EMPLOYMENT TRIBUNALS

Claimant: Mr S T Uncles

Respondents: 1. National Health Service Commissioning Board
2. David J Fish
3. Kevin Bates
4. Paul Smith

HELD AT: Leeds **ON:** 4 and 5 October 2017

BEFORE: Employment Judge Franey
Mr G Harker
Mr J Simms

REPRESENTATION:

Claimant: Mr S Morris, Trade Union Representative
Respondents: Ms O Checa-Dover, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the complaints of direct sex discrimination, of direct race discrimination and of direct discrimination because of a philosophical belief fail and are dismissed.

REASONS

Introduction

1. By a claim form presented on 10 June 2016 the claimant brought complaints against six different respondents arising out of the termination of his agency work with the first respondent with effect from 6 May 2016. They were complaints of unfair dismissal, of breach of contract in relation to notice, of unlawful deductions from pay and complaints of discrimination because of or harassment related to race, sex and philosophical belief. The claimant is a man who describes himself as English, and the philosophical belief on which he relied was a belief in English nationalism.

2. At first the proceedings were accepted only against the first respondent because of an absence of early conciliation details, but subsequently that defect was rectified. The response form on behalf of all respondents was filed on 6 September 2016. It denied that the claimant was a contract worker under section 41 Equality Act 2010, denied that he had a philosophical belief, and denied that there had been any unlawful treatment.

3. Matters were clarified at a preliminary hearing before Employment Judge Cox on 21 October 2016. All complaints save for the three complaints of direct discrimination were withdrawn and dismissed. All complaints against the fifth and sixth respondents were dismissed. It was recorded that the first respondent accepted liability should any of the other respondents have discriminated against the claimant on its behalf.

4. On 17 November 2016 the respondents conceded that the claimant had been a contract worker under section 41 at the material time.

Issues

5. There were two issues for the Tribunal to determine.

6. The first was whether the claimant's belief in English nationalism was a philosophical belief protected by section 10 Equality Act 2010.

7. The second was whether in deciding on 6 May 2016 to terminate his placement the respondents treated the claimant less favourably because of sex, because of race and/or because of his philosophical belief in English nationalism than they treated or would have treated a comparator in circumstances not materially different to those of the claimant.

8. There were in addition two costs applications made earlier in the proceedings which were to be addressed at this hearing.

Evidence

9. The claimant gave oral evidence pursuant to two written statements. The first set out the chronology of events. The supplementary statement set out his philosophical belief in English nationalism. He also relied on a written statement from Anthony Linsell, who described himself as an English political and cultural campaigner. His witness statement set out the history and beliefs of English nationalism. The respondents did not wish to challenge any of the contents of Mr Linsell's statement and we accepted it as a written statement without him being called to give evidence.

10. Each of the individual respondents gave oral evidence pursuant to a written witness statement. No other witnesses were called for the respondents.

11. The parties had agreed a bundle of documents which ran to over 850 pages. Any reference in these reasons to a page number is a reference to that bundle unless otherwise indicated. In addition we were provided with a 17 page printout of extracts from the claimant's Twitter account to which reference will be made as appropriate.

Relevant Legal Framework

Jurisdiction

12. Discrimination against a contract worker is prohibited by section 41 of the Equality Act 2010.

Protected Characteristics

13. Section 9 defines the protected characteristic of "race" as including nationality and ethnic or national origins. Section 11 establishes the protected characteristic of sex.

14. Section 10 defines the protected characteristic of a religious or philosophical belief. The material parts read as follows:

> **"(1)….**
>
> **(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.**
>
> **(3) In relation to the protected characteristic of religion or belief—**
>
> **(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;**
>
> **(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."**

15. The leading authority on the proper interpretation of what will amount to a philosophical belief remains **Grainger PLC and others v Nicholson [2010] ICR 360**, a decision of Burton J in the Employment Appeal Tribunal ("EAT"). The claimant asserted that a belief in man-made climate change was a protected characteristic. The EAT agreed that such a belief was capable of being protected under what is now section 10. After considering the European Convention on Human Rights ("ECHR") and authorities on the scope of Article 9 (see below), the EAT identified in paragraph 24 five limitations or criteria which must be satisfied if a belief is to be protected:

> **"(i) The belief must be genuinely held.**
>
> **(ii) It must be a belief and not … an opinion or viewpoint based on the present state of information available.**
>
> **(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.**
>
> **(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.**
>
> **(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others…."**

16. These considerations are replicated in paragraph 2.59 of the Equality and Human Rights Commission Code of Practice on Employment (2011).

Direct Discrimination

17. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".**

18. The concept of treating someone "less favourably" inherently requires some form of comparison, actual or hypothetical, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

19. It is well established that where the treatment of which the claimant complains is not overtly because of a protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual(s) responsible for the decision: see the decision of the EAT in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed. If the protected characteristic had any material influence on the decision – consciously or subconsciously – there will have been a contravention of section 13.

Burden of Proof

20. The burden of proof provision appears in section 136 and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

21. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination.

22. Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.** It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different protected characteristic would have been treated reasonably. However, whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

European Convention on Human Rights

23. The ECHR is partially incorporated into English law by the Human Rights Act 1998. Those Articles which have been incorporated are set out in Schedule 1.

