**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4105347/2017**

**Heard in Glasgow on the 19, 20 and 21 June 2019**

**Employment Judge Lucy Wiseman**
**Members Foster Evans**
**Patrick O'Donnell**

**Mr Christopher McEleny** — **Claimant**
**Represented by:**
**Mr M Briggs**
**Solicitor**

**Ministry of Defence** — **Respondent**
**Represented by:**
**Dr A Gibson**
**Solicitor**

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim.

## REASONS

1. The claimant presented a claim to the Employment Tribunal on the 23 October 2017 alleging he had been discriminated against because of the protected characteristic of religion or belief (being his belief in Scottish independence and the social democratic values of the Scottish National Party). The claim was one of direct discrimination in terms of section 13 Equality Act.

2. The respondent entered a response denying the allegations of discrimination, and denying that belief in Scottish independence and the social democratic values of the Scottish National Party (the SNP) amounted to a philosophical belief in terms of the Equality Act.

3. An Employment Judge, at a Preliminary Hearing on 29 May 2018, decided the claimant's belief in Scottish independence amounted to a philosophical belief within the meaning of section 10(2) of the Equality Act, and that it could be relied upon by the claimant as a protected characteristic for the purposes of claiming direct discrimination under section 13 of the Equality Act

4. The parties agreed, at the commencement of this hearing, that the alleged instances of less favourable treatment were (i) the respondent's decision to suspend the claimant; (ii) the respondent's refusal to accept the recommendation of the Vetting Officer to reinstate the claimant and (iii) the claimant's resignation in terms of section 39(2) of the Equality Act.

5. The respondent's representative, at the commencement of the hearing, made an application for a restricted reporting order and an anonymisation order in terms of rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The application was made in connection with the names of the security vetting personnel and those who gave statements to the UK Vetting Agency. The application was made because of concern for vetting security personnel who could be targeted because of the work they do, and because those who had given statements had done so on the basis they would be confidential. The respondent had, for the purposes of this case, agreed to disclose the content of the statements, but wished to have the names of those involved anonymised in order to ensure the credibility of the process remained intact, and people were not deterred in the future from coming forward.

6. The claimant's representative did not object to the application.

7. The Tribunal decided to grant the respondent's application and put in place a Restricted Reporting Order and an Anonymisation Order. It was agreed the names of those involved will be replaced with the letters "A" to "J" as appropriate.

8. We heard evidence from witness "A" who is the Head of Profession, Policy and UK Strategy for UK Security Vetting and witness "B" who is the Assistant Head of Vetting Policy with the Ministry of Defence (MOD) and from the

claimant. We were also referred to a number of jointly produced documents. We, on the basis of the evidence before us, made the following material findings of fact.

**Findings of fact**

9. The claimant was employed by the respondent as an Electrical Maintenance Fitter from 15 August 2016 until his resignation on 15 September 2017. The claimant's role was subject to security clearance.

10. The United Kingdom Security Vetting (UKSV) service is currently the single vetting provider for the military and the foreign and commonwealth office. The UKSV was launched on 1 January 2017, and brought together the Defence Business Services National Security Vetting (DBS NSV) and the Foreign and Commonwealth Services National Security Vetting (FCOS NSV).

11. The DBS NSV had the task of investigating security vetting of employees and contractors of the respondent, and made decisions regarding the claimant in this case.

12. The Directorate of Security and Resilience (DSR) is the department within the MOD tasked with, amongst other things, taking decisions regarding security clearance.

13. There are three security levels, the middle of which is Security Clearance (SC), which determines whether a person's character and personal circumstances are such that they can be trusted to work in a position which involves long-term, frequent and uncontrolled access to secret assets, and occasional access to top-secret assets.

14. Security vetting looks at a person's financial history; current and historic medical history and any potential impact this may have on their decision-making ability; lifestyle including internet activity, sexual activity, dependences and criminal convictions. The focus of vetting is to look for vulnerabilities which could make the individual open to corruption.

15. A person's political views and/or membership of a political party will not present a security concern unless those views, or that membership, may make them vulnerable to sharing sensitive information inappropriately or if those views or that membership have the potential to demonstrate the person holds extreme views which could undermine national security.

16. The term "Aftercare" is used to describe a review of a person's security clearance, and is triggered by someone raising a concern (using an Aftercare Incident Report {AIR}) which could affect an individual holding a NSV clearance. The Aftercare team will carry out an investigation and monitor anything of continuing security concern between periods of normal review (security clearance has a normal lifespan of 10 years).

17. The respondent encourages individuals to come forward with security concerns so they may be investigated. Concerns raised in an AIR have to be addressed, and will be investigated because the focus is on risk to national security.

18. The Civil Service Code was produced at page 408. The Code included, at page 411, a section regarding political impartiality which provided that "*you must serve the government whatever its political persuasion, to the best of your ability and in a way which maintains political impartiality and is in line with the requirements of this code, no matter what your own political beliefs are. … You must not act in a way that is determined by party political considerations, or use official resources for party political purposes, or allow your personal political views to determine any advice you give or your actions."*

19. The respondent was aware the claimant has been a member of the Scottish National Party (SNP) since 2006. He is an elected SNP councillor and leader of the Council's SNP group. He also ran for Depute Leader of the SNP in 2016.

20. The claimant has a philosophical belief in Scottish independence. The subject of Scottish independence was discussed on the sites where the claimant

worked, particularly in the period leading up to the independence referendum and subsequently when the SNP won a majority of seats at Westminster.

21. The claimant undertook an apprenticeship with Babcock International Group Marine Division (a defence contractor), and commenced employment with them on 16 August 2004, working on various sites including Faslane and Coulport. The claimant obtained his security clearance when he started as an apprentice.

22. An Aftercare Incident Report was raised by Babcock Marine Security, and passed to HMNB Clyde Base Security and then on to DBS NSV on 14 November 2012 (page 82). The report noted the claimant had "*addressed the Scottish National Party conference in Perth (18 – 21 October 2012) during which he had revealed his role at HMNB Clyde and announced views on the future of the base".* The report set out details of the systems to which the claimant had access.

23. The DBS NSV Aftercare Vetting Manager ("F") sent an email on 24 January 2013 (page 86) in which he stated: "*I had a heads-up about this matter in Nov/Dec 12 and advised at the time that DBS NSV could not dictate what political party a subject could support providing there was no real security concern. I suggested that the matter was a local one and would need to be closely monitored on site. I believe I mentioned it was obviously important that subject does not use his TU role to further his political agenda to the extent that it would constitute a security concern and there is no evidence to suggest he is doing this, or is indeed anything other than an active SNP member promoting his party's manifesto and ideals. Admittedly his party believes that an independent Scotland should be free of nuclear weapons but the decision on independence is some way off and there is nothing to suggest he is anything other than "traditionally political" in his actions i.e. uses debate and parliamentary process (rather than action or violence) to further his party's agenda. The AIR supports that the matter is being handled locally and in my opinion this is the correct avenue through which this situation needs monitoring/managing. The AIR contains nothing to change my initial opinion."*

24. The matter was referred back to Babcock to deal with. The AIR noted that "DBS NSV have directed BSYO to take no further action". The BSYO is the Base Security Officer.

25. The claimant was not aware an AIR had been raised. He was not told anything officially about the AIR, but knew unofficially that a line manager had been asked to provide information.

26. A second AIR concerning the claimant was raised in February 2016 (page 88) by the Base Security Office at HMNB Clyde ("C" was the Head of Security at HMNB Clyde, and "D" was the Assistant Head of Security), and was sent to DBS NSV. The report raised three concerns: (i) the Daily Mail had published an article on 8 December 2015, which had the headline "*Council's SNP Leader forced to apologise for IRA lyrics relating to comments made on social media by [the claimant]".* The claimant had subsequently removed the post and apologised. It was noted the claimant followed a number of trending topics on Twitter, and three highlighted were Sinn Fein, Easter Rising 1916 and Irish Unity. (ii) The claimant was currently off on long term sickness absence and (iii) the claimant had raised two grievances against his line manager. The report noted a grievance had been raised against the claimant because he was considered "antagonistic".

