Appeal No. UKEAT/0073/14/DM
UKEAT/0075/14/DM
UKEAT/0314/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 10 & 11 February 2015
Judgment handed down on 13 March 2015

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

SITTING ALONE

UKEAT/0073/14/DM

THE GENERAL MUNICIPAL AND BOILERMAKERS UNION APPELLANT

MR KEITH HENDERSON RESPONDENT

UKEAT/0075/14/DM & UKEAT/0314/14/DM

MR KEITH HENDERSON APPELLANT

THE GENERAL MUNICIPAL AND BOILERMAKERS UNION RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For The General Municipal and Boilermakers Union	MR EDMUND WILLIAMS (of Counsel) and MS S FRASER-BUTLIN (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St Johns Lane London EC1M 4LB
For Mr K Henderson	MR SAMI RAHMAN (of Counsel) Direct Access and MR NICK DE MARCO (of Counsel) Bar Pro Bono Scheme

SUMMARY

UNFAIR DISMISSAL

RELIGION OR BELIEF DISCRIMINATION

HARASSMENT

1. The Employment Tribunal found that the Claimant was fairly dismissed for gross misconduct but also found that he had suffered unlawful direct discrimination and harassment on the basis of the protected characteristic of his "left-wing democratic socialist beliefs" which were held to be protected beliefs. The Tribunal held that the protected beliefs formed a substantial part of the reasoning for his dismissal and were accordingly an effective cause of it. The Tribunal also found that three incidents of unwanted conduct by the GMB related to his protected beliefs were found proved, all of which had the purpose of creating an intimidating, hostile or humiliating environment for him.

2. The appeal against the finding of unfair dismissal was dismissed. Although there appears to be a tension between the conclusion that the Claimant's dismissal was both fair and unlawfully discriminatory, provided a tribunal makes findings of fact that are supported by the evidence, correctly applies the relevant statutory test, and reaches reasoned conclusions by reference to the facts found, there is no reason in principle why such a conclusion cannot stand. The two statutory tests are different and the mere fact of these two findings does not, without more, indicate any error of law.

3. The findings of unlawful direct discrimination and harassment could not stand. There were no findings of fact or evidential basis to support them. The Tribunal made unsupported legal or factual assumptions about disputed questions of less favourable treatment on protected belief grounds. There was no analysis of the factors relevant to those conclusions and the

evidential basis for reaching the conclusions was nowhere identified. There was no material from which adverse inferences could properly be made and no evidential basis for the Tribunal's findings in this regard.

4. Further, of the three harassment incidents relied on, two were obviously trivial. The third was an 'incident' and not an 'environment'. Although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so. To conclude that the third incident was an act of unlawful harassment is to trivialise the language of the statute.

5. The Claimant's assertions (there being nothing more than this by way of evidence identified as available but in respect of which findings were not made) that his protected beliefs were at least a significant part of the reason for the impugned treatment were not supported by any evidence and amounted to no more than unsupported speculation. It would not be open to a tribunal properly directing itself as to the law to reach any other conclusion. There is only one outcome on the evidence and the findings made by the Tribunal in this case. The Respondent's appeal on these grounds would accordingly be upheld, and findings of no unlawful discrimination or harassment substituted.

THE HONOURABLE MRS JUSTICE SIMLER DBE

Introduction

1. On 7 December 2012 Mr Keith Henderson who was until then employed as a Regional Organiser by the General and Municipal Boilermakers Union ("GMB") was dismissed. In a Judgment with reasons sent to the parties on 30 September 2013, the Employment Tribunal dismissed claims brought by him for unfair dismissal, wrongful dismissal, victimisation, and unjustified union discipline. Having found that Mr Henderson was fairly dismissed for gross misconduct, the Tribunal also found that he had suffered unlawful direct discrimination and harassment on the basis of the protected characteristic of his "left-wing democratic socialist beliefs" (referred to as the 'protected beliefs'). The Tribunal held that the protected beliefs formed a substantial part of the reasoning for his dismissal and were accordingly an effective cause of it. As for the harassment claim, three incidents of unwanted conduct by the GMB related to his protected beliefs were found proved, all of which had the purpose of creating an intimidating, hostile or humiliating environment for him.

2. There are two appeals arising out of the Tribunal's decision on liability. The first brought by Mr Henderson seeks to challenge the finding that the dismissal was fair. The second appeal brought by the GMB seeks to challenge the findings of unlawful direct discrimination and harassment. There is a third appeal against the subsequent remedy decision brought by Mr Henderson. Reasons for the remedy decision were sent to the parties on 3 July 2014, the Tribunal rejecting claims for compensation for loss of employment and awarding compensation for injury to feelings alone, assessed at £7000.

3. In this Judgment Mr Henderson is referred to as the Claimant (though he was the second Claimant below) and the GMB as the Respondent. The Claimant appears by Mr DeMarco and Mr Rahman (who has taken over from Mr Oxton as a result of the latter's illness) neither of whom appeared below; and the Respondent by Mr Williams (who appeared below) and Ms Fraser-Butlin (who did not). I am grateful to all counsel for their cogent and helpful submissions.

The Tribunal's Findings of Fact

4. The liability appeals raise wide-ranging questions about the Tribunal's conclusions and it is important in those circumstances to set out the material facts found by the Tribunal in relation to the Claimant's case.

5. He was employed in November 2009 as Regional Organiser in the London Region based at Hendon in North London and his employment became permanent on 30 June 2010 when he became a Regional Organising Officer. This job included undertaking political work as part of the region's political efforts on behalf of the Labour Party.

6. The Tribunal found that the Claimant is an advocate of left-wing democratic socialism and that this includes:

> (i) a belief in establishing "socialism through democratic processes and [propagating] its ideals within the context of a democratic political system through a working-class industrial and political movement";
>
> (ii) a belief in 'workers' control, that is a term meaning "participation in the management of factories and other commercial enterprises by the people who work

there. Crossing workers' picket lines contradicts this aim because it undermines workers' ability to control their workplaces."

7. The Tribunal found the Claimant to be an extremely effective and committed employee of the respondent, extremely successful in negotiations on behalf of members with employers and somebody who had achieved the highest settlement award ever in the London Region.

8. The first relevant incident found by the Tribunal occurred in late November 2011 when staff at the House of Commons who were GMB members voted to take strike action to include a picket line at the House of Commons. The strike vote included a provision that Labour MPs should not cross the picket line. There is no suggestion that the Claimant was responsible for or had any part in this vote and the Tribunal found that he was not an organiser for GMB members in the House of Commons. In the absence of the individual who was so responsible, the Claimant was simply tasked by his employer with organising the picket line.

9. The Tribunal found expressly that the Claimant publicised the picket to the media stating that Labour MPs were expected not to cross the picket line. This was picked up by Sky News and political columnists.

10. The matter was raised in the House of Commons during Prime Minister's Questions on 30 November 2011 and the Labour Leader, Ed Miliband was given a difficult time being asked where he stood on Labour MPs crossing the picket line. Shortly after that, the respondent's General Secretary Paul Kenny, was contacted by somebody in Mr Miliband's office expressing their displeasure at the publicity that had been courted by the Claimant about Labour MPs not

crossing the picket line, as this had been used by Mr Cameron to suggest that Mr Miliband was being controlled by the unions. The Tribunal found that it was "further made clear to Mr Kenny that Mr Miliband's office was unhappy that the Claimant had told the press that no Labour MP should cross the picket line."

11. As a consequence, the Tribunal found at paragraph 17.5, Paul Kenny personally telephoned the Claimant,

> **"shouted at him saying that the Day of Action letter he had written was "over the top", that it was too left-wing, and ordered the claimant to allow all Labour MPs to cross the picket line. [The claimant] made it clear to Mr Kenny that he was doing his job by carrying out his instructions from the GMB members at the House of Commons."**

This incident is referred to as the 'picketing incident' below.

12. The Claimant's case was that:

> **"From this time onwards [he] experienced difficulties with [his] managers, including Tony Warr, who would subsequently initiate disciplinary proceedings against him" (ET1 paragraph 2(d)).**

13. He contended that Paul Kenny was the instigator of his difficulties from then on and that it was inconceivable that Paul Kenny, did not discuss the 'picketing incident' and his displeasure with the Claimant's managers. The Claimant contended that from December 2011 onwards he was required to undertake onerous duties as a deliberate attempt to force him to resign and which constituted a form of bullying which made him ill and that from this date he was sent 'blue letters' which arrived "practically every day" and contained allegations that he had given incorrect advice over the phone or failed to appear at meetings or failed to represent properly, most of which were without any foundation at all, and none of which were sustained as valid complaints. The Claimant further contended that he was repeatedly asked for written reports about these alleged events, mostly by Paul Hayes (the Regional Secretary and Mr

Warr's line manager) and to a lesser extent by Tony Warr (the claimant's line manager), which made his workload additionally onerous and was done deliberately to increase his already unsustainable workload and continued until he became ill with stress at the end of April 2012. His case to the Tribunal was that the decision to commence a disciplinary investigation and the ensuing disciplinary process occurred with the concurrence and at the instigation of Paul Kenny on 21 August 2012.

14. The Tribunal expressly rejected the Claimant's assertions that there was a hostile environment in the office after the picketing incident (17.6). The Tribunal found that it was quite clear that Mr Warr had no control over the amount of work provided to him and that there were natural peaks and troughs in the work over which Mr Warr had no control. The Tribunal also rejected the Claimant's evidence about Mr Hayes sending him letters of complaint, finding that he was extremely good at his job and there were hardly any complaints at all (17.7).