24. They include the right to life under Article 2 which is in the following terms:

> **"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.**
>
> **2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:**
>
> **(a) in defence of any person from unlawful violence;**
>
> **(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;**
>
> **(c) in action lawfully taken for the purpose of quelling a riot or insurrection."**

25. The right to liberty is guaranteed by Article 5 in the following terms:

> **"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:**
>
> **(a) the lawful detention of a person after conviction by a competent court;**
>
> **(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;**
>
> **(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;**
>
> **(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;**
>
> **(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;**
>
> **(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."**

26. The right to freedom of thought, conscience and religion is protected by Article 9 in the following terms:

> **"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in**

> **community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.**
>
> **2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."**

27. Article 14 prohibits any discrimination in the enjoyment of these rights as follows:

> **"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."**

Findings of Fact

28. This section of our reasons sets out the chronology of events involving the parties. Any factual disputes of importance to our decision will be resolved in the discussions and conclusions section.

The Claimant

29. The claimant's career has been working as a consultant in contract management roles. He has in recent times provided his services through his own limited company, Passport & Associates Limited. He has worked in the public and private sectors, including work for NHS Trusts and the BBC.

30. At the relevant time he was active in politics in his home county of Kent as a member of the English Democrats political party. He joined the party in 2004 and was a Parliamentary candidate in the 2010 and 2015 General Elections. His political activities are a manifestation of his belief in English nationalism.

31. In early 2014 the claimant faced criminal charges arising out of his conduct during a local election. They were charges brought under the Representation of the People Act 1983. The claimant unsuccessfully applied to have the charges against him dismissed in December 2014 (pages 89 and 90). The prosecution was still pending in the spring of 2016, with no date for a final hearing yet confirmed.

English Nationalism

32. Mr Linsell described in his statement what he believed it meant to be an English nationalist. He defined a nation as a group of people with a communal history, language, culture, ancestry, identity and sense of belonging. He said:

> **"A common religion often also plays a part in binding together a nation. A nation is an extended family with informal and hard to define boundaries."**

33. He went on to describe a nationalist as:

> **"Someone who gives political expression to their feelings of affection for and loyalty to their nation."**

34. A nation was to be distinguished from a state, which was a political entity claiming ownership of a territory and the right to enact and enforce laws in that territory. His witness statement set out a historical perspective on the development of the English nation going back to the mention of the *Anglii* by Tacitus in 98AD.

35. His statement said at paragraph 29:

> **"English nationalists wish to preserve the English nation and promote its welfare. In this they are like Indian, Scottish and other nationalists. English nationalists generally do not want special favours they just want the English, the largest ethnic group in England, to be able to enjoy the same statutory rights, benefits and privileges that other communities enjoy."**

36. In his supplementary witness statement the claimant explained his childhood belief that England, Scotland, Wales and Ireland were all one united country, and how through football he became aware of the differences between those different countries. He had not been active politically until his late 30s when through a friend he discovered that there were political parties who would "stand up for England and the English." This led to him joining the English Democrats in 2004. He describes his philosophy as follows:

> **"English nationalism is the nationalism that asserts that the English are a nation and promotes the cultural unity of English people. In a general sense, it comprises political and social movements and sentiment inspired by a love for English culture, language and history, and a sense of pride in England and the English people. English nationalists often see themselves as predominantly English rather than British."**

37. The claimant believes that the establishment of a separate Parliament for England would encourage the people of England to become more aware of their English identity. In paragraph 49 of his supplementary witness statement he said the following:

> **"With territory as a common factor, nationalism can focus on the common descent of a race <u>or</u> solely on a national identity which does not depend upon ancestry and race; <u>my focus is on the latter</u>."** [Emphasis as original]

<u>The Respondents</u>

38. The first respondent (also commonly known as NHS England) leads the NHS in England. It has a number of functions including entering into commercial contracts for the supply of goods and services to the NHS.

39. Kevin Bates was the Head of Commercial and Procurement at the relevant time. Paul Smith was the Transformation Lead. David Fish was appointed as Contract Management Lead shortly after the claimant's engagement began.

40. The first respondent regularly engages agency staff on a short term basis pursuant to a government-wide arrangement known as the "Contingent Labour One" framework. That framework is run by Capita on its behalf but involves use of employment agencies such as Badenoch & Clark ("B&C"). The first respondent delegates to Capita and B&C the responsibility for a number of checks on candidates to ensure that they are appointable, following which the first respondent interviews a shortlist of such candidates.

Engagement of the Claimant

41. In early 2016 the claimant was considered for a vacancy with the first respondent via the Contingent Labour One framework. His details were put forward by B&C. After an informal interview with Mr Smith and Mr Bates on 25 February 2016 the offer was confirmed by email from B&C on 26 February 2016 (page 142). The claimant accepted the offer subject to contract the same day (page 143). The initial assignment was for three months with the likely assignment running for more than six months.

Completion of Forms

42. The Contingent Labour One framework required the claimant to complete a number of different forms. An email from B&C of 26 February 2016 at pages 145-146 identified what was required. Some forms were for B&C and some for Capita. The B&C requirement included a copy of the current passport, whilst the Capita requirements included two forms of significance in this case.