27. The AIR was acknowledged by the DBS NSV team (page 91) and it was noted further investigations would be carried out. A letter was sent by the DBS NSV team to HMNB Clyde (Faslane) where the claimant was based, asking for a sealed envelope to be passed to the claimant. This was duly done and the content of the sealed envelope was a letter (page 93) informing the claimant the DBS NSV would like to carry out an aftercare review to confirm his suitability to hold continued SC level security clearance, and that this would involve an interview with one of the DBS NSV team. The claimant was asked to, and did, complete a pro-forma questionnaire, and return it.

28. The interview did not in fact take place because the claimant resigned on 3 March 2016.

29. The claimant accepted there was nothing within this AIR which related to his belief in Scottish independence. The claimant signed a written undertaking (as part of these proceedings) (page 407) in which he accepted that the issues discussed with the respondent on the 27 September 2016 (which were the subject of the AIR - see below) in relation to (a) social media activity which may have suggested sympathies for the IRA; (b) his social media posts which had led to interactions with Rangers fans and his receiving sectarian abuse; (c) his public pronouncements of opposition to the renewal of Trident and (d) his mental health, are not issues which are related to or incorporated within his belief in Scottish independence.

30. The log maintained by the respondent (page 78) recorded that on 8 March 2016 the claimant had left the employment of Babcock, and his security clearance had lapsed. It was noted "*clearance is not to be reinstated or transferred.*"

31. Security clearance lapses when an individual leaves employment. A person only holds security clearance if they are required to do so. This requirement ceases when a person leaves employment.

32. The claimant announced to the Press in mid/late May 2016 that he intended to stand as a candidate in the SNP Depute Leader election.

33. The claimant subsequently applied for two posts with the respondent in July 2016. The claimant was offered and accepted (page 95) the post of Electrical Maintenance Fitter at Beith Defence Munitions. This was a post which required security clearance. The claimant was unaware his security clearance had lapsed.

34. The DBS resourcing team confirmed, by email of 8 August 2016 (page 97) that the claimant's security clearance was valid until the 10 June 2019, and that no restrictions applied. This was an error by that team because the security clearance lapsed when the claimant left, and it had been noted the security clearance was not to be reinstated or transferred.

35. The claimant commenced work on site on 15 August 2016, and worked until the error was discovered some days later when “E” (a member of the Directorate of Security and Resilience) was asked by “C” (Head of Security at HMNB Clyde) to check on the security clearance details. “E” carried out a check of the claimant’s security clearance and noted the security clearance had been confirmed in error.

36. “E” sent an email dated 19 August 2016 (page 105) confirming that “having reviewed the previous AIR and circumstances leading to the reinstated SC clearance I believe that it is suitable to suspend [the claimant’s] security clearance with immediate effect. I will be writing to DBS NSV to instruct them to record the clearance as suspended and for them to recommence the security review that was initiated prior to [the claimant] leaving his previous employment. I will instruct DBS NSV to refer the case to DBR DefSy (Defence Security) prior to any further security clearance being awarded/reinstated”.

37. The decision to suspend the security clearance (and therefore the claimant) was taken because the security clearance had been reinstated in error, there was an outstanding AIR which had not been fully investigated and the claimant had been out of the workplace for five months.

38. A letter was sent to the claimant (page 106) informing him that his security clearance had been suspended and because of this he was no longer SC cleared and able to operate on site. Accordingly, the claimant was suspended from duty with pay from 19 August 2016 pending further investigation.

39. The claimant completed a medical consent form and questionnaire, and a financial questionnaire prior to meeting with “I” for an interview on 27 September 2016.

40. At the same time as this happened, the respondent received an email from a journalist with the Sunday Express (page 102) dated 18 August 2016 at 12.49. The email noted she had been informed the claimant had previously been dismissed after claims he had taken unauthorised pictures at Coulport/Faslane and passed them on to SNP activists. The email went on to say the claimant had put his name forward for the office of Depute Leader of

the SNP and she had raised this matter because it was the media's job to scrutinise the candidates' fitness for the role.

41. This email was forwarded up the line and "C" responded in an email dated 18 August at 16.38 (page 99) to say " .. *Mr McEleny was re-employed by the MOD at Beith in recent months. When we discovered this earlier in the week, we immediately contacted DES PSYA and NSV to ask them what was going on .."*

42. DSR instructed DBS NVS to recommence the investigation into the AIR, and to refer the case back to DSR prior to any further security clearance being awarded or reinstated.

43. The claimant met with "I", a Vetting Officer, on 27 September 2016 to investigate the concerns which had been raised in the AIR. A note of the interview was produced at page 139.

44. The claimant told "I" that he had copied and pasted a third party tweet on to his Twitter feed, stating "*And you dare to call me a terrorist, while you look down your gun?"* The claimant explained the circumstances in which this had been posted, and that had he been aware of the significance of the phrase or its association with Irish terrorism, he would not have used the post. The claimant took the post down as soon as he became aware and apologised for it.

45. The claimant also explained that he had an interest in Irish history and Irish nationalism because his family originally came from Donegal. He read extensively on the subject and enjoyed finding out about his cultural identity.

46. The claimant told "I" he had become involved in football related posts, and had been given police advice following receipt of sectarian abuse. The claimant accepted this had been blown out of proportion due to his political prominence and confirmed he would take cognisance of this in the future.

47. The claimant confirmed he had been absent from work because of stress. He had been prescribed medication, but was clinically depressed.

48. The notes record on page 145 that the claimant had been a member of the SNP since 2006, and was currently an SNP councillor and leader of the SNP opposition. It was noted the claimant maintained an excellent level of general knowledge concerning current affairs and politics which informed his moderate and reasoned personal beliefs which he did not try to force on others. He had not ever been sympathetic to any subversive organisation. The claimant confirmed he was not opposed to nuclear weapons in general but was opposed to the renewal of the Trident programme on the grounds the money could be better spent elsewhere. The claimant did not consider this to be a conflict of interest with his job as he was neither a pacifist nor opposed to nuclear weapons in principle. He assured "I" he had no conscientious objection to working in any nuclear establishment concerned with the research, manufacture or storage of nuclear weapons. The claimant's belief in Scottish independence was not discussed.

49. "I" produced a Vetting Officer Analysis and Recommendation document (page 147). "I" confirmed he understood the concerns raised in the AIR dated 3 February 2016, but he believed the claimant had offered a truthful account of the circumstances surrounding the alleged IRA lyrics and a sincere apology. "I" also confirmed he was willing to accept the rationale offered by the claimant that he was not opposed in principle to nuclear weapons, although he would, for practical reasons, prefer that Trident was not replaced. "I" was comfortable that this position did not pose any additional risk to the claimant being granted SC clearance, particularly as Beith was not a nuclear site.

50. "I" concluded his report by stating "*in my view, no significant issues of security concern arose during the interview and from the information made available at the interview, I have no reservations about the claimant's suitability for SC clearance.".*

51. "I"'s report and recommendation were sent to the Aftercare team to consider.

52. An email (page 150) was also sent to the Beith site informing them that whilst no formal decision on the claimant's clearance had been made yet, the Vetting Officer was minded to recommend the reinstatement of his security clearance.