15. The Tribunal found that in the early months of 2012 the Claimant was becoming more politically active in his local Labour Party and had ambitions to become a Councillor (although later, on 27 July, "for reasons which are unknown to the Tribunal, the Claimant was suspended as a member of the local Labour Party"). It was clear, however, as the Tribunal found, that taking together his long commute, his work as a regional officer and his evening political activity, the claimant was becoming exhausted (17.11 and 17.12).

16. On 7 May 2012 the claimant went off sick with stress and remained off until early July 2012. There was an email exchange with Mr Hayes on Friday, 29 June 2012 when he indicated that he would be returning to work on 2 July 2012. When he attended work he was seen by Mr

Williams who sent him home because he did not have a fit note. He returned to work on 6 July 2012 with a fit note he paid for (but was subsequently reimbursed) and was placed on special leave until he could be seen by the respondent's Occupational Health Adviser.

17. The Claimant saw the Occupational Health Adviser and told the adviser about his "50-80 hour week". The Tribunal found this to be "a very substantial exaggeration of the true position" (17.6).

18. The Tribunal found that the claimant's health had improved greatly by this time and that the Occupational Health Adviser advised a return to work on adjusted duties increasing by an hour a day each week until he was back to his full contracted hours, but starting with four hours on alternate days in the first week and increasing slowly. At paragraph 17.18 the Tribunal found as follows in relation to his meeting with the Occupational Health Adviser:

> **"Importantly, she explored with the [claimant] if there was any aspect of his work he felt was contributing to the problems he was currently suffering from. The [claimant] informed her that although he felt the respondent had been extremely supportive, he did not wish to impede (we think this should read 'impose') further pressures onto his line manager. He was keen to return to work but knew he still needed to be in a more emotionally stable state to do that successfully. That would be gradual and could be supported by the phased return."**

19. By the time he returned to work and the Tribunal found possibly even earlier, the claimant's problems with his local Labour Party had been intensifying and the local Labour Party Regional Director, Alan Olive had become involved and was emailing him.

20. The Tribunal found that on 23 July 2012 the claimant went to see Mr Warr in the morning to seek his advice about his problems with his local Labour Party. The Claimant provided Mr Warr with copies of emails passing between him and Mr Olive. In one of the emails the Claimant had said to Mr Olive words to the effect

“As you are well aware I have an extremely onerous workload and I am therefore not in a position to return your calls…”.

21. Following that meeting and in order to assist the claimant, Mr Warr contacted Mr Doolan to see if he could give the Claimant any assistance in his capacity as an elected Labour Party representative. The Tribunal found that after that conversation Mr Warr noticed the email referring to the claimant’s ‘extremely onerous’ workload and called him into his office to discuss those words. The Tribunal recorded the considerable dispute in the evidence about the meeting that then took place between Mr Warr and the claimant and made its own findings about what occurred, as follows (18.1 and 18.2):

> (a) Mr Warr demanded that the claimant write to Mr Olive retracting the suggestion that he had an extremely onerous workload because he felt the statement could reflect badly on the Respondent. He also pointed out that the Claimant was working under a phased return.
>
> (b) The Claimant refused to withdraw the remarks and the conversation became heated. Mr Warr threatened the Claimant with disciplinary action to which the claimant replied “if you want to, discipline me” and left the room banging the door shut.

22. On 26 July 2012 the claimant made a request to Mr Hayes that for the two to three weeks of the Olympics he could be based at the respondent’s Chelmsford office. Mr Hayes rejected this request offering, by way of alternative, work at Gants Hill on the basis that there were no office computer facilities and support staff at Chelmsford. The Tribunal rejected Mr Hayes’ reasoning for failing to accommodate the claimant’s request, finding that there were office and computer facilities sufficient for the claimant’s needs available at Chelmsford and

that "there was no rational reason for him not to agree that the Claimant could be based at Chelmsford" for this period. (18.4)

23. The Tribunal found that by 27 July 2012 the Labour Party had suspended the claimant as a member which had the effect of preventing him from standing in the Essex County Council elections.

24. The Claimant was plainly unhappy about the problems he was having with the Clacton Labour Party and contacted Paul Kenny for advice about this on 26 July 2012. There were emails between the Claimant and Paul Kenny and at one point in the correspondence, Paul Kenny pointed out that the issues related to his membership of the Labour Party and were not work-related and suggested that they were not therefore relevant to the Respondent. Paul Kenny suggested that the Claimant discuss the matter with Mr Hayes. It appears that the Claimant did not take up this suggestion, but after he had been suspended he wrote again to Paul Kenny and Paul Kenny passed the correspondence to Mr Hayes. Mr Hayes was the Tribunal found,

> **"extremely upset that the [claimant] had bypassed him by going directly to the General Secretary. The [claimant] replied that he was not trying to circumvent Mr Hayes; he stated that Mr Kenny might have a point about it not being a GMB matter and that his work for the GMB was very onerous at that time and that he was thinking of an injunction against the Labour Party." (18.6)**

25. On 1 August 2012 the Tribunal found that Mr Hayes replied stating that because the role of County Councillor makes demands on time both during the day and evening there can be a conflict with the regional office's unspecified hours' requirements. He felt common sense and common courtesy suggested that the Claimant should have discussed his intention to stand as a candidate in advance; and refuted the fact that the Claimant had an onerous workload.

26. The Tribunal found (expressly rejecting the Claimant's evidence that this only happened later and presumably after he, the Claimant had initiated a grievance against Mr Warr) on 31 July 2012, Mr Warr wrote to Mr Hayes bringing to his attention six concerns he had about the Claimant's conduct and behaviour starting with his conduct on 23 July 2012 when he left Mr Warr's office slamming the door and ending with his negative approach to Mr Hayes' attempt to satisfy his request for an alternative office location during the period of the Olympic games.

27. On 2 August 2012 the Claimant told Mr Warr that he intended to raise a grievance against him and Mr Warr wrote to Mr Hayes by letter dated 2 August 2012 refuting the Claimant's allegations and setting out his own account of the events of 23 July. The Claimant was then away on sick leave from 17 August 2012 until 26 September 2012.

28. By letter dated 21 August 2012 Mr Hayes appointed Warren Kenny, a senior organiser and also the son of the General Secretary to carry out an investigation into the Claimant's conduct.

29. Warren Kenny commenced his investigation promptly and attempted to contact the Claimant who was unwilling to meet him (18.12). By letter dated 31 August 2012 Warren Kenny wrote to the claimant advising him to attend an investigatory meeting on 18 September 2012, but the Claimant responded that he should not be attending until his grievance had been heard, nor while he was signed off work (18.13). An occupational health report dated 24 September 2012 indicated that the Claimant was fit to attend an investigatory hearing (18.14).

30. After the Claimant's return to work on 26 September 2012 an investigatory meeting was fixed for 3 October 2012 and subsequently postponed until 17 October 2012. But the Claimant

still refused to attend on the basis that his grievance should be dealt with first. In those circumstances Warren Kenny proceeded without meeting the Claimant (18.15).

31. The Tribunal found that Warren Kenny obtained information from the Claimant's personnel file and office diary records and collated all the relevant documents necessary to conduct his investigation. He carried out

> **"the most thorough investigation and by letter dated 23 October 2012 wrote to Mr Hayes setting out in an eight-page letter a summary of his conclusions and appending five appendices, 46 relevant documents and a copy of the GMB disciplinary procedure" (18.16).**

In summary Warren Kenny found that there were seven matters warranting a case to answer by the Claimant:

(i) Consistently refusing to carry out reasonable management instructions (this related to the Alan Olive email);

(ii) being engaged in external political work while absent from his GMB position due to work-related stress and anxiety;

(iii) challenging the authority of line management and the regional secretary;

(iv) conduct that was likely to bring the respondent and its working relations into serious disrepute and undermining trust and confidence;

(v) making serious allegations of collusion between the GMB and the Labour Party in respect of his suspension from the Labour Party;

(vi) failing to disclose his intention to stand for public office which might conflict with the second Claimant's unspecified hours and contractual obligations;

(vii) failure to observe union procedures.

32. On 14 August 2012 the Claimant raised a second grievance against Mr Hayes and Mr Warr to replace his first grievance. He complained of bullying and victimisation including that he was being overworked deliberately; that he had been required to produce a sick-note unnecessarily; he had been verbally abused by Mr Warr; his request to work at Chelmsford had been unreasonably refused; and again he referred to being suspended from the Labour Party and that Mr Warr and Paul Kenny had failed to assist him in respect of the unfairness to him in being debarred from holding office while an internal Labour Party investigation was taking place.

The Tribunal recorded the penultimate paragraph of the Claimant's email relating to his second grievance as follows:

> **"the only conclusion I can come to is that extreme right-wing elements in both the GMB and the Labour Party have colluded to prevent a left-wing Unionist and a Labour Party activist from a working-class background making genuine progress in our movement."**

33. On 19 August 2012 whilst the claimant was on sick leave he received an email from a Labour Party candidate called Linda Jacobs who was in competition with him for selection for a seat in the County Council elections. The email expressed mock surprise regarding his suspension and stated that she knew he was not being supported by the Respondent. The Tribunal found that it was this comment that had prompted the allegation of collusion between the GMB and the Labour Party in the Claimant's grievance email (18.20).