43. The first was the declaration of interest form at page 147. The fourth paragraph said:

> **"I will inform the Contracting Body to which I am providing services of any situation where my honesty, integrity or impartiality might seem in doubt."**

44. The claimant signed this form on 26 February 2016. In doing so he recorded that although his full name was Steven Thomas Uncles, he was known as "Steven Thomas".

45. The second form was a criminal record declaration form at pages 151-153. It contained the following rubric at the top:

> **"If a conditional offer for the provision of service is made to you, you will be required to obtain and produce for inspection a 'Basic Disclosure' Certificate from Disclosure Scotland (who provide this service for posts located throughout the UK), which provides an independent check against the National Collection of Criminal Records to confirm the accuracy of the information provided in this Form."**

46. The first question on the form was in the following terms:

> **"Have you ever been convicted or found guilty by a court of any offence in any country…or have you ever been put on probation…or absolutely/conditionally discharged or bound over after being charged with any offence or <u>is there any action pending against you</u>? You need not declare convictions which are 'spent' under the Rehabilitation of Offenders Act (1974)."** [Emphasis added]

47. Despite his pending prosecution for electoral offences, the claimant answered "no" to that question.

48. Question 3 on page 152 of the form read as follows:

> **"Do you know of any other matters in your background which might cause your reliability or suitability to have access to Government assets to be called into question?"**

49. Again the claimant answered "no" to that question.

50. The declaration of the foot of the form was in the following terms:

> **"I declare that the information I have given on this form is true and complete to the best of my knowledge and belief. In addition, I understand that any false information or deliberate omission in the information I have given on this form may disqualify me from employment in connection with Government contracts. I undertake to notify any material changes in the information I have given above, including any future criminal convictions, to the HR or security authority concerned."**

51. The claimant signed this form on 26 February 2016. Again he made clear that his full name was different from the name from which he was known. The passport which he provided to B&C also showed his full name.

52. The claimant explained to our hearing that he considered declaring the pending criminal prosecution for electoral offences but took legal advice and decided not to mention it because he was "innocent till proven guilty". We accepted his evidence that this was his reason for not declaring that matter.

53. The claimant also provided a Disclosure Scotland report of 21 April 2015 (page 93). It confirmed that he had no criminal convictions to be disclosed.

The Claimant's Work

54. The claimant began work for the first respondent on 7 March 2016. He was part of the contract management team. He had access to commercially sensitive information and face to face contact with suppliers, sometimes negotiating on behalf of NHS England. His area of work was governed by the Public Contracts Regulations 2015 which require public authorities to act in a transparent manner. His line manager was Paul Smith, who was acting as the Contract Management Lead on a temporary basis. Within about a week David Fish was appointed to that post and took over as line manager. Mr Smith reverted to his substantive role as Transformation Lead, reporting to Mr Bates as Head of Commercial and Procurement.

55. There were no recorded issues with the claimant's work. It went well. In early May he was promoted to a more senior role.

5 May 2016

56. On 5 May 2016 Mr Smith was approached by another member of the claimant's team, David Birkett. Mr Birkett told Mr Smith that he had seen on his own Facebook profile the claimant's profile and picture but under a different name. He showed the Facebook account to Mr Smith, who could see that the person he knew as Steven Thomas was known on Facebook as Steve Uncles. Although the claimant had made clear in the B&C/Capita documentation that he used both names, these documents had not been passed on to Mr Smith or his colleagues.

57. Mr Birkett told Mr Smith he had seen press items about the claimant, having searched for his name via Google. He showed Mr Smith an article about Steve Uncles being involved in an electoral fraud allegation. Mr Smith did some internet research himself which led him to an article in Kent Online on 22 March 2016 referring to the claimant facing charges of electoral fraud. He and Mr Birkett went to speak to Mr Bates to draw this to his attention. They also told Mr Bates that they had

seen references on the internet to the claimant standing as a candidate for the Police and Crime Commissioner for Kent in the May 2016 election.

58. As Head of Department Mr Bates decided to investigate the matter further. His did his own internet research. He saw from an online news article that the claimant had made a statement via social media that the only cost-effective way to stop illegal immigrants trying to storm through the Channel Tunnel would be

> **"…to set up a machine gun and take out a few people - that would stop it very quickly and immediately cut dead this tactic…"**

59. He also viewed an interview with the claimant available online from Kent News on 4 May 2016 in a piece about the candidates for election as Police and Crime Commissioner for Kent. The interview recorded the claimant saying:

> **"But it's no good just having the threat of armed force, you have to be prepared to use it. It will only take one or two people to be shot for them to be put off and this will all disappear."**

60. Mr Bates also saw on the claimant's social media site a picture of a woman in a headscarf with the comment that she would not be welcome in the UK and a specific reference to "Ban the Burqa".

61. Mr Bates requested further information from B&C. At page 372 appeared an email he sent on 5 May at 4.43pm seeking a full explanation as to how the claimant had managed to get through compliance checks. He said his concerns included the use of the middle name on his CV instead of his surname, and that he wanted full visibility of all checks including Disclosure Scotland. He said the matter was "very serious".

62. After a further exchange of emails Mr O'Neill of B&C sent the "full pack for Capita" at 6.09pm that evening (page 370). He made clear that all necessary compliance checks had been carried out in the process, but that no social media checks were part of the framework agreement.