This led the Head of Establishment at Beith ("G") to write to Chris Baker, Personnel and Industry Security Adviser with DBS NSV on 11 October 2016 (page 159) stating he was "*disturbed and concerned by the suggestion … that the Vetting officer is minded to recommend the reinstatement of Mr McEleny's clearance. This would then require me to allow Mr McEleny to return to his employment at DM Beith with full access to the site which, under normal circumstances, would be acceptable for a member of staff with full clearance. However, given the circumstances of Mr McEleny's suspension and the information that came out during the discussions on the 18th and 19th August including the AIR that was raised at the time of his departure from his previous employment, and the reasons for it, I am not content that he is allowed back on this site. It would be interesting to know the outcome of the security review that "E" was going to instruct DBS NSV to carry out…"*

53. "G" also confirmed the claimant had requested a protected conversation which the claimant believed would allow them to reach a reasonable settlement to part company in a speedy and amicable manner.

54. "G" has no authority in respect of the vetting process or decisions made regarding that process: he cannot refuse to comply with a vetting decision.

55. "F" of DBS NSV responded to "G's" email, and expressed his frustration at what he saw as interference in the process from those on the base. "F" also expressed his concern that it appeared the claimant was being viewed as guilty on the basis of the suspension and gossip. "F" went on to say that "*it is not lost on this office that Mr M clearly upset the establishment but left a [sic] pay-off, the detail of which is subject to a confidentiality agreement. Ergo, he wasn't dismissed and must be treated with fairness and impartiality. Unless all SNP supporters are to be disallowed from having NSV clearance I am leaving this argument off the shelf. Obviously there could be a conflict of interest but this is what we were looking into .. Can I ask that details of this case are not divulged further as it always seems to fuel speculation and discontent? … "*

56. The Aftercare team manager decided to investigate further because of the concerns raised by “G” and others whom it was said could provide supporting evidence. Arrangements were made to interview “G”, and “C” and “D” who are Head, and Assistant Head, of Security at Faslane.

57. The notes of the interview with “C” and “D” were produced at page 215. Both men stated the claimant was not a suitable individual to be trusted with security clearance. They believed he had, over a number of years, exhibited a pattern of behaviour which, when taken together with his political beliefs and activities, would make him unsuitable. The claimant was viewed as a troublemaker who was both unreliable and untrustworthy: he was viewed as someone who would challenge authority and tried to bend the rules to suit himself.

58. The notes of the interview with “G” were on page 218. “G” referred to discussions which had taken place on 18 and 19 August 2016 regarding the AIR, during which it had been suggested the claimant had been taking photographs onsite which had subsequently been shared with third parties. “G” could not remember the names of the third parties but thought it may have been with SNP colleagues. “G” conceded he had no evidence to substantiate this claim. The notes record “G” confirming he did not consider the claimant’s political beliefs to be a bar in their own right to employment at Beith.

59. “F” contacted “C” by email (page 225) asking him to elaborate on what information had been leaked and what photographs had been taken. “F” also enquired why these matters had not been raised at the time if they were a security concern.

60. “C” responded by email (page 224) in the following terms:

> “*A number of Parliamentary Questions to the Secretary of State for Defence have been raised by the local MP to the area, Brendan O’Hara (SNP), over the past 3 years. Our analysis of those questions suggests that the questions were formulated using insider knowledge from O’Hara’s contacts on the base. In the interview with “J”, I was explaining the sense we had of Mr McEleny’s overall character and strong political views.*

*However, there is no evidence that he personally leaked the information to any external party. This was conjecture on my part and hence why you have not seen this evident in any Aftercare Report.*

*I wasn't in on the call with … but the background here is that Mr McEleny had access to a mobile phone at Coulport while in employment with Babcock Marine. He justified its use to the previous line management structures as a necessity to allow him to keep in touch with his constituents. When I took up this post and enforced a ban on mobile phones in our most sensitive areas he opposed this. Unfortunately I do not have the detail to hand on what he is alleged to have taken a picture of so will hand that off to "D" to confirm from his case file."*

61. "F" prepared a report (page 236) which set out the background to the current situation. "F" concluded that those making the claims could not substantiate or corroborate them, and that the claims had been made because people had not agreed with the initial recommendation. "F" confirmed in his report that he was "*left with the overriding sentiment that HMNB were probably "miffed" that he got another job, so much so that every little disagreement, inference or dislike of Mr McEleny has become almost "fact", but fact without evidence. I get a sense that the HMNB hierarchy, with the west of Scotland being particularly politically charged over the whole SNP/independence debate, look upon Mr McEleny as a "spy in the camp" but having served there for many years Mr McEleny has had plenty of opportunity to "do damage" and despite this they have no evidence of any wrongdoing on his part. ..."*

62. "F" recommended reinstatement of the claimant's security clearance because no security risk had been identified. The report (and all relevant information) was referred to the Directorate for Security and Risk (DSR) in December 2016.

63. DSR took the decision in June 2017 to reinstate the claimant because all investigations had been carried out and there were no security concerns associated with the claimant, and therefore security clearance could be reinstated and the claimant could return to work at Beith.

64. The delay between December 2016 and June 2017 was caused by the fact the post witness "B" currently occupies, was vacant, and a backlog of work accumulated. The respondent, at that time, had no system in place to prioritise the urgent cases, and it took time for the claimant's case to work its way to the top of the pile.

65. The claimant was advised by letter of 12 June 2017 (page 262) that his suspension would end on 10 June 2017 because DSR Vetting had instructed UKSV to lift the suspension of his security clearance with instruction to recommence employment within the workplace. The claimant was instructed to report for normal duties on 15 June 2017.

66. An anonymous AIR was submitted on 17 June 2017 (page 330). The AIR raised various matters which were investigated by "F" and dismissed as being not credible. "F" prepared a report (page 342) in which he concluded the information was simply scare-mongering and without foundation.

67. The claimant did not return to work. The claimant had, in October 2016 (page 151) sent an email stating that he believed the handling of the situation as well as the perception amongst his work colleagues made a return to work not feasible. He enquired whether a protected conversation could be facilitated to allow a reasonable settlement to be reached. The respondent did not respond to the claimant's request.

68. The claimant emailed HR again on 20 June 2017 (page 281) stating "*I have decided my employment with the MOD is no longer tenable. As you may be aware I was suspended for 10 months as my security clearance was withdrawn. The accusations that were directed at me as being the reason for having my clearance suspended have resulted in my believing that the employer's actions have destroyed any hope of an ongoing relationship. Therefore I wish to inform you that it will be my intention to resign and go to an employment tribunal under grounds of constructive dismissal. However as you will agree it is neither in my interest or in that of the MOD to have to embark on such a public process in which I will raise the following issues which were reasons for having my security clearance suspended:*

- *MOD personnel urging my security clearance to be removed on grounds that I am a member of the SNP …"*

69. "F" responded to the claimant's letter on 21 June 2017 (page 284) in the following terms:

> "*Thank you for sight of your email to DES HR, the overriding nature of which it would not be appropriate for me to comment upon.*
>
> *I would however like to elaborate on the first sentence of the last paragraph of my previous letter (date 12 June 2017) so that you are aware of the context in which it is written. Given the democracy we live in a person's specific political "stance" is of no interest unless of course it is vehemently opposed to the UK's democratic principles from a National Security point of view. Indeed the Civil Service Code is quite clear on the political impartiality of government staff when carrying out their official duties. Our own vetting guidelines are similarly "to the point". It was not lost on this office that all MOD sites probably have a cross section of "voters" within its personnel and so your specific party membership (of the SNP) was not a consideration. …"*

70. The respondent did not facilitate a protected conversation as requested by the claimant.

71. The claimant did not resign in June 2017.

72. The claimant attended a meeting on 27 July 2017 to discuss his wellbeing, his current absence and whether the respondent could do anything to help him return to work. The respondent wrote to the claimant after that meeting (page 320). The letter noted the claimant confirmed he was suffering with anxiety as a result of his suspension, and "*felt that [he] was unable to return to work at any point now or in the future as [he] felt [he] could not work within this organisation".* The letter also recorded the claimant saying he intended to resign from the Department and intended to remain on sick leave.

