stated as follows:

> **"That on 7 January 2008 you stated to Relate that you would comply with its Equal Opportunities policy and Professional Ethics policy in relation to work with same-sex couples and same-sex sexual activities, when you had no and have no intention of complying with Relate's policies on those issues."**

The letter continued:

> **"During the hearing you had an opportunity to make representations about the above point and I listened to what you had to say. However, on consideration of what you said and all the evidence my view is that your actions constituted gross misconduct and in the circumstances you can not be trusted to perform your role in compliance with Relate's Equal Opportunities policy and Professional Ethics policy."**

11. The Claimant appealed against his dismissal. There was a hearing on 28 April before the chairman of the Respondent's trustees and two colleagues. The Claimant's main point, as at the disciplinary hearing, was that nothing had happened since 7 January which warranted his dismissal. His views had not changed since then; he had not discussed them with anyone apart from Ms Bloomfield; and it was unreasonable to regard him as untrustworthy. The appeal was dismissed. The panel held that Mr Bennett's lack of confidence that the Claimant would comply with Relate's policies was justified in the light of all the evidence that they had heard and read.

## THE TRIBUNAL'S DECISION AND THE ISSUES ON THIS APPEAL

12. The Claimant's pleaded claims were of discrimination (both direct and indirect) and harassment contrary to the 2003 Regulations; unfair dismissal; and wrongful dismissal. The Tribunal dismissed all the claims save for wrongful dismissal (as to which see below). There is no appeal against the dismissal of the claim of harassment, and accordingly we are concerned on this appeal only with the claims of direct and indirect discrimination and of unfair dismissal. We deal with each of those issues separately below, and it will be more convenient to set out the Tribunal's reasoning at that stage. We take this opportunity, however, to say that we have found the Reasons clearly expressed and well-structured.

13. The position about the claim for wrongful dismissal is a little unusual. In the course of his final submissions Mr Knight conceded that the Claimant's dismissal had been wrongful – i.e., (whether or not he specifically expressed it this way) that the Claimant had committed no sufficiently serious breach of contract to justify his summary dismissal. Following the conclusion of the hearing, however, he had second thoughts. He wrote to the Tribunal, before it had had an opportunity to meet to consider its decision, seeking leave to withdraw the admission. Mr Diamond put in a written objection. The Tribunal considered the application as a preliminary point in its Reasons, on the basis of the written submissions received. It concluded that the Respondent should not be entitled to withdraw the concession. Accordingly, it made a formal finding of wrongful dismissal, with the issue of remedy being adjourned. There is no cross-appeal against that decision, but an alleged inconsistency between it and the Respondent's case on unfair dismissal is a live issue before us: see para. 40 below.

14. It is convenient at this stage to refer to the way in which the Claimant's case was argued before us. Mr Diamond opened the appeal but confined himself to what in his skeleton he characterised as "Submissions on Human Rights Law" based on art. 9 of the **European Convention of Human Rights**: those submissions were at a high level of generality and not closely related to any analysis of the particular issues on the appeal. Mr Cordrey then followed with submissions more particularly addressed to the alleged errors of law in the Tribunal's reasoning. Although we found Mr Cordrey's submissions clear and helpful as far as they went, the procedure adopted was unsatisfactory. Art. 9 and the case-law on it is on any view important by way of background (though, as will appear, we have found it to give little direct assistance on the issues before us); and it would have been helpful to have had a structured analysis of the key authorities, cross-referred to the particular issues arising on this appeal. That is not something which Mr

Diamond offered us, and we are bound to say that the omission was not remedied by Mr Knight. Fortunately, the principal authorities were at least copied for us (though often not in the most useful format), and we have been able to identify the passages which seem most relevant for our purposes. But in these circumstances we have been cautious about ourselves offering any wider analysis of the case-law than is strictly necessary to resolve the issues before us.