63. Mr Bates made Mr Fish aware that afternoon of the concerns which had arisen. Mr Bates informed Mr Fish that he was going to meet the claimant to ask him about the information about the electoral fraud charges and the other matters, and if it were true to tell him that his services were no longer required as the failure to disclose information had brought into question the claimant's integrity and honesty and that as a result the claimant had lost the trust of the management and the team itself.

64. Mr Fish arranged to meet the claimant in London the following morning. The claimant did not know what the meeting was to be about. Mr Fish told him that it was about some work he had been doing.

<u>6 May 2016</u>

65. On Friday 6 May at Stephenson House in London the claimant had a brief discussion with Mr Bates about work matters before David Fish arrived. Mr Bates and Mr Fish went to discuss matters over a coffee. We accepted the evidence of Mr Fish that Mr Bates showed him the criminal record declaration form, not any of the

social media or press postings. Mr Bates told Mr Fish that B&C had confirmed that the claimant's assignment could be terminated for any reason and at any time. The concern voiced by Mr Bates to Mr Fish was the apparent failure to disclose that he was being prosecuted for electoral fraud, a failure which brought into question the claimant's honesty and integrity.

66. Mr Bates, Mr Fish and the claimant then had a meeting. None of them kept any notes during the meeting. There was no-one else present. However, shortly after 9.00pm that evening the claimant completed handwritten notes of what had transpired that day, which appeared at pages 283-291. They included apparently verbatim quotes attributed to each of the individuals present. Neither Mr Bates nor Mr Fish subsequently compiled any notes of that meeting. However, when they saw the claimant's notes during the Tribunal process in 2017 they were able to include in their witness statements details of passages which they said had been omitted, or passages which had been wrongly included or were inaccurate. We will return to that matter in our conclusions.

67. What was not in dispute, however, was that the claimant was informed that his assignment was terminated with immediate effect. There was discussion of his use of a different name at work, the fact he was standing for election as a Police and Crime Commissioner, that he was being prosecuted for electoral fraud, and that views he had expressed in social media raised a concern because of the first respondent's equality and diversity policy and the fact that there were team members who wore headscarves.

68. The claimant had been given no warning of what the meeting was about and nor was he given any opportunity to prepare a response. He had to respond immediately in the meeting. The decision was taken straight away and conveyed verbally.

<u>After 6 May 2016</u>

69. The reasons for the decision to terminate his engagement was not confirmed in writing to the claimant. He made a number of efforts to obtain written confirmation via B&C and by writing to the respondents directly. He caused a solicitor's letter to be sent on Monday 9 May 2016 indicating that a discrimination complaint would be pursued.

70. On 13 May 2016 he was given written confirmation by email from B&C that his assignment was terminated but no reasons were given.

71. He later became aware that on 24 May 2016 the Corporate People Business Partner Adrienne Postle had emailed Mr Lewis at B&C to say that she was happy to share a short statement about the reason Kevin Bates had ended the assignment, although for any more detail she would need Mr Bates to sign off the wording. The wording she offered was:

> **"A number of significant omissions from the declaration of interest. These include no declaration of standing in the Police and Crime Commissioner election."**

72. The claimant had still not received any written explanation of the reason for the termination of his assignment by the time he presented his Tribunal claim form on 10 June 2016. The first written explanation he got was in the response form on

behalf of the first respondent which was filed on 13 July 2016. It asserted in paragraph 20 that the placement was terminated because the claimant had failed to disclose matters which might cause his reliability and/or suitability to have access to Government assets to be called into question, and failed to inform the respondent about a situation, namely that he was to stand trial on charges of electoral fraud, where his honesty, integrity and/or impartiality might seem in doubt.

73. In the months that followed the termination of the assignment the claimant made a number of posts on his Twitter account about Islam and Muslims. He did not dispute that on occasion he used the hashtag ***"****#RemoveAllMuslims*". His tweets included the following:

> **"[A] religion that finds pork and dogs 'unclean' but does not use toilet paper, and allows camel urine to be drunk, is only for the insane."**
>
> **"This is why Japan had the sense to ban Islam."**
>
> **"Ethnic cleansing…always happens to Muslims…wonder why?"**

74. In cross examination in our hearing the claimant said that in its current form Islam should be banned from England unless it were "Anglicised" and "toned down" to fit in with society in England.

Submissions

75. At the conclusion of the evidence each representative made an oral submission. Helpfully Mr Morris had also produced a written skeleton argument running to six pages which we read before the oral submissions.

Respondents' Submission

76. Ms Checa-Dover submitted that the claimant's particular brand of English nationalism failed to satisfy criterion (e) in the **Grainger** test. She referred to the postings made by him on Twitter after the termination of his assignment, but suggested that these represented his views at the time. They included the posts summarised above. She also relied on the contemporaneous press article about use of a machine gun and submitted that these views could not be regarded as compatible with human dignity or anything other than in conflict with the fundamental rights of others. She therefore submitted that the claimant had failed to establish that his philosophical belief was protected under section 10 of the Equality Act 2010.