73. The claimant sent an email dated 15 September 2017 (page 364) to the HR department formally notifying them of his immediate resignation. The claimant believed there had been a fundamental breakdown in trust between himself and his employer, and that he had been discriminated against due to a mental health condition, his belief system in the form of his support for an independent Scotland, his membership of the SNP and his religion.

74. The claimant obtained alternative employment which started on 3 November 2017. The claimant is earning £443.11 gross per week. This is slightly more than he previously earned (£442.31 gross per week) with the respondent.

**Credibility and notes on the evidence**

75. Witness “A” is the Head of Profession, Policy and UK Strategy for UK Security Vetting. This was a new post in UKSV, with a remit to modernise and standardise security vetting. “A” was not in post at the time of these events, but gave evidence because he is the most senior person in the organisation to speak to these matters. “A” had, in preparation for the hearing, read the documents and spoken to those involved in the case, and in particular to “F”, whom he described as being the most experienced person in Aftercare.

76. Witness “A” was a credible and reliable witness who gave his evidence in a straightforward and honest manner. “A” set out the chronology of what had happened, and explained the reasoning behind the decisions which were made.

77. “A” explained the purpose of security vetting was to protect national security, and in particular to look at “insider threat”, that is, individuals who hold sensitive positions and who may be minded to share that information with others who may wish harm to the UK. “A” emphasised the need to encourage individuals to come forward with concerns.

78. Witness “A” told the Tribunal, and we accepted, that membership of a political party was not a security concern unless the individual held extreme views which could undermine Government policy. He confirmed the fact the claimant

was an active member of the SNP and promoted his party's manifesto and ideals in a peaceful manner was not a security concern.

79. Witness "A" rejected the suggestion that the decision to suspend the claimant, carry out investigations and ultimately the claimant's resignation was because of his belief in Scottish independence. He concluded there was a "distorted view" by local management on site that the claimant was a risk to national security. "A" accepted the AIR process could allow an individual to make up vexatious allegations to keep someone's security clearance restricted, but he was confident this would be discovered in the objective investigation which followed.

80. Witness "B" is Assistant Head of Vetting Policy and currently works for the Directorate of Security and Resilience (DSR). DSR is responsible for setting the security policies for the MOD. Witness "B" heads up the team making decisions regarding security clearances. The team includes "E" who took the decision to suspend the claimant because he did not have valid security clearance, and reinstate the investigation into the AIR. We also found witness "B" to be a credible witness.

81. Witness "B" told the Tribunal that in the vetting process questions will be asked of everyone regarding their beliefs. There are no specific questions regarding Scottish independence. The reason these questions are asked is because the respondent wishes to know about terrorist links or links to far-right organisations.

82. Witness "B" supported witness "A" in explaining the fact the three issues raised in the AIR were worthy of investigation individually and cumulatively.

83. We accepted the evidence of witness "B" when she explained to the Tribunal that when the first AIR had been received the claimant had been permitted to continue to work with restrictions being put in place. This contrasted with when the second AIR was received and the claimant was suspended from work. Witness "B" explained the difference was that on the first occasion the claimant had valid security clearance, whereas on the second occasion the

claimant's security clearance was not valid because it had been reinstated in error.

84. Witness "B" rejected any suggestion the AIR had been raised because of the claimant's belief in Scottish independence. "B" told the Tribunal that "*DSR had no concerns that anyone was acting for anything other than security reasons. If it was suggested that the claimant's belief in independence was the reason for it being raised, I would say "No". People are encouraged to raise security concerns. The issues raised were considered cumulatively. Political belief is not a security risk unless it links to or supports a terrorist group .."* Witness "B" confirmed that if those same concerns had been raised against any other person, they too would have been investigated.

85. Witness "B" supported the view of witness "A" when she told the Tribunal that she believed the concerns raised by "C", "D" and "G" were genuine security concerns, and were raised because of the culture of encouraging people to raise concerns. "B" referred to the concerns regarding the claimant's character and his reaction to the ban on using mobile phones on site. There was concern regarding rule breaking. "B" rejected the suggestion the political views were the reason for the concerns being raised. "B" was satisfied that the motive of "C", "D" and "G" in raising the concerns was explored during the interviews. "B" emphasised that "*regardless of how the issues came to light, it is important to investigate".*

86. We also found the claimant to be a credible witness notwithstanding his tendency to provide the response he wished to give rather than answer some of the questions put to him in cross examination. The claimant's position was that certain people at Beith did not want him working there. The claimant did not know "G" but assumed people must have told "G" stereotypical things about him, such as "*he's a Nat"; "he's against Trident"; "he's not fit to be on site"; "he supports independence".* The claimant also felt there was a community in the MOD who did not want him working for the MOD because they did not like him. The claimant suspected this was because he held a senior position in the SNP and supported independence.

87. The claimant believed the allegations made by “C” and “D” to have been maliciously fabricated to ensure his security clearance was revoked. The claimant believed they did not want a prominent SNP politician and independence supporter working on site. The term “spy in the camp” was accurate because the threat to national security was seen to come from SNP/independence.

88. The claimant told the Tribunal that at the time of the independence referendum and subsequently when the SNP returned a majority to Westminster, there had been discussions about Scottish independence on site. The claimant was of the view that the majority of employees on site were not in favour of independence, and that those who were (with the exception of the claimant) had kept their views quiet.

89. The claimant was very concerned when he learned of the allegations regarding leaking of information and taking photographs. These allegations were essentially allegations of espionage, which if proved, could carry a prison sentence of up to 14 years. The claimant had wanted to return to work because it was important for him to see matters through to a conclusion to confirm he was not a threat to national security. The long delay in hearing from the respondent regarding the decision and the fact there was a lot of chatter about the situation resulted in the claimant concluding he could not return to work. He was concerned that if he returned to work it would simply be a matter of time before the next allegation was made.

90. The claimant told the Tribunal he sent the email of the 6 October because he had been in a panic and feeling under pressure regarding how to explain to people why he was not at work. Plus, he had been in the middle of the Depute Leader of the SNP contest. He felt he needed to find a way out. He had sent a further email in June because he had been ill with the stress of it all. He did not in fact resign until September because after the June email things seemed to improve and people had started to talk to him again. The claimant rejected the suggestion he had resigned because he did not get a pay-off from the respondent.

**Claimant's submissions**

91. Mr Briggs referred the Tribunal to sections 13, 109 and 136 of the Equality Act. He invited the Tribunal to find the evidence of witness "A" to be both credible and reliable, and that he had given his evidence in a straightforward and honest manner. The only issue with "A"'s evidence was that he could not speak to events or decisions because he had not been involved: he could only speak to his opinion on matters.

92. Mr Briggs submitted the evidence of witness "B" should be treated with some caution because she had at times appeared unwilling to give answers which may have weakened the respondent's position. Further, witness "B" could also not provide factual evidence.

93. Mr Briggs submitted it was a difficulty for the respondent that they failed to lead evidence from anyone at Faslane, Coulport or Beith. Neither witness "A" or "B" could speak to the motivations behind the AIRs or the further queries raised by individuals on those bases. This was a lacuna particularly in the context of how the burden of proof operates. Mr Briggs invited the Tribunal to draw an adverse inference from the fact the respondent had not called these individuals.

94. Mr Briggs invited the Tribunal to find the claimant to be a credible and reliable witness. The Tribunal was invited to accept the claimant's evidence that it was well known throughout his employment that he was both an elected SNP politician and a campaigner for Scottish independence. Further, the claimant had given evidence that voiced political opinion in Faslane and Coulport was against Scottish Nationalism, and that this was due in part to the concern that an independent Scotland would not be used to house the UK's nuclear deterrent, which posed a potential threat to their livelihoods. Mr Briggs submitted it would fall within the industrial knowledge of the Tribunal that members of the UK's defence community would more likely than not favour maintaining a union with the country they serve.