## DISCRIMINATION

15. Reg. 3 (1) of the 2003 Regulations defines discrimination as follows:

> **"For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if—**
>
> **(a) on the grounds of the religion or belief of B or of any other person except A (whether or not it is also A's religion or belief) A treats B less favourably than he treats or would treat other persons;**
>
> **(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same religion or belief as B, but—**
>
> **(i) which puts or would put persons of the same religion or belief as B at a particular disadvantage when compared with other persons;**
>
> **(ii) which puts B at that disadvantage, and**
>
> **(iii) which A cannot show to be a proportionate means of achieving a legitimate aim."**

Reg. 3 (3) provides as follows:

> **"A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."**

Reg. 6 (2) provides that discrimination by an employer against an employee "by dismissing him, or

subjecting him to any other detriment" is unlawful. Reg. 29 provides for the so-called "reverse burden of proof" in terms equivalent to those familiar from other anti-discrimination legislation.

Direct Discrimination

16. The Tribunal began its consideration of the claim of direct discrimination by referring to a submission by Mr Diamond that special considerations applied to the use of a comparator in cases of alleged discrimination on the ground of religion or belief. In that connection it referred to the decisions of this Tribunal (Elias P presiding) in **McClintock v Department of Constitutional Affairs** [2008] IRLR 29 and of an Employment Tribunal presided over by Judge Auerbach in **Noah v Desrosiers** (2201867/2007). It continued:

> **"40. In this case, we concluded, firstly, that it was necessary for an actual or hypothetical comparator to be identified and, secondly, that an appropriate comparator would be another counsellor who, for reasons unrelated to Christianity, was believed by the respondent to be unwilling to provide PST counselling to same sex couples and therefore unwilling to abide by the respondent's Equal Opportunities and Ethical Practice and Policies. The question, therefore, is whether the respondent would have treated a comparator differently, and in our view it would not. It was plain to us that the respondent takes extremely seriously its commitment to provide counselling to all on a totally non-discriminatory basis, and that is clearly its ethos, as the letter from counsellors showed, and not some mere policy statement to which only lip service is paid. We were unanimously satisfied that any other counsellor who had evinced similar concerns for reasons unrelated to religion and left the respondent with similar uncertainty as to his or her commitment to what appeared to us to be the respondent's core values, would have been treated in precisely the same way. We were, therefore, unanimously satisfied that the claimant was not treated as he was because of his Christian faith, but because the respondent believed that he would not comply with its policies and that it would have treated anyone else of whom that was believed, regardless of religion, in the same way. The claim of direct discrimination must, therefore, fail."**

17. The express finding that the reason why the Claimant was treated as he was was not because

of his Christian faith but because of his perceived unwillingness to provide PST counselling to same-sex couples, and thus – this being the other side of the same coin – that he was treated in the same way as any non-Christian who had evinced such an unwillingness, was clearly open to the Tribunal on the facts, if not indeed inevitable. On the face of it, it is conclusive of the question of direct discrimination. But the Claimant's case is that the Tribunal's approach involves an illegitimate distinction between the immediate conduct which led to the act complained of – that is, the Claimant's (perceived) unwillingness to counsel same-sex couples – and the religious belief of which that conduct was an outward and visible sign. As developed by Mr Cordrey, the underlying point is that for religious belief to be effectively protected it is necessary to prevent discrimination on the ground not only that a belief is held but that it is manifested. The importance of protecting not merely the right to hold religious beliefs but the right to manifest them in conduct was a recurrent theme of both his and Mr Diamond's submissions. The two are, they submitted, inseparable.

18. We cannot accept this argument. It is of course correct that persons with a religious belief are likely to manifest that belief in their conduct. We further accept that in some cases where an employer objects to such a manifestation it may be impossible to see any basis for the objection other than an objection to the belief which it manifests; and in such a case a claim by the employer to be acting on the grounds of the former but not the latter may be regarded as a distinction without a difference. But in other cases there will be a clear and evidently genuine basis for differentiation between the two, and in such a case the fact that the employee's motivation for the conduct in question may be found in his wish to manifest his religious belief does not mean that that belief is the ground of the employer's action. Take the case of an employee who wears an item of jewellery or clothing with a religious significance. In the absence of any other context, it may be permissible to infer that an employer who dismisses an employee for wearing the item in question does so because

of an objection to the belief so manifested: the protestation "I don't mind you being a Christian/ Muslim, but I object to you wearing a cross/veil" might, without more, be rejected as spurious. If, however, it appeared from the context that there was some other ground for the objection – such as a general policy about the wearing of jewellery or practical reasons why the wearing of a veil was regarded as inappropriate – the position would be entirely different. In such a case any claim would have to be on the basis of indirect discrimination. We note that in **Eweida v British Airways Plc** [2009] ICR 303 although a direct discrimination claim was advanced before the employment tribunal it was not pursued in this Tribunal. (See also the decision of this Tribunal in **Chondol v Liverpool City Council** (UKEAT/0298/08), which recognises (at para. 23) the legitimacy of the distinction between objecting to a religious belief and objecting to inappropriate proselytisation.)