77. As to the direct discrimination complaints, Ms Checa-Dover invited the Tribunal to conclude that the only effective cause was the failure to disclose the electoral fraud charges. She relied on the contemporaneous evidence about which documents had been taken by Mr Bates when he met Mr Fish on the morning of 6 May, the significance of the phrase "electoral fraud" in the press report which the respondents had, and the fact that a serious concern about such a matter not having been declared made sense. The claimant was in a role where rigour and transparency was particularly important. She submitted that the other matters had been raised in the discussion with the claimant only because they provided context and were part of the process by which the core issue had come to light. She also invited us to conclude that the managers felt hoodwinked by the claimant and that

this was understandable. The claimant had not suggested to them that he had inadvertently omitted to make the entry.

78. Ms Checa-Dover submitted that the lack of any documented investigation, any formal procedure and any written explanation were not matters which should shift the burden of proof. They were all explicable by the contractual framework, the nature of the engagement and the fact that Mr Bates was advised that it could be terminated at any time without any reason. She invited us to dismiss all the complaints on the basis there was no sex or race discrimination, and no protected characteristic of philosophical belief.

Claimant's Submission

79. In his written submission Mr Morris began by emphasising the burden of proof provisions in the Equality Act 2010 and then asserted that the claimant had fully complied with the rules and procedures set out by the respondents for the recruitment process. He suggested that the claim that the assignment was terminated simply because of the failure to disclosure the electoral fraud charges was "a smokescreen". The claimant had answered "no" to the question about pending criminal actions on advice because he was innocent until proven guilty. Mr Morris relied on the Universal Declaration on Human Rights article 11, article 6 of the European Convention on Human Rights, and chapter 40 of Magna Carta.

80. He also asserted that Capita would have done a check on pending court cases, although he accepted that there was no evidence before the Tribunal to that effect and it was an assumption on his part and that of the claimant.

81. Mr Morris relied on a number of matters as shifting the burden of proof to the respondents, including the lack of any formal investigation or procedure, the absence of any reason given to the claimant despite his repeated request for one, and the contents of the email from Adrienne Postle of 24 May 2016. He also relied on the fact that the other matters were raised in the meeting on 6 May, not simply the electoral fraud issue. He submitted that the respondents had failed to show that they did not contravene section 13 and that the main reason for his abrupt termination was his activity as an English nationalist.

82. The written submission went on to assert that this was a protected characteristic under section 10. Mr Morris addressed the factors set out in Grainger. He also suggested that the matter would have been different had the claimant been a woman or from an ethnic minority because the use of two different names would not have caused any enquiry.

83. In his oral submissions Mr Morris emphasised that seeking to get Muslims to "tone it down" was simply a way of saying that Islam was acceptable as long as it did not break English law. The views on border control expressed by the claimant were in line with the views of the UK Government which vigorously defended its borders as a sovereign state, and the situation the claimant had been talking about when interviewed had been where illegal immigrants had been storming the border posts in line with what had been happening in Hungary at the time. He invited us to uphold the direct discrimination complaints.

Discussion and Conclusions - Philosophical Belief?

84. The parties were agreed that the relevant authority was **Grainger.** Our task was to assess the beliefs of this claimant, not whether a belief in English nationalism in the abstract is a protected characteristic. We concluded that the claimant's beliefs went beyond the English nationalism described by Mr Linsell and by the claimant in his supplementary witness statement. Neither statement expressed any view on Islam, yet a strong anti-Islamic theme was evident in his beliefs from the following matters.

85. Firstly, at the time of the alleged contravention of the Equality Act 2010 the claimant had been quoted in an online article about the desirability of setting up a machine gun to take out a few illegal immigrants coming through the Channel Tunnel. The claimant explained the context in which he made this remark, namely that a number of individuals were storming border control posts, and also suggested that he had been misquoted because he had referred to automatic weapons not to a machine gun. However, whatever the context and precise wording, he clearly advocated killing some illegal immigrants to deter others.

86. Secondly, at the time the claimant had made posts on Facebook about "Banning the Burqa" and how a woman wearing a headscarf was not welcome in the UK.

87. Thirdly, since the termination of the assignment the claimant had posted a number of Tweets which included comments about Islam being only for the insane; that Japan had had the sense to ban Islam; and that Muslims were always the ones being ethnically cleansed and he wondered why that was. He also did not dispute that at times he had used the hashtag "*#RemoveAllMuslims*".

88. The claimant's evidence under questioning in this hearing was that Islam in its current form needs to banned unless it is "Anglicised" and "toned down." He denied that he held that view in May 2016 when the first respondent terminated his assignment, and we considered carefully his assertion that the views subsequently expressed on Twitter were not his views at the time. We unanimously rejected that argument. The only matter he could identify as having changed was his discovery that Japan had apparently banned Islam. There was no other evidence to support any significant step change or development in his views. We concluded that this discovery about Japan simply fortified views he already held. It did not cause him to change his views.

89. We therefore concluded as a question of fact that his anti-Islamic beliefs were part of his belief in English nationalism at the time of the termination of his assignment.

90. Having made that determination we applied the **Grainger** test. We were satisfied that these beliefs were genuinely held by the claimant and they were not simply an opinion or a viewpoint but represented a belief about something of a weighty and substantial aspect of human life, namely national identity. The beliefs

were also, we concluded, ones which satisfied the test of being serious, cohesive[1] and important, and were cogent in the sense of being clearly expressed.