34. At paragraph 18.21 the Tribunal held:

> **"At no time whilst the [claimant] was still employed by the respondent, nor indeed at any time during these proceedings, was the claimant able to point to any individuals who had been guilty of any form of collusion and there is not a shred of evidence to suggest that any member of the GMB had been in touch with Ms Jacobs. The Tribunal makes a specific finding of fact that nobody had been in touch with her and therefore there had been no collusion."**

35. The Claimant was asked to provide details of the names of people whose behaviour amounted to bullying and harassment with specific dates and incidents, identifying any witnesses but refused to do so, maintaining that he had already provided sufficient details. By a letter dated 29 October 2012 he was informed that the disciplinary proceedings would go ahead as he had failed to provide the necessary information to progress his grievance. He was suspended from work on 25 October 2012.

36. Although not referred to in the Tribunal's findings, it is common ground that by email dated 22 November 2012 to Tom Brennan (the dismissing officer), the Claimant set out a detailed response to the seven allegations against him. Having dealt with those seven allegations, he then set out his concerns of discrimination and victimisation on the grounds of his political beliefs, referring to the picketing incident and the telephone call that followed it and his manifesto to the interviewing panel of the Clacton Labour Party, naming a front bench Labour Councillor, Gary Doolan as his comparator.

37. The Claimant asserted in evidence that he was not supplied with any information relating to the allegations against him, but this was rejected by the Tribunal at paragraph 18.29. The Tribunal was satisfied that the Claimant was well aware of the case he had to meet and had set out a detailed response to it.

38. On 30 November 2012 the disciplinary hearing took place with Tom Brennan and the Claimant was represented by Mr Allday. The Tribunal was provided with notes of that meeting which lasted all day. Ultimately, Mr Brennan considered that there were two points that amounted to the most serious allegations. These were (i) challenging the authority of line

management and the regional secretary and (ii) making serious allegations of collusion between the GMB and the Labour Party in respect of suspension from the Labour Party (18.31).

39. The Tribunal found that in relation to both these issues, the Claimant was not prepared to acknowledge any wrongdoing and offered no mitigation. It found that as far as Mr Brennan was concerned, the Claimant was effectively saying he would not carry out a management instruction unless he, the Claimant, felt it was reasonable. Further he was not prepared to withdraw his allegations of collusion (18.32).

40. The Tribunal found that Mr Brennan considered alternatives to dismissal but saw no prospect of any reconciliation between the Claimant and the respondent and was satisfied that the Claimant had been guilty of serious misconduct in respect of the two allegations which he found to be proved. Mr Brennan came to the conclusion that the Claimant should be dismissed, concluding that these two matters amounted to gross misconduct. Mr Brennan's decision was set out in a letter dated 7 December 2012 which set out in detail his reasoning and the Claimant was offered a right of appeal.

41. The Claimant appealed and Mr Phillips heard the appeal on 15 January 2013. Again the claimant was represented by Mr Allday whose main contention was that dismissal was too harsh a sanction in the circumstances. The Tribunal found: "Although he [Mr Allday] accepted that some of the things the Claimant did were 'bang out of line', the Claimant had underlying health issues and that in challenging his superiors he was following a tradition whereby trade unionists sometimes stepped over the mark in putting forward their strongly held beliefs". (18.37)

42. By letter dated 29 January 2013 Mr Phillips rejected the claimant's appeal and confirmed that the original decision for dismissal stood. His reasons were set out in a nine page letter agreeing with Mr Brennan's findings that the Claimant's conduct in refusing to amend the comment about an onerous workload in the email to Mr Olive and his refusal to participate in the investigation of Warren Kenny had the effect of being disrespectful, disobedient and disloyal to the Respondent his employer, such that trust and confidence in him were seriously impaired. Mr Phillips was unimpressed by the distinction that Mr Allday drew in the email referring to collusion between elements in the GMB and the Labour Party being different from the Respondent itself. Mr Phillips considered that there was no material difference between allegations against unnamed "elements" within the respondent and the Respondent itself. Mr Phillips agreed with Mr Brennan that these remarks were such that they were sufficient to destroy the trust and confidence which is at the heart of the employment relationship. (18.39)

43. Having made those findings of fact the Tribunal set out the relevant principles of law, and no substantial criticism is made of these paragraphs. At paragraphs 19 to 23 it set out well established and uncontroversial principles relating to claims of unfair dismissal. It set out the relevant sections of the **Equality Act 2010** relating to religion or belief discrimination. At paragraph 26 it dealt with the burden of proof guidance given in **Igen v Wong** [2005] IRLR 258. Again no criticism is made of its self-direction there. At paragraphs 27 to 39 it dealt appropriately with the proper approach to harassment by reference to Richmond Pharmacology v Dhaliwal [2009] IRLR 336.

The Tribunal's conclusions

44. The Tribunal's conclusions on liability in relation to the claims relevant on this appeal are as follows:

"Unfair dismissal

45. The tribunal is satisfied on the balance of probabilities that the principal reason for the dismissal of the claimant was his conduct. Further, having considered the matters set out in s.98(4) Employment Rights Act 1996 and the relevant case law, the tribunal concludes that the respondent carried out a reasonable investigation of the matter (indeed a more than reasonable investigation). There was no procedural unfairness. Indeed, no such unfairness has been suggested by the second claimant. We further conclude that on the basis of our findings of facts, and having considered the law as set out above, dismissal was a fair sanction and was within the range of reasonable responses of a reasonable employment with the same union background of the respondent. Indeed, in the tribunal's view the respondent was entitled to from the view that the second claimant had become unmanageable. In those circumstances dismissal was indeed inevitable.

Wrongful dismissal (Issues 17.1 – 17.2)

46. The tribunal is satisfied that the second claimant was guilty of gross misconduct and was therefore not entitled to notice. There has therefore been no breach of contract in failing to give him notice.

Unjustifiable discipline by the Union (Issues 18.1 – 18.6)

47. The tribunal having considered the facts the law conclude that the second claimant did indeed contravene the respondent's rule book. The claimant was dismissed and was therefore disciplined by the respondent. However, we conclude that that disciplining of the claimant was justified because of his conduct which, as we have already set out, was the principal reason for his dismissal.

Direct discrimination (issues 12.1 – 12.5)

51. The tribunal considers that the hypothetical comparator would be an individual with similar qualifications and experience to the claimant who did not hold the philosophical belief of left wing democratic socialism but another philosophical belief or, alternatively, held no philosophical belief at all. We did not find Mr Doolan to be an appropriate named comparator and have had difficulty understanding how the second claimant puts his case in relation to Mr Doolan as a comparator.

52. Clearly the respondent has dismissed the second claimant and he has therefore been subject to less favourable treatment.

53. Further, the tribunal concludes that the second claimant has proved primary facts from which a tribunal could properly and fairly conclude that there has been a difference in treatment between the claimant and the hypothetical comparator because of the claimant's philosophical belief. Although we have considered that the principal reason for the claimant's dismissal was his conduct, we also are of the view that the claimant has established to our satisfaction that a substantial part of the reasoning behind dismissing the claimant was because of his philosophical belief and was an effective cause of his dismissal. The burden of proof having shifted to the respondent, we are not satisfied that the respondent's explanation has failed to establish to the satisfaction of the tribunal that the second claimant's philosophical belief was not a substantial reason for his dismissal.

Harrasment (Issue 13.1 – 13.5)

55. From the tribunal's findings of fact the tribunal concludes that the respondent did engage in unwanted conduct in respect of the second claimant as set out at paragraphs 2(d), 2(j) and 2(l)(ii) but not as set out at paragraphs 2(e), 2((f), 2(g), 2(l)(i) and (iii) and 2(o)(i) and (ii) of Issue 13.1.

56. That unwanted conduct was in the tribunal's view related to the second claimant's protected characteristic and did have the purpose of creating an intimidating, hostile or humiliating environment for the second claimant. In coming to this conclusion the tribunal has considered the claimant's perception, the other circumstances of the case and considers it was reasonable for the conduct to have that effect.

57. As the tribunal has concluded that a substantial part of the reasons behind dismissing the claimant was because of his philosophical belief it follows that these three successful allegations were part of a continuing act and within time. Even if the tribunal is wrong about that issue, the tribunal considers it just and equitable to extend time. This is one of the exceptional cases where there should be an extension and the tribunal can see no prejudice to the respondent as a result."

45. Accordingly, the Tribunal found:

(i) Rejecting the claim of unfair dismissal, that the principal reason for dismissal was the Claimant's misconduct that led to him being unmanageable and constituted gross misconduct; that a reasonable investigation was conducted without procedural unfairness, and that his dismissal was both fair and inevitable in the circumstances. Summary dismissal was also justified.

(ii) As to unlawful direct discrimination, that although the principal reason for dismissal was the Claimant's conduct, a substantial part of the reasoning behind dismissing him was his philosophical belief which was therefore an effective cause of his dismissal.

(iii) As to harassment, that there was unwanted conduct in that Paul Kenny shouted at the Claimant describing him as too left wing in the picketing incident (2d); he was threatened with disciplinary action by Mr Warr if he failed to retract a statement to Alan Olive that he had an extremely onerous workload (2j); and he was refused a two to three week relocation to Chelmsford by Mr Hayes (2lii). This conduct was related to his protected belief and had the purpose of creating a hostile (etc) environment. These were continuing acts given the finding of unlawful direct discrimination in his dismissal, and time was accordingly extended.