19. Both Mr Diamond and Mr Cordrey sought to draw an analogy with the issue whether dismissal on the grounds of pregnancy-related unavailability for work could be regarded as direct sex discrimination. The House of Lords in **Webb v Emo Air Cargo Ltd.** [1993] ICR 175 held that it could not; but the European Court of Justice ([1994] ICR 770) subsequently held to the contrary, emphasising that comparing the case of a woman who was absent as a result of pregnancy with that of a man who was absent on account of illness was inappropriate because pregnancy is unique to women. Similarly, it was argued, a faith-based objection to counselling same-sex couples could not be equated with an objection based on other grounds. We do not believe that the Court's reasoning in **Webb** – which was very specific to the case of pregnancy – can be extended to other situations. If it could, it would remove the ability of employers to make genuine and necessary distinctions between objecting to an act and objecting to the belief which may have given rise to it. We cannot see that the two situations are comparable.

20. There is no inconsistency between that conclusion and the requirements of art. 9 of the Convention. This reads as follows:

> **"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."**

Mr Diamond referred us to para. 31 of the Judgment of the European Court of Human Rights in **Kokkinakis v Greece** (14307/88) [1993] EHRR 397, where the Court emphasised the importance of art. 9 and observed that without the right to manifest one's religion the rights enshrined in it "would be likely to remain a dead letter". But the subsequent case law makes clear that it does not follow that an employee has an unqualified right to manifest his religion. In **Kalac v Turkey** [1997] 27 EHRR 552 the Court stated plainly (see para. 27, at p. 564) that:

> **"Art. 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an application may need to take his specific situation into account."**

The same observation was repeated in **Sahin v Turkey** [2005] 19 BHRC 590, at para. 66. In **R (Williamson) v Secretary of State for Education and Employment** [2005] 2 AC 246 Lord Nicholls described this as representing the consistent position of the Strasbourg jurisprudence: see para. 30 at p. 261A. Likewise, in **R (S B) v Governors of Denbigh High School** [2007] 1 AC 100 Lord Bingham referred, at para. 22 of his speech, to both **Kalac** and **Sahin**, together with the earlier decision in **Ahmad v United Kingdom** [1981] 4 EHRR 126, and continued, at para. 23 (p. 112 G-

H):

> **"The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to observe his or her religion without undue hardship or inconvenience."**

Mr Diamond attached particular importance to the decision in **Thlimmenos v Greece** (2000) 31 EHRR 411; but we could find nothing in it which contradicted the view of the authorities expressed above.

21. We accordingly dismiss the appeal on the issue of direct discrimination.

Indirect Discrimination

22. It was common ground before the Tribunal, and it found (at para. 41 of the Reasons):

(a) that the Respondent imposed on counsellors employed by it a requirement that they conform to the policies which we have set out at para. 3 above, and in particular that they should be prepared to make their services available without differentiation to same-sex and heterosexual couples;

(b) that that requirement constituted a "provision criterion or practice" ("PCP") within the meaning of reg. 3 (1) (b), which was applied to the Claimant;

(c) that that PCP put persons of the same religion or belief as the Claimant at a particular disadvantage.

(As to (c), there was no analysis, because the point was not argued, of whether the religion or belief in question should be characterised as Christianity *tout court* or in some more limited way which confined it to Christians holding what might be called traditional views. But nothing turns on this.)

23. It follows, as the Tribunal held in the same paragraph, that the Respondent had unlawfully discriminated against the Claimant within the meaning of reg. 3 (1) (b) unless it could show that the application to the Claimant of that PCP was a proportionate means of achieving a legitimate aim – or, in the usual shorthand, whether it was justified.