91. The crux in our view was whether those beliefs were compatible with human dignity or fundamental rights. In in our judgment they were not. Aspects of the claimant's belief were incompatible with the right to life in Article 2. Article 2 admits that deprivation of the right to life may be appropriate where force which is no more than absolutely necessary is used, but the concept of using automatic weapons on illegal immigrants and "taking a few out" to deter others, even if those immigrants are "storming" border posts en masse to overwhelm a border post and gain entry to the country, in our judgment goes far beyond force which would be no more than absolutely necessary. Such a situation is not to be equated, as Mr Morris in one question about World War Two implied, with an armed invasion by a hostile foreign power.

92. Similarly the freedom of religion guaranteed by Article 9 is infringed by views which are to the effect that Islam in its current form should be banned if not Anglicised and toned down. That view is not compatible with Article 9. It is based on two stereotypical assumptions: firstly, that offensive practices such as female genital mutilation or "grooming" are peculiarly or predominantly matters to do with the Islamic faith or Muslims, a view unsupported by any evidence before us; and secondly that all behaviour by Muslims must be taken to be a representation of Islam as a religion.

93. We also considered that there was a likely violation of Article 14 which guarantees that the substantive rights should be enjoyed without discrimination on the grounds of religion. Those substantive rights include the right to liberty under Article 5. The hashtag "*#RemoveAllMuslims*" can only be construed as indicating coercive removal dependent on religion, and that would inevitably involve infringements of the liberty of Muslims who did not wish to be removed from the UK.

94. As a consequence the Tribunal unanimously concluded that the claimant's philosophical belief in English nationalism was not a protected characteristic in May 2016 because elements of it (expressed both before and after the termination of his assignment) were incompatible with the fundamental rights guaranteed by the European Convention on Human Rights. On that ground alone the complaint of direct discrimination because of philosophical belief failed and was dismissed.

Discussion and Conclusions – Direct Discrimination – Philosophical Belief

95. The Tribunal then addressed the question whether there had been any contravention of section 13 of the Equality Act 2010.

96. We decided to approach this as if the claimant's belief in English nationalism had been a protected characteristic just in case we were wrong about that. That was the first protected characteristic we addressed as it was at the heart of the evidence and submissions in the claimant's case. His reliance on sex and race discrimination was ancillary to that main complaint.

[1] i.e. intelligible and capable of being understood – see paragraph 34 of **Harrop v Chief Constable of Dorset Police UKEAT/0234/15/DA.**

97. The approach to be taken under section 13 is one of identifying the reason why the decision is taken. That involves consideration of the mental processes, conscious or subconscious, of the decision maker. Before considering section 13 there were three factual matters that we needed to resolve.

Whose Decision?

98. The first factual matter was to identify the decision maker(s). We accepted the evidence that the decision was made by Mr Bates. That was implicit in his witness statement and he was not challenged on it. Mr Fish was explicit in saying that it was a decision made by Mr Bates even though he supported it. The Tribunal was therefore concerned primarily with the mental processes of Mr Bates.

Documents Available 6 May 2016

99. The second factual matter was a dispute about the documents which Mr Bates had at the time of the meeting with the claimant on 6 May. Mr Morris invited us to infer that Mr Bates only had the form which appeared at pages 281A-281G which was a further declaration of interest which he signed in April 2016 as Steven Thomas. He suggested that inference was warranted because the other documents which he had earlier signed in February made clear what his full name was, and therefore had Mr Bates seen those documents there would not have been any need to question him about the two different names on 6 May.

100. In contrast Mr Bates said in paragraph 10 of his witness statement that he had other documents, and that was consistent with the contemporaneous emails. Page 372 was an email of 5 May where he requested full visibility of all checks conducted by B&C and Capita, and he repeated that request on page 371. The email that came back on 5 May from B&C at page 370 enclosed the “full pack for Capita”. That account was supported by Mr Fish who said that Mr Bates had shown him other documents including the passport and declaration forms.

101. We concluded that Mr Bates did have the full documentation from Capita including the criminal record declaration form at page 151. Despite having seen that the claimant had completed those earlier documents making clear what his full name was, he still raised it because of a suspicion that the claimant had used a different name to avoid the criminal prosecution coming to light. We declined to draw the inference which the claimant wanted us to draw. The declaration forms signed in February were in the possession of Mr Bates before and at the meeting on 6 May 2016.

What was Said on 6 May 2016

102. The third factual dispute concerned exactly was said on 6 May. There were no notes taken and no-one other than the three protagonists present. The claimant prepared notes at page 283 onwards which were done just after 9.00pm that evening from memory of the meeting earlier that day. Mr Bates and Mr Fish did comment on those notes in their witness statements, but their witness statements were drawn up after seeing the claimant's notes at the earliest in early 2017 and possibly only a few weeks or so before this hearing; at the very least their recollection of the conversation was put together some months later.

103. We did not find it necessary to resolve every dispute about what precisely was said and by whom, but in broad terms we were satisfied that Mr Bates and Mr Fish did raise a range of concerns. They included a discrepancy in the names used by the claimant; the absence from the disclosure forms of any reference to the pending electoral fraud charges, and the fact that the claimant was standing for election as Police and Crime Commissioner for the English Democrats. We found that it was said that if that had been disclosed he might not have been shortlisted by B&C or Capita. We did not find that Mr Fish said "We wouldn't have employed you" because Mr Fish was well aware that the first respondent did not employ the claimant, and screening was a matter for those intermediaries.