46. Against that background, I turn to consider each of the appeals, starting as counsel did, with the Claimant's appeal against the Tribunal's rejection of his unfair dismissal claim.

Appeal against finding that dismissal fair

47. Although a number of grounds of appeal are pursued in relation to the finding that the Claimant's dismissal was fair, including perversity and inadequate reasons, the only grounds developed orally by Mr Rahman are the following. First, Mr Rahman contends that the Tribunal's decision that the dismissal was both fair and unlawfully discriminatory at the same time is confused and bewildering, and must involve an error of law. Secondly, he contends that there was a misdirection in law in relation to (i) the finding that the respondent was entitled to treat the Claimant's refusal to retract a statement that he had an extremely onerous workload in the "Alan Olive" email as misconduct, and (ii) his refusal to participate in the investigatory process as amounting to misconduct. The misdirection means that the Claimant's conduct was not a potentially fair reason for dismissal and consequently the Respondent did n ot discharge the burden of proof under section 98 **Employment Rights Act 1996**.

48. So far as the first point is concerned, although there appears to be a tension between the conclusion that the Claimant's dismissal was both fair and unlawfully discriminatory, provided a tribunal makes findings of fact that are supported by the evidence, correctly applies the relevant statutory test, and reaches reasoned conclusions by reference to the facts found, there is no reason in principle why such a conclusion cannot stand. The two statutory tests are different: unfair dismissal focussing on the reason or principal reason where more than one; and in relation to unlawful discrimination, the requirement that there be no discrimination whatever meaning that provided discrimination is more than a trivial reason or ground for impugned treatment, it need not be the sole or main reason or ground for that treatment. The mere fact of these two findings does not, without more, indicate any error of law here.

49. As for the misdirection, Mr Rahman submitted that the proper approach to the two allegations of misconduct is to consider first whether the employer acted reasonably in issuing the relevant instruction, and in the event of a refusal to obey such instruction, to consider whether the employee acted reasonably or unreasonably in refusing to obey that instruction, the focus of the enquiry being on the reasonableness both of the refusal and of the instruction itself. Here, he submits that the Claimant contended that he acted reasonably in refusing to retract the Alan Olive statement because he honestly believed that he had a very heavy workload. The instruction was accordingly unreasonable because it required him to make a dishonest statement by retracting his assertion. The Tribunal failed to address or make relevant findings on this question. As to the refusal to participate in the investigation, the implied duty of cooperation does not oblige an employee to participate in a disciplinary investigation about his own alleged misconduct. Moreover the Employment Tribunal's characterisation of the Claimant's refusal to participate in the disciplinary investigation as impairing trust and confidence involves, he submits a misconception of the implied term of trust and confidence that ordinarily has application only as an implied contractual term that employers are required to observe.

50. I do not accept that the Tribunal's decision involved any misdirection. As stated above, the Tribunal set out the well-established legal principles governing cases of unfair dismissal at paragraphs 19 to 22 inclusive. Its summary reference to **UCATT v Brain** is broad-brush, but that apart, the Tribunal's self-direction in law is adequate. More importantly, the Tribunal's approach to the facts demonstrates a proper appreciation of the distinction between reasonable and unreasonable management instructions, and the need to consider the Claimant's explanation for non-compliance, and its reasonableness or otherwise. There is nothing to suggest (as was urged in writing by Mr Oxton) that the Tribunal required an 'extreme case' before being

satisfied that the dismissal was unfair in circumstances of a refusal to obey a reasonable instruction.

51. The relevant findings of fact in relation to the misconduct relied on to support dismissal are at 18.31-18.32 and 18.38-18.39 as summarised above. Two allegations of serious misconduct were found proved by Mr Brennan. On both counts the Tribunal found that the Claimant was not prepared to accept any wrong doing and accepted Mr Brennan's view that he was effectively saying he would not carry out a management instruction unless he felt it was reasonable. As for collusion, the Claimant refused to withdraw this most serious allegation against the GMB and the Labour Party despite the fact that he had never been able to identify any individual guilty of any form of collusion (either during employment or afterwards) and there being "not a shred of evidence" to support it. Mr Phillips agreed with Mr Brennan, and additionally regarded the Claimant's refusal to participate in Warren Kenny's investigation as disrespectful, disobedient and disloyal to his employer.

52. The context for the finding that the Claimant had refused to obey management instructions as found by the Employment Tribunal reflects an implicit acceptance that the management instructions were reasonable and that the Claimant's refusals were unreasonable. First, the Claimant's evidence that Mr Warr deliberately increased his workload from December 2011 was rejected. This simply did not occur on the Tribunal's findings. The Claimant's subsequent exhaustion and stress resulted from a combination of his work as a Regional Officer together with the very long commute (six hours) and his evening political activity related to his Labour Party political aspirations. The Claimant substantially exaggerated his work and case load in a meeting with the Occupational Health Adviser (albeit

that he told the adviser that Mr Warr had been extremely supportive). When he returned to work in July it was on substantially adjusted duties, as he must have known. But by the time he returned to work, his difficulties with his local Labour Party were intensifying and it was then that he made the "onerous workload" comment in email correspondence with Alan Olive, the Regional Director of the local Labour Party, with whom no doubt the GMB had an important relationship.

53. This was the background to the Claimant's meeting on 23 July, at his own instigation, to seek advice from Mr Warr about his problems with the local Labour Party. It is apparent that Mr Warr was supportive, and indeed contacted a local Labour Party representative on his behalf. Having done so Mr Warr noticed the "onerous workload" comment in the emails and sought to challenge the Claimant about it. The Tribunal's finding indicates that Mr Warr's reason for doing so was that the comment was untrue (the Claimant was on reduced duties on a phased return to work) and it could reflect badly on the respondent. Against the background findings made by the Tribunal and in light of the obviously important relationship between the GMB and the Labour Party it is implicit in the Tribunal's findings that Mr Warr's request was regarded as reasonable and the Claimant's approach (including his false insistence that his workload was onerous) and his refusal to retract the statement, as unreasonable. Moreover his behaviour in stating "if you want to, discipline me" then leaving the room banging the door shut appears to have been regarded, on a reasonable basis, as disrespectful.

54. Similarly, so far as the refusal to attend an investigatory interview was concerned, it is implicit in the Tribunal's findings, that the Claimant was regarded as behaving unreasonably in response to reasonable requests. First, the Claimant's assertion that Mr Warr made disciplinary

allegations only after the claimant had raised a grievance against him was rejected, as was his assertion that he was not provided with information relating to the allegations against him. When the investigation commenced the Claimant was simply "unwilling to meet" Warren Kenny. Subsequently the claimant sought to rely on his absence through illness and the fact that he was pursuing a grievance to avoid attendance, but Occupational Health reported that he was fit to attend an investigatory meeting during that period. Further, although the normal procedure was for a grievance to be dealt with ahead of any disciplinary action, and although the Claimant was insisting that his grievance should be dealt with first, the Claimant refused to provide details as requested by the HR Manager for the purposes of investigating his grievance. There is nothing in the Tribunal's findings to suggest that it accepted that the Claimant had provided sufficient details, or that the respondent acted unreasonably in proceeding with the disciplinary process ahead of the grievance in the circumstances; rather the opposite conclusion was implicitly drawn. Finally, the Tribunal found that Warren Kenny conducted a most thorough investigation by reference to the Claimant's personnel file and office diary records.

55. So far as the collusion allegation is concerned, the express findings at paragraph 18.21 support the obvious inference that the Tribunal regarded this as a serious and unsubstantiated, un-particularised allegation which impugned the integrity of his employer, and which the Claimant was not prepared to withdraw despite not being able to point to any individual who had been guilty of any form of collusion. The Tribunal was accordingly entitled to find both Mr Brennan's and Mr Phillips' conclusions to this effect reasonable.

56. These were all findings of fact and inferences appropriately drawn (whether expressly or implicitly) by the Tribunal that were supported by the evidence. Against that background, the

Tribunal concluded, as it was entitled to do, that the principal reason for the dismissal was the Claimant's conduct. It concluded that the respondent carried out a reasonable investigation and there was no procedural unfairness. It concluded that dismissal was a fair sanction and was within the range of reasonable responses of a reasonable employer. Indeed the Tribunal went further and said that the Respondent was entitled to form the view that the Claimant had become unmanageable and that in the circumstances, dismissal was inevitable. This was a reasoned decision that reflected careful findings of fact and a proper application of the relevant principles of law to the facts. There was no misdirection of law, whether in the respects developed orally by Mr Rahman or as set out in writing by Mr Oxton.

57. So far as the remaining points raised on the claimant's behalf are concerned, grounds one and two relate to an asserted failure by the Tribunal to make material findings about the procedural unfairness involved in Warren Kenny being the investigator in circumstances where that gave rise to an appearance of bias. This is said to have been a prominent part of the Claimant's case to the Tribunal. The appearance of bias is said to arise from the fact that Warren Kenny is the son of Paul Kenny, the Claimant alleged collusion in an email sent to Paul Kenny, implying that Paul Kenny was the 'element' colluding with Labour Party elements, and the collusion allegation was one of the seven matters considered by Warren Kenny as warranting a case to answer.