24. As to the question of legitimate aim, the Tribunal said, at para. 42:

> **"As we understood it, the legitimate aim relied upon by the respondent was the provision of a full range of counselling services to all sections of a community regardless, among other things, of their sexual orientation. That seems to us to be a legitimate aim which the respondent was entitled to pursue. The question, therefore, became even more narrow: could the respondent justify dismissing the claimant as a proportionate means of achieving that aim?"**

That conclusion too was not disputed before us.

25. The Tribunal proceeded, at paras. 44 and 45 of the Reasons, to set out the parties' respective submissions on the central issue. Essentially the same arguments were advanced before us. In summary:

- The Claimant contended that there was no adequate reason why the difficulties which persons of his religious belief encounter in counselling same-sex couples could not be met by Relate allowing them to counsel heterosexual couples only. His position was that, as regards PST counselling, same-sex couples should simply not be referred to him; and that, as regards couples counselling, while he would continue to be prepared to counsel same-sex couples he should have the right to withdraw if specifically sexual issues arose. He relied on the decision of the Employment Tribunal in **Ladele v London Borough of Islington** that the Council in that case should have permitted registrars to opt out of conducting civil partnership ceremonies: that decision has of course since been overturned by this Tribunal (see below). He relied, again, on art. 9 and on decisions from other jurisdictions where employers had been held obliged to afford reasonable accommodation to their employees' religious beliefs: the authority to which Mr Diamond attached particular importance in this connection in his submissions before us was the decision of Krieger J., sitting in the US District Court for the District of Colorado, in **Buonanno v A T & T Broadband LLC** [2004] 313 F. Supp. 2d. 1069.

- Relate's primary argument was that such an accommodation would be unacceptable as a matter of principle because it ran "entirely contrary to the ethos of the organisation to accept a situation in which a counsellor could decline to deal with particular clients because he disapproved of their conduct". But it also argued that it was not practicable to operate a system under which a counsellor could withdraw from counselling same-sex couples if circumstances arose where he believed that he would be endorsing sexual activity on their part.

26. The Tribunal then proceeded, at para. 46, to give its conclusion. It stated:

> **"We acknowledged that there were powerful arguments on both sides but at the end of the day we unanimously concluded that in this case the respondent had demonstrated that dismissal was a proportionate means of achieving the legitimate aim which has already been identified. The commitment to providing non-discriminatory services is, it seemed to us, fundamental to the respondent's approach to the work that it does. The claimant, at the end of the day, did not give an unequivocal assurance that he would provide the full range of counselling services to the full range of clients without reservation as the respondent was, in our judgment, entitled to expect. We accepted the argument put forward by the respondent that filtration or separation of clients, although it might work to a limited extent, would not protect clients from potential rejection at the claimant's hands, however sympathetically and tactfully he might deal with such issues. In those circumstances we unanimously concluded that in this case the respondent had discharged the burden upon it and that the claim of discrimination on grounds of religion must fail."**

27. As noted above, the Tribunal's decision was reached before the decision of this Tribunal in **London Borough of Islington v Ladele** [2009] ICR 387. (**Ladele** was in fact decided on 19 December 2008, the day after the Tribunal considered the case in chambers.) As the Claimant had himself asserted, at a time when the assertion favoured him, the facts are very similar to those of the present case. In short, a registrar in the employment of the Council, who had a religious objection to "gay marriage" was disciplined for refusing to conduct civil partnership ceremonies. She brought claims of both direct and indirect discrimination under the 2003 Regulations. For present purposes we are concerned only with the claim of indirect discrimination. There was, on the facts, no dispute that it was practicable for the Council to have arranged matters so that the claimant did not have to perform such ceremonies: the issue was thus squarely whether the Council's position that to take that course would be inconsistent with its commitment to equal opportunities was justifiable. As to that, Elias P said this, at para. 111 (pp. 411-2):

> **"In our judgment, if one applies the statutory test, the council was entitled to adopt the position it did. Once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate -and in truth it was bound to be- then in our view it must follow that the council were entitled to require all registrars to perform the full range of services. They were entitled in these circumstances to say that the claimant could**

> **not pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation. That stance was inconsistent with the non-discriminatory objectives which the council thought it important to espouse both to their staff and the wider community. It would necessarily undermine the council's clear commitment to that objective if it were to connive in allowing the claimant to manifest her belief by refusing to do civil partnership duties."**

The Tribunal in **Ladele** was referred to essentially the same authorities on art. 9 as we were. (Mr Diamond pointed out that it was not, apparently, referred to **Thlimmenos**, but we can see no significance in that.) But it concluded that they were of no real assistance: see paras. 119-127.