95. Mr Briggs noted there was an issue with the claimant not knowing about or having documents at the time, until either "I" interviewed him or they were

produced for this hearing. Mr Briggs submitted that any failure on the part of the claimant to specify who did what and when was because of this.

96. Mr Briggs invited the Tribunal to contrast the way in which the claimant had been treated in relation to the first and then the second AIR. He had not been suspended whilst the first AIR was investigated, but had been suspended in relation to the second one. It was submitted that the only difference was the fact an email had been received from a journalist. There was no genuine belief or suspicion that the claimant was an enemy spy. It was not credible to say the concerns had to be investigated. It was submitted the people who wanted the claimant suspended had not succeeded in February and had therefore made further allegations which had delivered the suspension. If the suspension was causally linked to a discriminatory act, then liability for it attached to the respondent.

97. Mr Briggs submitted no evidence had been given regarding how the error in the claimant's clearance had been identified. No official correspondence was recorded in the log. Mr Briggs submitted it was possible to assume that individuals from either Faslane or Coulport had become aware of the claimant having been hired by the respondent and contacted individuals from Beith.

98. It was submitted the reason the claimant was suspended in August and not in February could only have been because of the additional allegation of espionage. The AIR had not changed: it contained identical allegations. There was no increase in risk that would warrant a suspension in August. Witness "B" initially advanced the position that it was because the claimant's clearance had been reinstated in error, but she provided no clear or cogent explanation as to how the risk posed by one individual to national security could be affected by an administrative error they were unaware of. Witness "B" then advanced the position that the passage of time could of itself create a risk. This was at odds with the fact the claimant's vetting form waiting for approval from her department for a similar period without there being any attendant increase in risk. The only logical inference the Tribunal could draw was that the increased risk must have come from additional information gleaned from the email from the journalist.

99. The allegation that the claimant was a spy was risible in circumstances where there was nothing to support the allegation. If the respondent cannot show that it had any genuine concerns the claimant might have been a spy, then the Tribunal is free to substitute its own motivation for why the decision was taken. It was submitted that there was sufficient evidence by witness “C” for the Tribunal to find that the discussion leading to suspension could have been because of the claimant’s religious or philosophical beliefs.

100. It did not matter if the decision maker in relation to the suspension was not himself motivated to suspend on the basis of the claimant’s philosophical beliefs, provided he was materially influenced by those who did have that motivation in their influencing, and those influencers are employees of the respondent, then liability will still pass to the employer.

101. Mr Briggs invited the Tribunal to find the claimant had discharged the onus to establish that suspension could have occurred for a discriminatory reason. It was then for the respondent to demonstrate on the balance of probabilities that there was another reason for the less favourable treatment.

102. The recommendation of “I”, following the interview on 27 September, was that the claimant’s security clearance be reinstated. This was leaked to someone at Faslane, Coulport or Beith and resulted in “G”’s email requesting that security clearance was not reinstated. Mr Briggs submitted that given the claimant’s prominence within the independence movement, there was sufficient evidence to allow the Tribunal to draw the inference that this email could have been motivated by the claimant’s belief in Scottish independence. This was supported by the reference in “I”’s email which suggested there was a bit of “hectoring” going on here, which in turn suggested the sender of the email believed the allegations were unfounded even at this stage. The respondent did not call the sender of the email and therefore could not discharge its burden.

103. Mr Briggs submitted that finding the claimant had a prima facie case was borne out by the response the email received from “F”. Witness “A” described “F” as the being among the most experienced vetting officers within UK

security. His assertions and conclusions, formed from having been involved with this process, should carry considerable weight and should be treated by the Tribunal as more than simply establishing a prima facie case.

104. Witness “A” confirmed that the effect of “G”’s email was to widen the scope of the investigation and prolong the submission of the report by a further two months.

105. The claimant was advised by email of 12 June 2017 that his suspension was being lifted. He advised the respondent by email of 20 June of his intention to resign. He sought a protected conversation with the respondent.

106. Mr Briggs submitted the claimant resigned in circumstances where he was entitled to by reason of the employer’s conduct. In order to establish that his resignation was a dismissal for the purposes of section 39(2)(c) Equality Act, the claimant was required to show:-

(a) that the respondent committed a breach of his contract;

(b) that the breach was material;

(c) that he resigned in response to the breach and not for some other, unconnected reason and

(d) that he did not delay too long before resigning.

107. The respondent, by discriminating against the claimant, breached the implied term of trust and confidence. The breach was material insofar as discrimination is serious. It caused the claimant to be off work for a considerable period of time, and caused him considerable distress. The claimant resigned in response to this breach. The claimant did not delay too long before resigning. He did not resign during the period that he was suspended because he was concerned that his security clearance had not been restored. This could have adversely affected his employment opportunities going forward, and his liberty if the allegation of espionage was proved.

108. Mr Briggs submitted that in all the circumstances the Tribunal should find the claimant's dismissal was an act of discrimination. In the alternative, the Tribunal should find that the acts of discrimination between August 2016 and June 2017 were detriments causally linked to the claimant's dismissal.

109. Mr Briggs invited the Tribunal to find for the claimant and to make an award of compensation for the financial losses up to the date the claimant commenced alternative employment, and an award for injury to feelings.

**Respondent's submissions**

110. Dr Gibson set out the findings in fact he invited the Tribunal to make. He submitted the question to be determined by the Tribunal was, did the respondent discriminate against the claimant because of his belief in Scottish independence by treating the claimant less favourably than the respondent would have treated others; and the answer to that question was no. Dr Gibson submitted that any other person who had done the things which the claimant had done would have been suspended and investigated quite regardless of whether they held a belief in Scottish independence or not.

111. The claimant, it was submitted, relied on a hypothetical comparator. The Tribunal must compare like with like, except for the existence of the protected characteristic (section 23 Equality Act). Dr Gibson referred to the case of **Shamoon v Chief Constable of the royal Ulster Constabulary 2003 IRLR 285.** He submitted the hypothetical comparator in this case was an MOD employee requiring security clearance to carry out the role, who held a belief in Scotland remaining part of the UK, or a belief that it really did not matter how Scotland was governed, who had the same AIR raised against them and who had had their security clearance re-instated in error, but who would not have been suspended.

112. Dr Gibson submitted it was not too difficult for the Tribunal to hypothesise of a left-wing Scottish Labour councillor who does not believe in Scottish independence, who posts lyrics of a pro-IRA song on Twitter, follows Sinn Fein, Easter Rising 1916 and Irish Unity on Twitter, who gives a speech at a Scottish Labour Party conference criticising the renewal of Trident, who had

been off work for a significant period of time and had a diagnosis of depression, who had raised two grievances at work and was described as being always resistant to management instructions, had access to secure sites on a nuclear submarine base, who resigned from a contractor role and was then re-appointed to an MOD position in error without the outstanding matters being investigated, having their security clearance suspended pending investigation of these issues. It was submitted that it would be perverse for the Tribunal to find that such a hypothetical comparator would not have been treated in the same way as the claimant.

113. The claimant must, to establish direct discrimination, show that he has been less favourably treated than a hypothetical comparator would have been. The respondent conceded that the suspension of the claimant's security clearance was subjecting him to less favourable treatment in comparison to a hypothetical comparator whose security clearance was not suspended. The respondent accepted that having your security clearance suspended pending investigation would be an unpleasant experience for any employee. However, the respondent refuted that they would exercise their powers to suspend security clearance pending investigation in a discriminatory way, using it inappropriately to treat people less favourably because of any protected characteristic.