58. There is nothing in this point. The Tribunal made the clearest of findings that the claimant did not, at any time whilst still employed or indeed during the Tribunal proceedings, point to any individual who was guilty of any form of collusion or provide a shred of evidence to substantiate this allegation. The factual underpinning relied on by the Claimant for the

assertion that there was an appearance of bias was accordingly not made out, as the Tribunal's findings expressly demonstrate.

59. In any event, Mr Williams on behalf of the respondent submitted, without contradiction from Mr Rahman, that neither Mr Brennan nor Mr Phillips were questioned on the basis that Warren Kenny's investigation had the appearance of bias and was on that basis procedurally unfair; and the notes of evidence make clear that this was no part of the Claimant's case. Consistently with this, it appears that the criticism made by the Claimant of the disciplinary procedure adopted by the respondent in his ET1 (and presumably his evidence) focused not on any appearance of bias but on assertions that detailed information was not provided in relation to the allegations. This criticism was expressly addressed by the Tribunal and rejected. Moreover the Tribunal found that Warren Kenny carried out a thorough and reasonable investigation and made no adverse findings about his role. In the circumstances, the Tribunal's finding that there was no procedural unfairness, appears to have been amply supported by the evidence and was a finding open to it and not perverse in the circumstances.

60. Finally, so far as the grounds of appeal asserting perversity are concerned, again not developed orally, the threshold is a high one. The Tribunal made proper factual findings as to the reasonableness of the investigation. So far as concerns the suggestion that there was perversity in finding that the Claimant refused to cooperate with Mr Hayes' instruction that he work from the Gants Hill office (paragraphs 18 and 19 of the grounds of appeal) this point was not upheld by Mr Phillips at the appeal hearing and is not referred to by the Tribunal as a factual basis for dismissal. The grounds of appeal come nowhere close to sustaining a perversity challenge here.

61. For all those reasons the Claimant's appeal against the finding that his dismissal was fair fails and is dismissed.

Appeal against findings of unlawful discrimination and harassment

62. Before addressing the grounds of appeal said individually or cumulatively to vitiate the Tribunal's conclusion that there was unlawful direct discrimination and harassment here, I make two preliminary observations. First, to the extent that Mr Williams appeared in the course of argument to suggest that less protection for a philosophical as opposed to a religious belief is to be accorded by the legislation, that proposition is not accepted. The law does not accord special protection for one category of belief and less protection for another. All qualifying beliefs are equally protected. Philosophical beliefs may be just as fundamental or integral to a person's individuality and daily life as are religious beliefs. In this case the Tribunal identified precisely what the claimant's belief is at paragraph 14, specifying the central tenets of his belief. At paragraph 48 it concluded that he is a 'left-wing democratic socialist' and held the beliefs identified. Moreover it found that "there were clear outward signs of those beliefs being manifested… particularly clear from the picketing incident…" The Tribunal concluded that left-wing democratic socialism is a protected belief for the purposes of the **Equality Act 2010** and this conclusion is not challenged on this appeal.

63. Secondly, on behalf of the Claimant it is recognised that the Tribunal has not given the full and precise explanations he would have preferred when translating its findings of fact into the conclusions that are challenged on this appeal. He submits that this is one of those cases where it is necessary to go back to the factual findings in order to identify what the Tribunal relied on and the basis for its conclusions. The Tribunal heard witnesses over a relatively long

hearing and came to detailed factual findings on that evidence which are set out at paragraphs 17 and 18 of the Tribunal's judgment and this Appeal Tribunal must respect the factual findings and cannot identify an error of law merely because it would have reached a different factual conclusion. I agree. Over analysis or hypercritical analysis of the way in which the decision is written is to be avoided. Further, tribunals are not required to make findings of fact on all matters of dispute, nor to recount all the evidence: see **Aslef v Brady** [2006] IRLR 576 at [55].

64. Addressing first the conclusion that there was unlawful direct discrimination in the Claimant's dismissal, the respondent contends that there were fundamental errors here. First, the Tribunal applied the wrong hypothetical comparator or perversely concluded that there was less favourable treatment (ground 1). Secondly, the Tribunal made an error of law in relation to and/or misapplied the burden of proof (ground 5). Thirdly, it failed to make findings as to whether the dismissing officers consciously or subconsciously dismissed the Claimant in part because of his protected belief, including by failing to consider whether it was the fact of his belief or the outward manifestation, and if the latter whether the manifestation was appropriate and or a distinction was to be drawn between his belief and any conduct arising out of that belief (grounds 2, 3 and 4).

65. There is substantial common ground between the parties as to the approach to be adopted in claims of unlawful direct discrimination. The following propositions reflect the well-established approach and are common ground:

(i) the critical question in a discrimination case is why the Claimant was treated as he was: the 'reason why' question. In most cases this will call for some

consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(ii) If one of the reasons for the treatment is a Claimant's protected characteristic, it is sufficient to establish discrimination, even if not the only or even the main reason, provided it is a more than trivial reason for the impugned treatment: **Igen v Wong** [2005] ICR 931, paragraph 37.

(iii) Because direct evidence of discrimination is rare, it is often necessary to infer discrimination from all the material facts. A two-stage test has been adopted in dealing with the burden of proof (reflecting the requirements of the Burden of Proof Directive 97/80/EEC): see **Igen v Wong**.

(iv) The burden is on the Claimant at the first stage to establish a prima facie case of unlawful discrimination i.e. to prove facts from which inferences could be drawn that the employer has treated the Claimant (i) less favourably and (ii) on the prohibited ground.

(v) If the Claimant proves such facts then the second stage is reached. The burden shifts to the employer who can only discharge it by proving on the balance of probabilities that the adverse treatment was not on the prohibited ground. If the employer fails to establish this, a finding of unlawful discrimination is required (save where justification is available).

(vi) The two-stage approach is not obligatory: see **Madarassy v Nomura International Plc** [2007] EWCA Civ 33. In some cases it may be more appropriate to focus on the reason given by the employer for the impugned treatment. If the reason or reasons given by the employer demonstrate that the prohibited ground played no part whatever in the adverse treatment, the case fails.

(vii) A Tribunal is not entitled to infer discriminatory treatment from unreasonable treatment alone, but as Elias P (as he then was) explained in **Bahl v the Law Society** [2003] IRLR 640 that does not mean that the fact that an employer has acted unreasonably is of no relevance. Rather at paragraphs 99-101 he held:

"The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable then the reason is likely to be non-discriminatory. In general a person has good non-discriminatory reasons for doing what is reasonable. This is not inevitably so since sometimes there is a choice between a range of reasonable conduct and it is of course logically possible the discriminator might take the less favourable option for someone who is say black or a female and the more favourable for someone who is white or male. But the Tribunal would need to have very cogent evidence before inferring that someone who has acted in a reasonable way is guilty of unlawful discrimination.

By contrast, where the alleged discriminator acts unreasonably then a Tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the Tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the *Zafar* case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.

The significance of the fact that the treatment is unreasonable is that a Tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the Tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct…."

(viii) Finally, and also uncontroversial, it will be an error of law for a tribunal to find less favourable treatment on prohibited grounds where there is no evidence or material from which it can properly draw such an inference. As Mummery LJ held in **Effa v Alexandra Health Care NHS Trust** (unreported CA, 5 Nov 1999):

"In the absence of direct evidence on an issue of less favourable treatment on racial grounds, the Tribunal may make inferences from other facts which are undisputed or are established by evidence. However, in the absence of adequate material from which inferences can be properly made, a Tribunal is not entitled to find a claim proved by making unsupported legal or factual assumptions about disputed questions of less favourable treatment on racial grounds. This is so whether the discrimination is alleged to arise from conscious or subconscious influences operating in the mind of the alleged discriminator."

Ground 1: Comparator issue

66. As Mr Williams submits, it is trite law that a tribunal is not bound to adopt a hypothetical comparator in order to address whether a Claimant was treated differently and less

favourably than a similarly situated comparator is or would have been treated. This is because the question whether the Claimant has received less favourable treatment is often inextricably linked with the question why that treatment was received. A concentration on why the Claimant was treated as he was may accordingly answer the question whether the treatment was unlawful without any need to construct a hypothetical comparator. But although not bound to do so, if a tribunal does adopt this approach, it must do so correctly by ensuring that the relevant circumstances and attributes of the comparator reflect the circumstances and attributes relevant to the reason for the adverse treatment about which complaint is made.

67. At paragraph 51 the Tribunal held that the hypothetical comparator here would be an individual with similar qualifications and experience as the Claimant but who did not hold his protected belief. Having accordingly excluded the alleged misconduct from its identified comparator, it followed necessarily that the comparator would not have been dismissed and that the Claimant's dismissal was accordingly less favourable treatment as the Tribunal found at paragraph 52. Mr Williams submits, and I agree that this approach fails to reflect the circumstances and attributes relevant to why the Claimant was dismissed, that he had become unmanageable and had made unsupported allegations of collusion.

68. He therefore contends that a proper comparator in this case would have been someone who had become unmanageable and made unsupported allegations of collusion, but who was not a left-wing democratic socialist, and given that such a comparator would have been treated in precisely the same way as the Claimant was treated, given the Tribunal's finding that dismissal was inevitable in the circumstances, there was no less favourable treatment.