28. In our view the reasoning at para. 111 of the judgment in **Ladele** applies directly to the present case. The aim on the part of the Council which was held to be legitimate is substantially equivalent to that conceded in the present case (see para. 24 above). The essence of Elias P's analysis is that in a case where a body such as the Council has such an aim it may properly insist on all employees participating in the services in question, even if to do so is in conflict with their religious beliefs, because to do otherwise would be inconsistent with the principle which it espouses. If that is the case for a local authority, we can see no material distinction in the position of a body such as Relate. It is true that any assessment of proportionality in a case such as this must be sensitive to the facts of the particular case, and in that sense the decision in **Ladele** is not direct authority on anything save its own facts. But clearly it is important that substantially similar situations should be treated in the same way, and we can see no real difference between the situation considered in **Ladele** and that in the present case.

29. Although the Employment Tribunal's reasoning at para. 46 is short, in our view it essentially accepts the argument of principle now propounded in **Ladele**. Mr Cordrey advanced a number of

points about the practicability of accommodating the Claimant's scruples about endorsing sexual activity between same-sex couples: among other things, he emphasised the distinctions that could be drawn between couples counselling and PST counselling. He pressed us with the many authorities that emphasise that an otherwise discriminatory act can only be justified where there is a real need on the part of the employer so to act and the requirement for a careful assessment by the Tribunal of all possible alternative ways of meeting the employer's aim. He criticised the brevity of the Tribunal's analysis on this aspect. But these points, cogently as they were made, do not address the central element in the Tribunal's reasoning, which was not concerned with the practicability of accommodating the Claimant but with whether Relate could legitimately refuse to accommodate views which contradicted its fundamental declared principles. In a situation of this kind detailed evaluations of the kind urged by Mr Cordrey are out of place: the question is whether the employer is entitled to treat the issue as one of principle, in which compromise is inappropriate. The argument based on practicalities was avowedly a fall-back.

30. Mr Diamond and Mr Cordrey acknowledged the difficulty that **Ladele** posed for them. In the end, their essential submission was that we should not follow it. But on ordinary principles we should only depart from such a decision if we were convinced that it was wrong. That is not the case. On the contrary, while we acknowledge that these are difficult and sensitive questions, we believe that it was right. We acknowledge the genuineness of the problem which a stance such as that taken by the Council in **Ladele** or by Relate in the present case causes for persons of traditional religious belief – not necessarily only Christian belief. We echo the observations in paras. 116-117 of Elias P's judgment about encouraging flexibility and finding accommodation where that is possible. But we also agree with this Tribunal in **Ladele** that it must be justifiable for a body in the position of Relate to require its employees to adhere to the same principles which it regards as

fundamental to its own ethos and pledges to maintain towards the public, all the more so where observation of those principles is required of it by law. If it judges that to compromise those principles in its own internal arrangements would be inconsistent with its external stance, that judgment must be respected.

31. We are aware that the decision of this Tribunal in **Ladele** is the subject of an appeal to the Court of Appeal. At a preliminary hearing the parties were offered the option of a stay pending the outcome of that appeal; but they declined. We understand that since the argument before us **Ladele** has now been argued in the Court of Appeal and that judgment has been reserved. But given the choice already made by the parties we do not believe it would be right to defer our decision.