104. We also found as a fact that the claimant was asked about the views he had expressed on social media and in the press, and that there was mention of the first respondent's equality and diversity policy and the impact of his views on women in the workforce with headscarves.

Reason Why

105. Having considered those factual disputes we turned to the key issue, which was the reason why Mr Bates decided to terminate the assignment. This was a question of considering the matters which were effective causes in his mind. Something is an "effective cause" for these purposes if it has any material influence on his decision and it is possible for several factors to be effective causes.

106. Assuming for these purposes that his belief in English nationalism was a protected characteristic, the Tribunal was satisfied that the claimant had shifted the burden of proof. The following factors taken together meant that the Tribunal could reasonably have concluded, in the absence of any explanation from the respondents that his belief in English nationalism and its manifestations had a material influence on the decision to terminate the engagement..

107. Firstly, in the discussion on 6 May matters were raised other than the electoral fraud concern. The social media postings and online news items were discussed.

108. Secondly, the decision was communicated without any warning and with no effort to follow any kind of procedure. There was no formal investigation of the matter nor any details put to the claimant in advance.

109. Thirdly, the first respondent failed entirely to give the claimant any written explanation for the decision until after he had commenced his Tribunal proceedings.

110. Fourthly, concern was expressed in the meeting about the effect of his political views on other employees, referring to the equality and diversity policy and colleagues who wore headscarves.

111. Fifthly, the email from Adrienne Postle of 24 May suggested that the reason included the failure to disclose that the claimant was standing for election as Police and Crime Commissioner.

112. However, the burden having shifted, the Tribunal was unanimously satisfied that the respondents had shown that the belief in English nationalism (had it been protected) was not an effective cause.

113. Firstly, we accepted Mr Fish's evidence that the concern in Mr Bates' mind when they met on 6 May 2016 immediately before seeing the claimant was the issue about failing to disclose the criminal prosecution. It was those documents which were shown to Mr Fish, not the social media postings or the press items.

114. Secondly, the phrase in the press report of "electoral fraud" is a vivid phrase, and even if technically inaccurate because the offences with which the claimant had been charged did not include the word "fraud", it was nevertheless a phrase which would understandably raise alarm bells for a post of this kind in an organisation like the NHS concerned with external contracts.

115. Thirdly, the concerns of managers over the criminal prosecution were compounded by the discrepancy over the claimant's name. There was a suspicion they had been hoodwinked.

116. Fourthly, the claimant's response to the electoral fraud matter was to play down its significance and say that he was innocent until proven guilty and therefore had not put it on the form. The managers understandably took the view, that this entirely missed the point. The fact the claimant did not declare that matter as he should have done meant that Capita, B&C and the respondents were deprived of the opportunity of making an informed decision about whether to offer him the assignment or not. At no stage did the claimant say this was simply an oversight and that he had forgotten about the criminal prosecution. His response concerned Mr Bates even more.

117. Fifthly, we declined to attach any significant weight to the email from Adrienne Postle of 24 May. As the email made clear, the reason she articulated did not come from Mr Bates himself and at best it was her view of the reason he had in mind at the time; he did not see that email at the time and did not approve the formulation it contained.

118. Accordingly, we were satisfied that the respondents had proven that the effective cause of termination was the belief of Mr Bates that the claimant had failed to disclose a pending prosecution for electoral fraud coupled with the discrepancy over his name. His beliefs in English nationalism and his political activities played no part in that decision, even subconsciously, and we concluded they had been mentioned only because they were part of the factual background uncovered by the investigation after matters were first drawn to the attention of Mr Smith.

119. Similarly, the lack of any procedure was explained by the claimant's status as a temporary agency worker and by the understanding of Mr Bates that his assignment could be terminated at any time without any reason. That also explained the failure to provide any written reason to the claimant after the decision, a failure to which the claimant's swift escalation of matters contributed. He caused his solicitor to write the next working day, Monday 9 May, and initiated Tribunal proceedings one month later on 10 June. It very quickly became something for lawyers to deal with. The respondents should have given a written explanation at the time, but the failure to do so did not support an inference that they acted for a discriminatory reason.

120. It followed that even had the claimant's belief been a protected characteristic, the complaint of direct discrimination because of philosophical belief would have failed anyway on causation.

Discussion and Conclusions – Direct Discrimination – Sex

121. Although the enquiry initiated by Mr Smith was generated in part by the discrepancy between the name used at work and the name on the social media postings, as well as by the report of electoral fraud charges in the latter name, we accepted Mr Smith's evidence that he would still have made an enquiry had it come to light in relation to a woman. We were satisfied that if an enquiry into the use of a different professional name by a woman was temporally linked to a pending prosecution for "electoral fraud" which had not been disclosed on the relevant forms the result would have been exactly the same. There was therefore no less favourable treatment of the claimant because of sex. That complaint was dismissed.

Discussion and Conclusions – Direct Discrimination – Race

122. Similarly in relation to the race discrimination complaint we are satisfied that if an enquiry into why an Asian member of staff who was using different names had uncovered the facts which were uncovered when the claimant's circumstances were considered, the result would have been exactly the same. There was therefore no less favourable treatment of the claimant because of race. That complaint was dismissed.