69. The problem with the comparator advanced by Mr Williams is that it is flawed for precisely the same reasons as he submits the comparator adopted by the Tribunal is flawed: this is a case where two reasons for the impugned treatment had been identified and given the Tribunal's conclusion that the principal reason for the dismissal was misconduct, it follows from the Tribunal's findings that the Claimant would have been subject to dismissal even if there had been no unlawful discrimination. As Elias P said in **London Borough of Islington v Ladele** [2009] IRLR 154 at [39]

> **"In these circumstances the statutory comparator would have been treated in the same way as the claimant was treated. Therefore if a tribunal seeks to determine whether there is liability by asking whether the claimant was less favourably treated than the statutory comparator would have been, that will give the wrong answer."**

70. Accordingly, to ask whether a person with the same unmanageable conduct would have been dismissed in the circumstances suggested involves a meaningless comparison that produces the wrong answer. Rather, the focus should have been on the reason for the treatment bearing in mind that there may be more than one.

71. Mr Williams submits however that this approach cannot be reconciled with the statutory test for direct discrimination which requires less favourable detrimental treatment. He contends that the fact that the Claimant would have been dismissed in any event means that there cannot have been less favourable treatment in his case. It is not direct discrimination to treat employees in the same way (Ladele), and since dismissal would have been the outcome in both cases, a finding of unlawful direct discrimination is necessarily precluded. I disagree. To dismiss a person on grounds of their protected characteristic (even where there is a lawful ground for dismissal as well) is an affront to that person's dignity and gives rise to a justified sense of grievance. A dismissal for both unlawful and lawful reasons is less favourable

treatment as compared with a dismissal for lawful reasons only, and sounds in damages for injury to feelings even if not in any pecuniary award for compensation.

72. Although I do not accept that the Tribunal's failure to construct a hypothetical comparator who had committed the same unmanageable conduct as the claimant was itself an error of law, I have concluded that the comparison exercise conducted by the Tribunal at paragraphs 51 and 52 was legally flawed and meaningless in the circumstances of this case. Once the Tribunal excluded the unmanageable conduct from its consideration of how the hypothetical comparator would have been treated, it was inevitable that the Tribunal would conclude that there was less favourable treatment, but the answer was positively misleading in the circumstances and not capable of determining whether there was liability on the facts of the Claimant's case.

73. Does this error taint the approach adopted by the Tribunal in paragraph 53 as Mr Williams contends? The statement in the first sentence of paragraph 53 that the Claimant had satisfied the first stage of the burden of proof in that he had "proved primary facts from which a Tribunal could properly and fairly conclude that there has been a difference in treatment between the Claimant and hypothetical comparator because of the Claimant's philosophical belief" rests on the meaningless comparison between the Claimant's treatment and the treatment of somebody who committed no misconduct whatever, and is accordingly flawed. Mr DeMarco accepted this to be the case, but submits nevertheless that the Tribunal's alternative approach midway in paragraph 53 is sufficient to sustain the Tribunal's conclusion that there was unlawful direct discrimination in the Claimant's dismissal.

74. Midway through paragraph 53 the Tribunal said

> **"Although we have considered that the principal reason for the claimant's dismissal was his conduct, we also are of the view that the claimant has established to our satisfaction that a substantial part of the reasoning behind dismissing the claimant was because of his philosophical belief and was an effective cause of his dismissal. The burden of proof having shifted … the respondent's explanation has failed to establish… that the claimant's philosophical belief was not a substantial reason for his dismissal."**

75. Mr DeMarco submits that this reflects the proper focus on the "reason why" question that is required and this is accordingly a case where the error in the Tribunal's approach to the comparator adopted is immaterial. Whether he is correct about this depends on my conclusions in relation to the third group of combined grounds of appeal pursued by Mr Williams.

Ground 5: Burden of proof

76. Before turning to those grounds, I address briefly Mr Williams' argument that the burden of proof provisions mandate a two-stage approach for the protection of employers and that by encouraging Tribunals to proceed directly to the second stage without first addressing the first stage, the courts have allowed Tribunals to assume that a prima facie case has been established and then look to respondents for an explanation. That, he submits, is unfair to respondents (and inconsistent with the genesis of the burden of proof provisions in European law) who ought not to be required to provide an explanation in a frivolous case based on assumptions and ought only to be required to provide an explanation where a prima facie case has been established.

77. There are two short answers to this argument which I reject. First, the case law and statutory provisions in relation to the burden of proof are clear and do not permit any assumption that a prima facie case has been established. This must be proved on the balance of probabilities by a complainant: see Madarassy. The only assumption permitted is an

assumption that there is no adequate explanation for the prima facie case that has been proved: see **Hewage v Grampian Health Board** [2012] ICR 1054 at [31]. Where a Tribunal goes straight to the second stage and considers whether the Respondent has proved that there has been no discrimination, it is equally on the basis of a prima facie case having been proved by the complainant and not on any assumption that this is the case. Secondly and perhaps more importantly for the purposes of this appeal, there is nothing in the Tribunal's decision to suggest that it ignored the first stage. As Mr DeMarco submits, the passage set out above from paragraph 53 of the Tribunal's reasons reflects a two-stage approach and if there is a criticism he submits, it is the failure to set out reasons for those findings. Whether that is the limit of the criticism of the Tribunal's approach remains to be determined.

Grounds 2-4: Challenge to factual findings

78. The Respondent criticises the Tribunal's conclusion that a substantial part of the reason for the Claimant's dismissal was his philosophical belief, on the following grounds:

> (i) The factual findings made by the Tribunal relevant to the Claimant's dismissal and in particular to why the dismissing and appeal officers dismissed him, make no reference whatsoever to his protected beliefs and the findings fully explain on a non-discriminatory basis why he was dismissed.
>
> (ii) The Tribunal made no finding that either the dismissing officer or the appeals officer knew that the Claimant was a left-wing democratic socialist or that the fact that he was a left-wing democratic socialist was operating on their minds at the time of dismissal.
>
> (iii) The Tribunal made no attempt to identify specific factual findings from which an inference of discrimination that called for an explanation could be drawn. There

was instead, merely a bare assertion that the Claimant had proved primary facts that called for an explanation. In fact there was no prima facie case that needed to be rebutted.

These points all ultimately boil down to one fundamental, critical question: what is the evidential basis and what are the primary findings of fact that underpin and support the conclusions expressed by the Tribunal at paragraph 53?

Given that the Claimant's case was that his dismissal was for unlawfully discriminatory reasons, the starting-point for the Tribunal was to identify the individuals responsible for it and in determining the reason for dismissal, to identify the set of facts which operated in their minds. There is no dispute that the two relevant individuals for these purposes are Mr Brennan as dismissing officer and Mr Phillips as appeals officer. The Tribunal made no findings of fact relating to the attitudes of Mr Brennan and Mr Phillips to the Claimant's protected beliefs. The Tribunal made no findings that their approach to the Claimant was unusual or untoward or for any other reason called for some explanation. On the face of the Tribunal's findings there is nothing in the circumstances surrounding the investigation and disciplinary process to suggest that the Claimant had proved facts from which a prima facie case that his dismissal was because of his protected beliefs could be inferred. Rather on the face of the Tribunal's findings the Claimant's misconduct appears to provide a full and non-discriminatory explanation for his treatment.

79. Mr DeMarco accepts that the only relevant finding in relation to the unlawfully discriminatory reason for dismissal is that set out at paragraph 53. He submits however, that

the Tribunal's conclusions at paragraph 53 are drawn from the totality of its findings of fact and not reached despite them. He contends that the findings, particularly in relation to harassment, afford a proper basis for the conclusions drawn. He points in particular to the critical findings about the picketing incident, where a vote to have a picket line was taken by others and all the Claimant was doing was publicising that picket and, consistently with his protected beliefs, that the picket line should not be crossed. This incident caused embarrassment to Ed Miliband and as a consequence, embarrassment to the Respondent. Mr DeMarco contends that for the General Secretary to pick up the phone to a regional officer such as the Claimant is extraordinary and unusual. The fact that he shouted at the Claimant for being too left-wing expressly links the picketing incident to the Claimant's protected beliefs. Although Mr DeMarco accepted that this was the only incident directly linked with the Claimant's protected beliefs, from then on, the Claimant was subjected to a campaign of harassment and although the Tribunal rejected many of the allegations he made, it accepted two of them: the incident with Mr Warr on 23 July 2012 and the refusal by Mr Hayes to allow him to relocate to Chelmsford on a temporary basis, where it rejected Mr Hayes' evidence as untrue. The Claimant's whole case to the Tribunal was that from the time of the picketing incident there was a campaign to undermine and ultimately dismiss him, orchestrated by Paul Kenny because of his protected beliefs. The Tribunal was entitled accordingly to look at the whole course of conduct and make the link between the harassment incidents and the dismissal. It was entitled to form the view (perhaps based on findings not made) that Mr Brennan and Mr Phillips held an antipathetic view towards the claimant because of his protected beliefs. The Tribunal's conclusion that part of the reasoning in those who dismissed him was his protected beliefs means that the respondent failed to satisfy the Tribunal that the protected beliefs did not form part of the reasons for dismissal.