32. We accordingly dismiss the appeal on the issue of indirect discrimination.

**UNFAIR DISMISSAL**

33. At paras. 47-50 of the Reasons the Tribunal considered whether Relate had established that, as alleged in the letter of dismissal (see para. 10 above), the Claimant had deliberately given a false impression at the hearing on 7 January as to his true intentions. It rejected Relate's case on this aspect, holding that the most that it could reasonably have concluded was that the Claimant had fudged his position somewhat: there had been no deliberate mis-statement. The Tribunal appears to have believed that the Claimant was in a genuinely difficult position: he could not conscientiously give Relate the assurance it required, but he hoped that a decision could somehow be avoided: that led to inconsistency and equivocation, but it was understandable in human terms and could not fairly be called dishonest. In this connection, the Tribunal observed (at para. 50 of the Reasons) that even

if it had allowed Mr Knight to withdraw his concession of wrongful dismissal it would have found in the Claimant's favour on that claim.

34. However, it went on to consider another way of putting the case. At para. 51 of the Reasons it said this:

> **"The respondent's final line of defence, however, was the alternative which it has pleaded: namely that it had some other substantial reason to justify dismissal: the fact that it had lost trust and confidence in the claimant's ability or commitment to provide the full range of counselling services to all clients without any discrimination on grounds of sexual orientation. The arguments there, it seemed to us, mirror very closely the arguments put forward in respect of the justification claim on the indirect discrimination issue. It follows, therefore, that we were unanimously satisfied that the respondent had genuinely and reasonably lost confidence in the claimant to the extent that it simply could not be sure that, if presented with same sex sexual issues in the course of counselling a same sex couple, the claimant would provide without restraint or reservation the counselling which the couple required because of the constraints imposed upon him by his genuinely held religious convictions. That, in our judgment, was something which the respondent legitimately concluded could not be tolerated and dismissal for that reason was, in our judgment, therefore fair. The remedy for the wrongful dismissal will be considered at a further hearing, upon the first available date, unless the parties can come to terms."**

The reference to "some other substantial reason to justify dismissal" is of course a reference to s. 98 (1) (b) of the **Employment Rights Act 1996**, which requires an employer in a claim of unfair dismissal to show that the reason, or principal reason, for the dismissal is either one of those specified under s-s. (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" (generally referred to as the "SOSR" provision).

35. The Claimant contended by way of preliminary that it was unfair of the Tribunal to decide the issue of unfair dismissal on that basis. What was said was that the "SOSR" case had only emerged

at the very end of Mr Knight's closing submissions to the Tribunal and that Mr Diamond had had no chance to deal with it.

36. We do not accept that argument. In the Respondent's Grounds of Resistance, under the heading "Unfair Dismissal/Wrongful Dismissal", there are pleaded in outline the facts leading to the Claimant's dismissal. Para. 41 (e) (read with para. 42) pleads that those facts give the Respondent a defence to the claims of both wrongful and unfair dismissal. The pleading slips rather uncertainly between the language appropriate to the two claims, but it is nevertheless adequately clear that the Respondent's case is that the Claimant's behaviour in saying one thing while thinking another – characterised as "vacillation" and "breach of trust" – both constituted "gross misconduct" such as to justify summary dismissal and was the principal reason for the dismissal, falling within s. 98 (2) (b) ("conduct"); and that it was reasonable to dismiss for that reason. Para. 42 then reads as follows:

> **"In the event that the Tribunal finds that the Respondent did not have a fair reason in accordance with s. 98 (2) (b) of the ERA 1996 (which is disputed) the Respondent argues in the alternative that it had some other substantial reason such as to justify the Claimant's dismissal in accordance with s. 98 (1) (b) of the ERA 1996."**

37. Mr Cordrey submitted that that pleading was so general in its terms as to give no indication of the case being advanced and that it was accordingly unfair for the Respondent to be permitted to rely on it. We do not accept that submission. Para. 42 was plainly intended as an alternative legal characterisation of the facts relied on in the previous paragraph, which included a clear assertion that the Claimant "could no longer be relied upon to … observe the policies by which he was bound". It should have been clear to the Claimant throughout that Relate was running an alternative case that it was reasonable to dismiss an employee who was not prepared to commit to complying with policies of fundamental importance to it, even if it could not establish its primary case that the Claimant had