114. Dr Gibson noted that in the amended claim form, the claimant asserted the respondent, in refusing to accept the recommendation of the vetting officer to reinstate the claimant's security clearance, treated the claimant less favourably than it would have treated someone without his belief in an independent Scotland. Dr Gibson submitted this was a misunderstanding of the situation and the process. The respondent did not refuse to accept the recommendation of the vetting officer to reinstate the claimant's security clearance. The exact opposite occurred. The DSR who are tasked with making such decisions did accept the recommendation of the DBS NSV. The reference to "G"'s reaction is neither here nor there because "G" did not have the authority to refuse to reinstate the claimant. The document circulated by Chris Baker dated 29 September 2016 was circulated to allow individuals to

comment on the recommendation: once they had done so, further interviews were undertaken and then a recommendation was sent to the decision-maker.

115. The claimant did not aver the raising of the AIR in February 2016, the email of “G” in October 2016 and the statements of “C”, “D” and “G” given in October 2016 were in and of themselves the less favourable treatment, and this was fatal to his case.

116. It appeared the claimant’s case was that the raising of the complaints themselves was because of his protected characteristic. However the claimant had not pled his case in that way.

117. In any event, the raising of the complaints themselves was not because of his protected characteristic, they were because of genuine security concerns which the complainers believed required further investigation. That two of the complaints which came out in October 2016 were related to suspicions that the claimant had used his position at Babcock’s to obtain and pass on information to the SNP were not made because the claimant believed in Scottish independence, they were made because the complainers genuinely had these suspicions.

118. There was no credible evidence to support the claimant’s position that the complaints themselves were because of his protected characteristic. The claimant provided some generalities about what he saw as unionist leanings within Faslane. However, he failed to present any evidence which might suggest that “C”, “D” and “G” were motivated to raise concerns about him because of his belief in Scottish independence. The claimant did not know “G” at all, and barely knew “C” and “D”. “C” and “D” hold senior security positions on the base and it is their job to raise concerns. “G” simply expressed disquiet about the juxtaposition of being told on the one hand that the suspension was to be lifted, whilst being told on the other hand that there were security concerns: he requested further investigations.

119. Dr Gibson submitted that the opposition which came from “C”, “D” and “G” was not unfavourable treatment. They had no authority to refuse to accept the recommendation: all they had was authority to offer further comment. It was

submitted that their opposition was not because of the claimant's protected characteristic, but because they had genuinely held concerns that the claimant presented an ongoing security risk. Witness "A" said repeatedly in his evidence that:-

- the witnesses genuinely perceived him to be a security threat;
- genuine concerns were raised;
- I would not criticise the reporting of these issues;
- coupled with two other concerns there was a cumulative effect which gave rise to a real security concern and
- there was no love lost, no secret of the fact they did not like him, but they did believe and had formed a view that he presented a security risk.

120. Dr Gibson submitted a contract could not be breached until a contract comes into existence. The claimant's case had to be confined to the actions of the MOD after 15 August 2016. Dr Gibson drew the Tribunal's attention to the fact the allegations of direct discrimination, as they had come out in the evidence, related to the actions and motivations of persons who had no contact with the claimant after February 2016, and no locus over decisions about him. The claimant indicated in October 2016 and June 2017 that he wished to leave the business, but did not actually do so until September 2017. Dr Gibson submitted it was clear the claimant resigned because he did not get a pay off from the respondent.

121. The claimant had to show the less favourable treatment occurred because of the protected characteristic. This required the Tribunal to consider the reason why the claimant was treated less favourably. The claimant averred at page 73, paragraph 14 that "*The respondent, in suspending the claimant because of fanciful and anonymous allegation of espionage it received from a tabloid journalist …"* This was fatal to his case because the claimant says he was suspended because of a fanciful and anonymous allegation of espionage it received from a tabloid journalist, and not because of his philosophical belief.

The claimant did not aver the respondent suspended him because of his belief in Scottish independence. In **Ahmed v The Cardinal Hume Academies UKEAT/0196/18** the EAT held the Tribunal had not misapplied its own findings. Its conclusion was that the employee had been suspended because of his difficulties with handwriting. That was a finding that treatment was because of the adverse effect of an impairment or of something arising from disability: it was not a finding that the treatment was because of the disability**.**

122. The fact the claimant had been treated less favourably than a hypothetical comparator by having his security clearance suspended when the hypothetical comparator would have not have their security clearance suspended was not sufficient to establish that direct discrimination had occurred. There had to be "something more" from which the Tribunal can conclude that the difference in treatment was because of the claimant's belief in Scottish independence (**Madarassy v Nomura International plc 2007 IRLR 246).**

123. Dr Gibson submitted the question which the Tribunal had to answer is "why did the respondent treat the claimant in this way?" He referred to the case of **R (on the application of E) v Governing Body of JFS and another 2009 UKSC 15** and **Igen v Wong 2005 IRLR 258** which had approved the correct test as being "*what was A's conscious or subconscious reason for treating B less favourably?"*

124. Dr Gibson submitted this was a case where the claimant's belief in Scottish independence was part of the background circumstances leading up to the suspension of his security clearance. However, it was not the reason for it. The Tribunal required to tread carefully and not be misled into thinking that because some of the claimant's behaviour which led to his suspension in August 2016, or was subsequently raised at interview in October 2016, related to him being an SNP councillor, that this meant the reason for the suspension of his security clearance was because of his belief in Scottish independence.

125. Dr Gibson asked: why did the respondent suspend the claimant's security clearance: what was their conscious or subconscious reason for doing so?

He submitted there were two related reasons for suspending the security clearance. The first reason was because his security clearance should not have been reinstated in the first place. The second reason was that there was an outstanding AIR which had not as yet been investigated and had to be prior to allowing the claimant unescorted access to a high security munitions site. Dr Gibson invited the Tribunal to have regard to the email sent by DSR on 19 August, and to “B"'s evidence: she was clear the claimant should never have had his security clearance reinstated in August 2016 and when it was realised this had been done by mistake, it was necessary to suspend the security clearance pending the investigation into the outstanding allegations.

126. Dr Gibson next asked why the respondent had taken until 12 June 2017 to reinstate the security clearance: what was the conscious or subconscious reason for taking so long? Dr Gibson referred the Tribunal to “A"'s evidence that the investigation had taken from 19 August 2016 until 16 December 2016, and then the case had been referred to DSR. “B” had spoken to the reason for the delay in her department being because of a backlog of work and no additional resources.

127. Dr Gibson acknowledged the claimant sought to make something of the fact his security clearance was not simply reinstated on the 29 September. It was submitted this position misunderstood the process. The stakeholders were given an opportunity to comment and when they raised questions it was appropriate for DBS NDV to hear those additional concerns. The concerns were rejected.

128. The claimant had sought to link his suspension with him standing for Depute Leader of the SNP, but the timeline did not work because the Depute Leadership contest was not triggered until May 2016, by which time the AIR had already been raised.

129. The claimant also sought to link his suspension with the email sent from the Sunday Express journalist. Dr Gibson acknowledged this email had triggered discussions and brought to light the fact that an error had been made in

reinstating the security clearance without reference to DBS NSV, it was not the reason why he was suspended.

130. Dr Gibson concluded his submission by reminding the Tribunal it should not be misguided into a perception that addressing someone's political beliefs with them as part of a vetting procedure was a no-go area and that mention of them automatically meant there was some objection to the person holding those beliefs. That was simply not the point of addressing them. The point of addressing them was to ascertain that they are democratic and non violent beliefs of a non-extremist nature. These are genuine security issues.

131. Dr Gibson also referred to the previous Judgment in this case where it had been noted that "*1.6 million people share the claimant's belief in an independent Scotland".* The MOD employ 13,500 people in Scotland, and it could reasonably be presumed that a large number of them shared the claimant's philosophical belief and were in no way discriminated against.