80. Persuasively as these points were developed by Mr DeMarco, I do not accept them. None of these points are relied on expressly (or indeed implicitly) by the Tribunal, and they amount to pure speculation, without any evidential foundation beyond the Claimant's assertions. If what Messrs Paul Kenny, Warr and Hayes thought or wanted is relevant at all, it can only be because they brought their wishes to bear somehow on the relevant decision makers. It is of course possible that Paul Kenny was behind a campaign to undermine and drive the Claimant out of the respondent's employment following the picketing incident, and that he manipulated events in order to achieve that purpose. In that situation his reasons for doing so might be attributable to the decision-makers or he might be found to have set an agenda that was followed by them. But there must be evidence to support a finding that such a situation exists and a detailed analysis and careful explanation of how he brought his wishes to bear on the decision makers. The need for careful findings is likely to be all the greater in a case where a Tribunal also finds that the principal reason for dismissal genuinely operating in the mind of the decision maker is gross misconduct, that the investigation conducted is reasonable, and that dismissal is a fair sanction for such misconduct.

81. The Tribunal identified no such evidence, made no such findings and provided no such analysis or explanation. On the contrary, whilst the Tribunal made findings that support a conclusion that Paul Kenny shouted at the claimant for being "too left-wing" in relation to the picketing incident in November 2011, the Tribunal expressly rejected allegations that Mr Warr and Mr Hayes treated him differently or less favourably in the immediate aftermath. Indeed there is no finding of anything untoward as far as the two managers is concerned until eight months later, and no finding that Paul Kenny had any involvement in matters related to the Claimant's employment at all. There is a positive finding that Mr Warr was supportive of the

Claimant; and a finding that the Claimant chose to contact Paul Kenny (see paragraphs 18.6 and 18.23) for advice and support over his difficulties with the Labour Party, both of which appear to be factually inconsistent with the points now advanced. There is nothing in the Tribunal's findings about the circumstances surrounding the investigation and the disciplinary hearings to suggest that Paul Kenny, Mr Warr or Mr Hayes had any involvement in or influence over the decisions made by Mr Brennan and/or Mr Phillips.

82. Additionally, Mr Williams submits that no prima facie case of discrimination could arise unless it were shown that either Mr Brennan or Mr Phillips knew of the Claimant's protected beliefs or that he was manifesting his protected beliefs at the material time. He submits that they could not have been influenced whether consciously or subconsciously by something of which they had no awareness. The issue is all the more important in the context of religion or belief since, in contrast with certain other protected characteristics, religion or belief as a protected characteristic may not be obvious to others in the workplace. However, the Tribunal made no finding to that effect and indeed made no attempt to analyse the question of who knew what. If it had done so, he submits, it would have appreciated that there was in fact no evidence that these individuals were aware of the Claimant's protected beliefs.

83. So far as the knowledge of these officers of the Respondent is concerned, Mr DeMarco submits that both allegations of misconduct found against the Claimant are directly connected with his protected beliefs: challenging the authority of line managers in a trade union is part of his belief in the democratic process and establishing socialism through democratic processes. Further, two emails were relied on as evidence supporting the requisite knowledge of Mr Brennan and Mr Phillips. The first dated 22 November 2012 being the email from the Claimant

to Mr Brennan, the second, a similar email dated 14 December 2012, sent to Mr Phillips; both setting out his response to the allegations made against him.

84. Again, none of the points identified by Mr DeMarco were relied on expressly by the Tribunal. In any event I do not consider that these facts could justify an inference that Mr Brennan and/or Mr Phillips knew of the Claimant's protected beliefs, and were substantially influenced by it in dismissing him. First, I do not consider that challenging the authority of line management in an employment context or making unsubstantiated allegations of collusion has anything to do with left-wing democratic socialism. Consideration of the Claimant's misconduct would not in itself have required any thought or discussion about his protected belief; and there is no evidence of any discussion or focus on this point by either Mr Brennan or Mr Phillips.

85. Secondly, no part of the Claimant's explanation (as set out in the two emails) is attributed to or said to be related in any way to his protected beliefs. Indeed in relation to the Alan Olive email his explanation for refusing to accede to Mr Warr's request is that his employer had no right to prevent him from exercising freedom of speech in an email to Alan Olive. A similar statement is made by him in relation to the allegations of collusion which he asserts is an expression of opinion for which his employer had no right to discipline or censor him. Having set out his response to the seven allegations, concluding that Mr Warr had acted in an un-comradely manner towards him, he set out his allegation of discrimination on "grounds of political belief" which appears to focus largely on alleged moves being made against him politically because of his involvement and support in the Labour Representation Committee, a pressure group promoting socialism within the Labour Party. The emails refer only to the

picketing incident and the fact that he had been shouted at by Paul Kenny who told him his letter was over the top and too left-wing, and that he should allow all Labour MPs to cross the picket line, but make no attempt to link that incident to any of the matters for which he was being disciplined.

86. Thirdly, so far as the incident between Mr Warr and the Claimant on 23 July 2012 is concerned, there was undoubtedly a heated exchange in which Mr Warr threatened the Claimant with disciplinary action but there is nothing whatever in the findings (nor has any evidence been identified) to suggest that this had anything whatever to do with the Claimant's protected beliefs. Rather the request concerned a statement reasonably believed by Mr Warr to be false, made to a Labour Party Official that could reflect badly on the respondent. The Tribunal's findings provide a full non-discriminatory (and reasonable) explanation for Mr Warr's treatment, and there is no reason for concluding that Mr Brennan would have had any other view of it. The same is true of Mr Hayes' refusal to allow the Claimant to relocate temporarily to the Chelmsford office. Although the Tribunal rejected as untrue Mr Hayes' explanation and found no rational explanation for Mr Hayes' unreasonable actions, that is not the same as finding no explanation for discriminatory treatment. The Tribunal may have been entitled to draw inferences that he behaved unreasonably but it is difficult to see what proper basis there was for concluding that the Claimant's protected beliefs played any part in this treatment in the first place. Again, consideration of the Claimant's misconduct would not in itself have required any thought or discussion by Mr Brennan about his protected beliefs, and there are no findings of fact that suggest Mr Brennan should have been alerted to a discriminatory reason for Mr Hayes' treatment of the Claimant.

87. The Tribunal may well have concluded that management in the form of Mr Hayes, Mr Warr and Paul Kenny were not particularly sympathetic to the concerns raised by the Claimant about his treatment by the Labour Party. There may have been a degree of hostility between Mr Warr and the Claimant on 23 July. However, it is difficult to see how this supports an inference that a substantial reason why Mr Warr acted as he did was the Claimant's belief in left wing socialism rather than his conduct on that occasion. The same is true of Mr Hayes and Paul Kenny, and even more so, of Mr Brennan and Mr Phillips. Even if Paul Kenny pressed Mr Hayes to instigate a disciplinary investigation (as to which there is no evidence at all), that would not mean that the reason for the treatment is the Claimant's protected beliefs. What is more likely to have bothered Paul Kenny and the other managers is not the Claimant's protected beliefs per se but his conduct in refusing to accept reasonable management instructions etc. The Tribunal did not address the distinction which the Respondent sought to draw before it, between the Claimant's protected beliefs and his conduct arising from it. In the absence of any analysis or explanation of its conclusion at paragraph 53, there can be no confidence that it avoided the trap identified in Ladele of confusing the Respondent's reasons for treating the Claimant as it did with his reasons for acting as he did. As Elias P explained in that case, these are not the same thing at all.

88. In light of these conclusions, the finding of unlawful direct discrimination cannot stand. The problem with the Tribunal's conclusion at paragraph 53 is the absence of any findings of fact or evidential basis to support it. The Tribunal made unsupported legal or factual assumptions about disputed questions of less favourable treatment on protected belief grounds. There is no analysis of the factors relevant to that conclusion and the evidential basis for reaching the conclusion is nowhere identified. I am quite satisfied on the Tribunal's findings

and in the absence of any identified evidential foundation that there was no material from which these inferences could properly be made and no evidential basis for the Tribunal's finding at paragraph 53 that a substantial cause of the dismissal was the Claimant's protected belief.

89. It follows that it is unnecessary for me to consider Mr Williams' argument about the distinction between treatment based on manifestation and treatment based on the belief itself. It seems to me that the short answer to the interesting points raised by Mr Williams in relation to manifestation is that the Tribunal held that it was the Claimant's belief per se that was a cause of his dismissal (see paragraph 53). There was in the circumstances no need to consider manifestation. The point simply did not arise. There was no evidential or factual basis for that conclusion, but that is a different point.

Appeal against findings of unlawful harassment

90. I turn to consider the appeal against the findings of unlawful harassment. The Tribunal dealt with this even more briefly. The relevant passages are set out above and show that the Tribunal found three instances of unwanted conduct established out of the ten alleged. It reached the conclusion that the unwanted conduct was related to the Claimant's protected beliefs and had the purpose of creating an intimidating, hostile or humiliating environment for the Claimant.

91. The Respondent appeals on the following grounds;

(i) The Tribunal made no findings of fact that the behaviour constituting harassment was related to the Claimant's beliefs (ground 6);

(ii) the Tribunal "erred in law" by analysing in a "cursory and superficial way" whether the acts of Mr Hayes amounted to harassment; and whether Mr Kenny's

comments were related to the Claimant's belief, and by not asking themselves whether such comments were or were not likely to cause offence (ground 7);

(iii) the Tribunal failed to consider whether the Claimant's harassers had knowledge of his beliefs (ground 8).