been disingenuous about his position. Whether or not Mr Diamond focused in the course of the hearing on that alternative way of putting the case, the evidence relevant to the discrimination issues would in any event have ensured that the relevant facts were fully before the Tribunal. Mr Diamond made his closing submissions first and did not address the point. It was only at the end of Mr Knight's submissions (and, we were told, very late in the afternoon) that the point explicitly re-surfaced in the course of exchanges between Mr Knight and the Chairman. On a strict view, it was Mr Diamond's look-out if he had not chosen to address it in his own submissions. Realistically, however, if he felt taken by surprise he could have asked for an opportunity to deal with the point at the end of Mr Knight's submissions, and we are sure that it would have been accorded to him. However, he did not do so. We see no unfairness here. As we have already observed, the issues on the SOSR point overlap very substantially with those which had no doubt been fully debated in relation to justification.

38. We turn to the point of substance. The essence of the Tribunal's reasoning in para. 51 is that it was reasonable for the Respondent to dismiss an employee who was, to put it no higher, equivocal about his willingness to conduct himself in accordance with principles which – legitimately, as it had previously held – it regarded as of fundamental importance. That is in our view plainly a conclusion to which it was entitled to come. (Strictly, it involved the Tribunal finding the Respondent's reason for dismissal being different from that advanced in the letter of dismissal; but that is not fatal, and the Claimant took no point on that aspect.) We do however have two observations about the form in which the Tribunal expressed its conclusion.

39. First, we are bound to say that the Tribunal unnecessarily complicated the analysis by referring to "loss of trust and confidence". Its doing so is understandable, since that is the way the case was

put in the Respondent's pleading and apparently in Mr Knight's oral submissions. Nevertheless, we think it unhelpful. Although in almost any case where an employee has acted in such a way that the employer is entitled to dismiss him the employer will have lost confidence in the employee (either generally or in some specific respect), it is more helpful to focus on the specific conduct rather than to resort to general language of this kind. We have noticed a tendency for the terminology of "trust and confidence" to be used more and more often outside the context of constructive dismissal in which it was first developed (see, classically, **Malik v Bank of Credit and Commerce International SA** [1997] ICR 606): this is a form of mission creep which should be resisted. But, in this case at least, the reference to trust and confidence does not obscure the Tribunal's substantive reasoning.

40. Secondly, we regard it as debatable whether dismissal for the reason identified by the Tribunal is properly to be described as being "for some other substantial reason", i.e. for a reason other than one of those identified in s. 98 (2). We ourselves would have been inclined to characterise the reason for the Claimant's dismissal as being his "conduct" - namely his failure to give a clear and unequivocal commitment to act in accordance with Relate's principles - in which case "SOSR" would be the wrong label. We suspect that the Tribunal was deflected from so characterising it because it regarded the "conduct" case as equivalent to the claim of "gross misconduct" which the Respondent had conceded and which it in any event did not accept (see para. 33 above) – that is, that the Claimant had consciously misrepresented his position at the first disciplinary hearing. We agree that the Claimant's position as the Tribunal found it to be would not normally be described as "gross misconduct", which carries strong outcomes of moral disapprobation; but it could nevertheless be a reason relating to the Claimant's conduct. However, we accept that the point is not open-and-shut, and that it could be argued that equivocation should not be treated as "conduct", in which case SOSR

would indeed be the right category. In the end, a point of categorisation of this kind is not fundamental: if the Tribunal's basic reasoning is sound the dismissal was fair, whichever box the case falls into.

41. Mr Cordrey submitted that the Tribunal's finding that the dismissal was fair was inconsistent with the concession – endorsed by the Tribunal – that it was wrongful. In principle, of course, the two questions are quite separate, and there are certainly many kinds of case where it may be fair to dismiss an employee who has committed no repudiatory breach of contract. But we accept that there is a tension in the present case: if the Claimant had indeed refused unequivocally to confirm that he would comply with a requirement on which Relate was entitled to insist, and which the Tribunal held to have been important, there must be a strong argument that that constituted a repudiation of the contract. However, the logic of the argument is in our view not that the dismissal should have been held to have been unfair but that, while the Tribunal may have been entitled not to allow Mr Knight to retract his concession, it was wrong to express the view that the concession was correct. If the Tribunal was in error in this regard, the error was in the Claimant's favour.

42. We accordingly dismiss the appeal on the unfair dismissal issue.