Costs Application/Preparation Time Application

123. At the conclusion of the hearing after giving oral judgment on liability the Tribunal addressed the two applications which had been made in writing earlier in the proceedings. We heard oral submissions from both representatives on each application.

Relevant Law

124. The power to award costs is contained in the 2013 Rules of Procedure. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented". Rule 75(2) defines a Preparation Time Order as being a payment in respect of preparation time spent by the party or an adviser whilst not legally represented.

125. The circumstances in which such orders may be made are set out in rule 76, and the relevant provision here was rule 76(1) which provides as follows:

> **"A Tribunal may make a Costs Order or a Preparation Time Order and shall consider whether to do so where it considers that**
>
> **(a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted…."**

126. Rule 84 concerns ability to pay and reads as follows:

> **"In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay."**

127. It follows from these rules as to costs that the Tribunal must go through a two stage procedure. The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; and secondly if so, to decide whether to make an award and of what sum.

128. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

129. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. However there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**:

> **"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case, and in doing so to identify the conduct, what was unreasonable about it and what effects it had."**

First Respondent's Application

130. The first respondent's application for costs was made on 14 March 2017 supported by a schedule which appeared in the main hearing bundle. It covered costs incurred in the period up to 26 April 2017.

131. By order of 23 March 2017 Employment Judge Cox required the claimant to provide evidence of his ability to pay not less than seven days before the final hearing if he wanted that to be taken into account. He had not done so. The claimant confirmed through Mr Morris that he did not wish his means to be taken into account.

132. There were three strands to the application and we considered each in turn.

133. The first strand was that the whole case had been unreasonably pursued. This was based upon the proposition that the claimant knew he had failed to declare his pending criminal prosecution at the time of completing the relevant forms and could not reasonably have believed that his belief in English nationalism had played a part in the decision to terminate his assignment once that came to light. Ms Checa-Dover relied on comments which Employment Judge Cox made at the last preliminary hearing on 26 April 2017, which she submitted amounted to an informal costs warning. There was no record of what was said before us, but in any event we noted that there was no claim for costs in the period after that hearing.

134. In the period (prior to that hearing) for which costs were sought we concluded the claim had been reasonably pursued by the claimant. Firstly, he was not given any reason in writing for the termination until after he had commenced proceedings; secondly, in the meeting on 6 May 2016 the managers had mentioned factors other than the failure to declare the criminal prosecution; thirdly, his argument that English nationalism was a protected characteristic was not a hopeless one even though we found against him based on his particular beliefs; and fourthly we concluded for

reasons explained earlier that the burden of proof had shifted to the respondents to provide an explanation for the decision. We rejected that part of the first respondent's costs application.

135. The second strand to the application was the failure to comply with an "Unless Order" made on 8 February 2017 requiring the claimant to disclose documents. We accepted what Mr Morris told us about the difficulties facing the claimant in February 2017. He was hospitalised for a week in early February and then spent two weeks representing himself in the Crown Court facing criminal charges. In addition his then lay representative, Mr England, was affected by his own wife's illness for the first three months of 2017. Although the failure to comply with Tribunal orders is a serious matter, and although that is particularly serious where it is an Unless Order, we concluded that in the exceptional circumstances facing the claimant and Mr England at the time the failure to comply did not amount to unreasonable conduct.

136. The third strand of the application related to other case management issues identified in paragraphs 2(a) and 2(b) of the respondents' solicitor's letter of 14 March 2017. We concluded that the claimant and/or Mr England were at fault in the way these matters were handled at the time. However, taking into account our findings in relation to the claimant's application (see below) we concluded overall that it was not in accordance with the overriding objective to require the claimant to reimburse the first respondent any of the legal costs incurred by those matters. We considered that they were part and parcel of litigation of this kind where a claimant is represented by a lay representative who has his own difficulties to deal with.

137. The first respondent's costs application was therefore unanimously rejected.

Claimant's Application

138. The claimant's application was made by a letter of 18 September 2017. Mr Morris confirmed that he sought a preparation time order representing 21 hours of his time incurred after 11 August 2017 once the claimant's witness statements and documents had been served, but the respondents had still not finalised the bundle and their witness statements were not served until September.

139. We accepted that in some respects the first respondent's solicitors appeared to have behaved unreasonably in overlooking documents provided by the claimant electronically via OneDrive in early 2017, and in not serving the witness evidence on time. However, we noted that Mr Morris did not identify with any particularity the extra work generated by the failure to do these matters when they should have been done. We were satisfied that most of the work would have been needed anyway, and any additional work generated by emails chasing the respondents' solicitor for these matters was unlikely to amount to a significant expenditure of time.

140. We also took into account that the claimant himself was in default: he had not served Mr Linsell's witness statement in accordance with the timetable in the Case Management Orders.

141. In summary, although some additional work will have been generated for the claimant's representative by unreasonable conduct by the first respondent's representative, the number of hours so generated was not identified by the claimant and remains a matter of speculation. We concluded it was unlikely to have been

sufficient to make a Preparation Order proportionate, and that extra work chasing late documents was really just part and parcel of litigation of this kind.

142. The claimant's application was therefore unanimously rejected.

Employment Judge Franey

13 October 2017