92. Mr Williams contends that what is altogether lacking from paragraph 56 is any analysis or assessment of why the conduct occurred and any identification of the evidential basis for the conclusions reached. Instead an unsupported inference appears to be drawn from the fact that conduct was unwanted and the Claimant held or was expressing protected beliefs.

93. Taking the three incidents in turn, in my judgment there is nothing in the Alan Olive incident to relate what happened or what was said in any way to the Claimant's protected beliefs, let alone to a significant extent. Nor is there any finding of fact that the purpose Mr Warr had in asking the Claimant to retract the "onerous workload" comment was to create an intimidating, hostile or humiliating environment for the claimant. On the contrary, the findings demonstrate that he reasonably believed the claimant's statement in the email to be false and that it could reflect badly on the respondent, and wished to correct this position. The Tribunal made no finding that Mr Warr behaved unusually or in a manner that was unpleasant or over the top. Again, on the contrary, its findings suggest a reasonable and appropriate approach.

94. So far as concerns the incident involving Mr Hayes, again there is nothing in the Tribunal's factual findings to establish that Mr Hayes' behaviour was attributable at least to a significant extent to the Claimant's protected beliefs. The Tribunal's finding that Mr Hayes behaved unreasonably and its rejection of his explanation cannot afford a proper basis for an

inference that his behaviour had anything to do with the Claimant's protected beliefs, still less without any clear explanation and analysis. Moreover, such an inference is contradicted by the Tribunal's own findings at paragraph 17.6 and 17.7 effectively rejecting the Claimant's assertions that there was a hostile environment in the office after the picketing incident created by Mr Warr and Mr Hayes, and that this incident occurred many months later and without anything untoward happening in the intervening period.

95. The picketing incident is different because here there was a direct link with the Claimant's protected beliefs in the comment that he was being "too left-wing". However, it is apparent from the Tribunal's findings that the context of the telephone call between Paul Kenny and the Claimant was the high profile political difficulties the Claimant's actions were perceived to have caused to Ed Miliband. That context potentially explained both why Paul Kenny acted as he did and why the exchange with the Claimant was heated, but is neither considered nor addressed in the Tribunal's conclusion that Paul Kenny's purpose was to create an intimidating, hostile or humiliating environment for him.

96. In **Warby v Wunda Group Plc** Langstaff P quoted from a Judgment of HHJ David Richardson at paragraph 16 as follows:

> **"We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not purpose of such legislation to address all forms of bullying or antisocial behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law…**
>
> **In our judgement, when a Tribunal is considering whether facts been proved from which it could conclude that harassment was on the grounds of sex or race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The Tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed…"**

97. I respectfully agree. It seems to me that an inference in this case appears to have been drawn that unwanted conduct was attributable to the Claimant's protected beliefs without any regard for the context of that conduct. Whilst it is for the Tribunal to determine that context in light of the facts, here the Tribunal's own findings pointed strongly against a conclusion that the asserted acts of harassment had anything whatever to do with his protected beliefs, and no evidential basis to support the contrary conclusion, beyond merely the Claimant's assertions, has been identified.

98. Even if I am wrong about that, in my judgment it was not open to the Tribunal in relation to any of these incidents as found, to conclude that there was unlawful harassment on the ground of the Claimant's protected beliefs. This was a case where the Tribunal found that the respondent's purpose in relation to the three incidents was to create an intimidating, hostile or humiliating environment for the Claimant. But as Elias LJ said in **Land Registry v Grant** [2011] ICR 1390 at [47]:

> **"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**

99. Whilst I fully accept that these are fact sensitive matters for the Tribunal to determine, the incidents involving both Mr Warr and Mr Hayes are quite obviously trivial as even Mr DeMarco accepted. In my judgment the same is true of the picketing incident notwithstanding Mr DeMarco's contentions to the contrary. This was an 'incident' and not an 'environment'. Moreover, although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so. True it is that the Claimant was shouted at and that his letter was described as over the top and too left-wing, but this did not prevent him from answering back to Paul Kenny (as the Tribunal found at paragraph 17.5), and nor did it prevent him from

contacting Paul Kenny subsequently, for support in relation to his Labour Party difficulties. To conclude that the telephone conversation between Paul Kenny and the Claimant in November 2011 was an act of unlawful harassment is to trivialise the language of the statute.

100. For all these reasons, in my judgment the finding of unlawful harassment cannot stand. There was no evidential or factual basis on which the Tribunal could have concluded that there was unlawful harassment on the grounds of protected beliefs in the three incidents identified. The appeal on this ground is accordingly upheld.

Time

101. Separately by ground 9 the respondent seeks to challenge the Tribunal's decision to extend time in this case. The Tribunal's decision to extend time cannot survive given my conclusions on direct discrimination and harassment. Had I been required to consider the respondent's appeal as a free-standing point, I would have rejected it. Tribunals have a very wide discretion to extend time and may consider any factor regarded as relevant. Here, the Claimant gave evidence explaining why he only lodged his claims after the dismissal took place (his absence with stress-related illness and a wish to exhaust internal procedures). Neither was challenged and the Tribunal was entitled to accept this evidence and conclude that it would be just and equitable to extend time. I would not have concluded that the Tribunal erred in law in exercising its discretion as it did. But for the reasons given this point is academic.

Remedy Appeal

102. Finally, in light of my conclusions above the Remedy decision cannot stand. In the circumstances I shall express my views on the Claimant's appeal against that decision shortly.

103. The Claimant challenges the Employment Tribunal's decision to make no award for financial loss consequent on his discriminatory dismissal. The reasons for that decision are at paragraphs 6 to 9 of the Remedy decision. In short, although referred to **Abbey National v Chagger** [2010] IRLR 47, the Tribunal regarded **Lisk-Carew v Birmingham City Council** [2004] EWCA Civ 565 as applicable to the facts of this case, despite it being a victimisation and not a direct discrimination case. The Tribunal referred back to the liability decision and its findings that the Claimant was fairly dismissed and that the respondent was entitled to come to the view that he had become unmanageable. At paragraph 7 it held that his misconduct was the dominant cause of the dismissal, and following **Lisk-Carew** made no award of financial loss.

104. It is common ground that unlawful discrimination is a statutory tort so that compensation is awarded on a tortious basis. In other words, an award of compensation should put the complainant in the position he or she would have been in had the statutory tort not been committed by compensating him for loss flowing 'directly and naturally' from the discriminatory act: see **Essa v Laing Ltd** [2004] ICR 746 at [37]. Where the statutory tort is a discriminatory dismissal, it is necessary to ask what would have happened had there been no discriminatory dismissal.

105. Accepting this, Mr Rahman criticises the decision on the basis that a finding that a substantial part of the reason for dismissal was the Claimant's protected beliefs which infected

the decision to dismiss and means that it is not possible to say what would have happened had no discrimination occurred. This was a case, he submits, where the percentage chance approach in **Chagger** should have been applied, and might materially have affected the outcome.

106. I disagree for the following reasons. Although in the liability decision, the Tribunal found two reasons for the Claimant's dismissal (a lawful reason leading to his fair dismissal, and an unlawful one that played a substantial part in the reasoning), the finding that the dominant cause of the dismissal was the Claimant's own misconduct was a finding that this misconduct was the dominant cause of the loss flowing from his dismissal. Or to put it another way, that he would have been fairly dismissed in any event irrespective of the discriminatory reasons.

107. Although not spelt out by the Tribunal, this conclusion flowed inexorably from the Tribunal's findings at paragraphs 45 and 46 that misconduct was the principal, fair reason for dismissal and indeed, dismissal was inevitable in the circumstances of his case, and that the Claimant was guilty of gross misconduct justifying his immediate dismissal without notice. In any event, on the facts found by the Tribunal, applying **Chagger** would have led to the same result: this is a case where there was certainty of outcome therefore and a nought percent chance of the Claimant remaining in employment irrespective of the unlawful discrimination that occurred.

108. Accordingly no arguable error of law arises on the Claimant's appeal against the Remedy decision which fails.

Conclusion

109. Accordingly for the reasons given above, I am satisfied that there is no proper evidential or factual basis for concluding that the Claimant was treated less favourably because of his protected beliefs by Mr Brennan and Mr Phillips in dismissing him. Nor was there a proper basis on which the Tribunal could have concluded that there was unlawful harassment on the grounds of protected beliefs in relation to the three incidents of unwanted conduct by Paul Kenny, Mr Warr and Mr Hayes. The Claimant's assertions (there being nothing more than this by way of evidence identified as available but in respect of which findings were not made) that his protected beliefs were at least a significant part of the reason for the impugned treatment are not supported by any evidence and amount to no more than unsupported speculation. In these circumstances I am satisfied that it would not be open to a tribunal properly directing itself as to the law to reach any other conclusion. There is only one outcome on the evidence and the findings made by the Tribunal in this case. The Respondent's appeal on these grounds is accordingly upheld, and I substitute findings that there was no unlawful discrimination or harassment.

110. I dismiss that part of the Respondent's appeal which sought separately to challenge the Tribunal's decision to extend time; and I dismiss the Claimant's appeals in relation to the finding that the dismissal was fair, and in relation to remedy.

111. Finally and for completeness, I record that a number of additional points were made during oral submissions and in the skeleton arguments on both sides. I have in this Judgment sought to deal with what I consider to be the principal points raised. Both sides can however be

assured that I have carefully considered all of the matters advanced in written and oral argument on their behalves.