**Discussion and Decision**

132. The first issue for this Tribunal to consider was the scope of the claim. The claimant had, in the response to the respondent's amended grounds of resistance, confirmed the alleged instances of less favourable treatment were (i) the respondent's decision to suspend the claimant and (ii) the respondent's refusal to accept the recommendations of the vetting officer to reinstate the claimant. There was also a complaint of constructive dismissal in terms of section 39(2) of the Equality Act.

133. The Employment Judge, at the commencement of the hearing, confirmed with the representatives that the above points accurately reflected the claimant's case.

134. It became apparent during the hearing that the focus of the claimant's case was that it was "C" and "D" who had discriminated against him. The claimant argued that "C" and "D" had raised complaints against him because of his belief in Scottish independence. The claimant's representative submitted the

complaints were causally linked to the detriment and the respondent was vicariously liable in terms of section 109 of the Equality Act.

135. Dr Gibson, in his submission, stated the fact the claimant had not averred the raising of the AIR in February 2016, the email of “G” in October 2016 and the statements of “G”, “C” and “D” in October 2016 were in and of themselves less favourable treatment, was fatal to his case. The case had not been pled in this way and it was not now open to the claimant to run that argument.

136. We noted, in considering this matter, that no application to amend the claim to include allegations of less favourable treatment and discrimination involving “C” and “D” had been made at any time. We acknowledged the claimant had initially been unrepresented but at the time of the response to the respondent’s amended grounds of resistance, the claimant was represented and had the benefit of legal advice.

137. There was no reference within the claim or the response to the respondent’s amended grounds of resistance to “C” or “D”. There was no allegation that they had treated the claimant less favourably because of his belief in Scottish independence. We acknowledged Mr Briggs did, in his submission, refer to the claimant not being aware of all the information regarding who did what, because he had not been provided with information until the interview with “I” or until documents were produced for this hearing. However, we considered the claimant could have sought to amend his claim once these matters became clear, but he did not do so.

138. We decided that in the absence of any amendment by the claimant to include allegations of less favourable treatment by “G”, “C” and “D”, this Tribunal must determine the case as pled. That case is set out in the response to the respondent’s amended grounds of resistance (page 71) where it was said the claimant was less favourably treated by the respondent when he was suspended and when the respondent refused to accept the recommendation of the vetting officer to reinstate his security clearance, and that the respondent had thereby breached the implied duty of trust and confidence entitling the claimant to resign and claim constructive dismissal.

139. We next had regard to the relevant statutory provisions which are found in section 13 of the Equality Act. This provides that "*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*".

140. Section 39(2) of the Equality Act provides that an employer (A) must not discriminate against an employee of A's (B) by dismissing B.

141. Section 136 Equality Act provides that: *"(1) this section applies to any proceedings relating to a contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision .."*

142. The claimant alleged there had been three instances of less favourable treatment:- (a) when the respondent took the decision to suspend the claimant; (b) when the respondent refused to accept the recommendation of the vetting officer to reinstate the claimant; and (c) when the claimant resigned.

143. Mr Briggs invited the Tribunal to draw an adverse inference from the fact the respondent had not called "C" and/or "D" to give evidence. We declined to do so for two reasons: firstly it is for the respondent to decide whom to call to give evidence and secondly, given the issue regarding "C" and "D" did not emerge until the claimant gave his evidence, it would not be appropriate to do so.

***The first alleged instance of less favourable treatment: suspension***

144. The first alleged instance of less favourable treatment was the respondent's decision to suspend the claimant. Section 136 of the Equality Act (above) sets out the burden of proof in cases of discrimination. The Supreme Court in the case of **Hewage v Grampian Health Board 2012 ICR 1054** endorsed the guidance set out in the case of **Igen Ltd v Wong 2005 ICR 931** (which in turn endorsed the guidelines previously set out by the EAT in **Barton v Investec**

**Henderson Crosthwaite Securities Ltd 2003 ICR 1205).** The guidelines make clear that it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not show such facts, the claim will fail. Only if such facts are made out to the Tribunal's satisfaction is the second stage engaged, whereby the burden of proof then shifts to the respondent to prove, on the balance of probabilities, that the treatment in question was in no sense whatsoever on the protected ground.

145. The claimant, in order to claim direct discrimination, must have been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant. Section 23(1) of the Equality Act makes clear that there must be "no material difference between the circumstances relating to each case." In other words, in order for the comparison to be valid, like must be compared with like.

146. We had regard to the Explanatory Notes to the Act which summarise that the comparator must be an actual or hypothetical person who does not share the claimant's protected characteristic and is in not materially different circumstances from him.

147. We also had regard to the **Shamoon** case (to which we were referred) where it was stated, in relation to a comparator, that the comparator required for the purposes of the statutory definition of discrimination must be in the same position in all material respects as the victim save only that s/he is not a member of the protected class.

148. We considered the above points make clear that the hypothetical comparator relied upon in this case must be someone who was in the same position in all material respects as the claimant, but who did not have a philosophical belief in Scottish independence.

149. Mr Briggs did not, in his submission, construct a hypothetical comparator, but suggested to the Tribunal that a comparison could be made by looking at the way in which the claimant had been treated in relation to the first AIR – when

he had not been suspended – compared with the second AIR – when he had been suspended. We could not accept that submission because, as set out above, the comparison must be with someone who does not share the claimant's protected characteristic.

150. We considered the hypothetical comparator would be a person who did not believe in Scottish independence, and who had resigned from a contractor role and subsequently been appointed by the MOD in circumstances where (a) there was a note on the security log stating the person's security clearance had lapsed and was not to be reinstated or transferred and (b) there were outstanding matters in an AIR raised prior to the resignation (relating to concerns regarding the posting of lyrics of a pro-IRA song on Twitter, following Sinn Fein, Easter Rising 1916 and Irish Unity on Twitter, giving a speech at a political party conference criticising the renewal of Trident, being off work for a significant period of time with a diagnosis of depression, raising two grievances at work, being resistant to management instructions and who had access to secure sites on a nuclear submarine base) which had not been investigated.

151. We must ask how a hypothetical comparator would have been treated. It is for the claimant to show the comparator would have been treated more favourably. There was no evidence before the Tribunal to suggest how other people had been treated, and so the claimant invited the Tribunal to draw inferences regarding the treatment of a hypothetical comparator.

152. We had regard to the case of **Laing v Manchester City Council 2006 ICR 1519** where the then President of the EAT stated that, in his opinion, the Court of Appeal in ***Igen Ltd*** had made it clear that the Tribunal was entitled to have regard to all material facts at stage one, including facts adduced by the employer. He explained there was a difference between an employer's explanation for allegedly discriminatory treatment (which should be left to the second stage) and facts adduced by the employer to counter or put into context the claimant's evidence (which it is permissible for the Tribunal to consider at the first stage).

153. We also had regard to the **Shamoon** case (above) where it was said that in many hypothetical comparator cases, the claimant may lead more general evidence and invite the Tribunal to find facts from which it can infer that the employer treated the employee (in that case a female) less favourably than it would have treated a male employee in the same circumstances.

154. We, in considering the question of how a hypothetical comparator in the same or similar circumstances would have been treated, had regard firstly to the evidence of "A" and "B" when they told the Tribunal that when a person leaves employment their security clearance lapses because it is no longer required. The claimant did not dispute this or lead any evidence to cast doubt on what the Tribunal had been told, or suggest that this had not happened in other cases. The claimant in fact accepted in cross examination that security clearance lapsing because a person left employment and no longer needed it was "*understandable"*. We accepted the evidence of "A" and "B" that when a person leaves employment their security clearance lapses because it is no longer required, and we found as a matter of fact that when the claimant left his employment with Babcock, his security clearance lapsed.

155. The claimant was in the position where, when starting employment with the MOD, he needed to have his security clearance reinstated because it had lapsed. The respondent's HR department duly asked for the necessary checks to be made regarding the claimant's security clearance, and received confirmation he had security clearance. We accepted the evidence before us that this confirmation was given in error and that that error had arisen because the claimant's initial security clearance had been valid for a period of 10 years and therefore, but for it lapsing, it would still have been valid. The claimant, however, did not have security clearance because it had lapsed, and there was a note on the system stating it was not to be reinstated or transferred. The effect of the error was that the claimant commenced work on site in circumstances where confirmation of the necessary security clearance had been issued in error.

156. There was no dispute regarding the fact the claimant required security clearance for his job on site at Beith. The claimant suggested he could have

continued to work on site without security clearance, but with restrictions in place. He supported this argument by pointing to the fact restrictions had been put in place to allow him to continue working whilst the first AIR was investigated. The respondent rejected that suggestion and pointed to the fact that on the first occasion the claimant had valid security clearance, whilst on the second occasion the claimant did not have valid security clearance. The respondent also pointed to the fact there was an outstanding AIR and the claimant had been out of work for five months.

157. We accepted the respondent's evidence regarding this matter. The claimant was in a different position because he did not have valid security clearance and there were outstanding concerns in the AIR which required investigation. We understood the issue of being out of work for 5 months would not, of itself, have been a reason to suspend. The issue with it was, however, the fact that until the respondent spoke with the claimant to explore what he had been doing in that period of time, they would not know whether there were any causes of concern.

158. We concluded, having had regard to these points, that a hypothetical comparator would have been treated in the same way as the claimant. We say that because the material point regarding security clearance lapsing upon leaving employment was not disputed by the claimant. Further, having accepted the respondent's evidence that the claimant's security clearance was confirmed in error, there was no basis for drawing an inference that another employee, in the same circumstances as the claimant, and whose security clearance had been confirmed in error, would not also have been suspended.

159. We next had regard to the claimant's argument that the real reason for his suspension was because an email had been received from the journalist for the Sunday Express, which had referred to the claimant leaking information and taking photographs, and this was what had prompted his suspension. The claimant considered he was supported in making this argument by the fact the email from the journalist was dated 18 August 2016 and sent at 12.49 (page 102); the email from "C" was also dated 18 August, sent at 16.38 (page

99) and “E” confirmed in an email dated 19 August at 10.59 that he would be writing to DBS NSV to instruct them to record the clearance as suspended.

160. We, in considering this matter, had regard to the evidence of “A”. He was asked if there was a link between the email from the journalist and the decision to suspend, and he replied “*No I don’t believe so – concerns regarding the claimant arose earlier in the week.”*

161. We also had regard to our findings of fact, based on the evidence and documents, which set out that “C” learned of the claimant’s employment with the MOD at Beith, and contacted DBS NSV to query it. This query caused “I” to check the system and learn that the security clearance had lapsed, and that it was not to be reinstated or transferred. This occurred earlier in the week prior to the receipt of the email from the journalist. This conclusion was supported by the fact that in “C”’s email of the 18 August, he referred to “*when we discovered this [that is, the claimant’s employment with the MOD at Beith] earlier in the week, we immediately contacted … NSV to ask them what was going on.”*

162. We were satisfied, having regard to the above, that the issue regarding the claimant being employed at Beith was raised by “C” earlier in the week, prior to the email being received from the journalist. The email from the journalist was not the reason for the claimant’s suspension. We noted the undisputed fact that the AIR raised in February 2016 had not been investigated because the claimant left his employment with Babcock. We further noted this AIR had been raised by “C”, and accordingly it would be within his knowledge that the investigation was outstanding and that the claimant’s security clearance could not be reinstated without the investigation being undertaken. This was the reason why “C” queried the claimant’s employment.

163. We concluded, in relation to the first allegation of less favourable treatment, that the claimant had failed to show that he was treated less favourably than a hypothetical comparator would have been. We say that because we accepted (i) a person’s security clearance will lapse upon leaving employment; (ii) the security log clearly noted the security clearance was not

to be reinstated or transferred; (iii) it was reinstated in error in circumstances where the investigation of an AIR was outstanding. Those are the reasons why the claimant was suspended, and they would have applied equally to the hypothetical comparator in the same or similar circumstances. There was no basis upon which those primary facts would have supported drawing an adverse inference of discrimination.

164. We should state that even if the claimant had shown he was treated less favourably than a hypothetical comparator would have been, we considered he totally undermined his claim that this was "because of" his philosophical belief when he sought to argue that the reason for the suspension was because of the email from the Sunday Express journalist.

165. The claimant further undermined his claim when, in his response to the respondent's amended grounds of resistance (page 73), under a heading entitled "Legal Position" it stated: *"The respondent, in suspending the claimant because of a fanciful and anonymous allegation of espionage it received from a tabloid journalist, treated the claimant less favourably than it would have treated someone without his belief in an independent Scotland".* The claimant, in making the assertion, that he was suspended <u>because of</u> a fanciful and anonymous allegation of espionage, undermined his argument that he had been suspended because of his belief in Scottish independence.

166. We were referred to the case of **Ahmed v The Cardinal Hume Academies UKEAT/0196/18** a case involving alleged direct disability discrimination, where the claimant, in his appeal, sought to argue that if the reason for his suspension was his difficulty in handwriting, that must amount to direct discrimination. The EAT upheld the Tribunal: it agreed the claimant had been suspended because of his difficulties with handwriting, but concluded that was a finding that treatment was because of the adverse effect of an impairment or of something arising from disability, it was not a finding that the treatment was because of the disability itself.

167. We accepted Dr Gibson's submission that even if the Tribunal made a finding that the respondent suspended the claimant because of a fanciful and

anonymous allegation of espionage it received from a tabloid journalist, it would not be a finding which would support a claim of direct discrimination.

168. We decided, for all of the reasons set out above, to dismiss the first alleged instance of less favourable treatment.

***The second alleged instance of less favourable treatment: refusal to acceptthe recommendation***

169. We next considered the second alleged instance of less favourable treatment which was said to be the respondent's refusal to accept the recommendation of the Vetting Officer to reinstate the claimant. We noted there was no dispute regarding the fact that Vetting Officer "I" confirmed he had no reservations about the claimant's suitability for security clearance. "G", when he learned of this, emailed to say he was not content that the claimant be allowed back on site given the circumstances of his suspension and the information disclosed in discussions on 18 and 19 August.

170. The claimant described this as a "refusal" to accept the recommendation of the Vetting Officer. We accepted the very clear evidence given by witness "A", when he told the Tribunal that "G" had no authority to challenge the decision made by the Vetting Officer: he, in essence, had no authority to "refuse" to accept the recommendation of the Vetting Officer.

171. We, in addition to this, also had regard to the fact the respondent did not, in fact, refuse to accept the recommendation of the Vetting Officer. The sequence of events was that "I" investigated the concerns raised in the AIR, and made a recommendation that the claimant's security clearance be reinstated. "G" then raised further security concerns. The Aftercare Team Manager decided it would be appropriate to investigate those concerns. "F" carried out this investigation and recommended the reinstatement of the claimant's security clearance. The claimant's security clearance was reinstated, his suspension was lifted and he was told to return to work. We concluded, in these circumstances and having regard to the fact "G" had no authority to challenge the Vetting Officer's decision, that there was, in fact, no refusal by the respondent to accept the Vetting Officer's recommendation.

The opposite was in fact true: the recommendation was accepted and the security clearance was reinstated. We accordingly decided the claimant has not shown the alleged less favourable treatment occurred, and this aspect of the claim must fail.

172. We decided it would be appropriate, notwithstanding our decisions (above) to stand back and consider the reason why the claimant was treated as he was. We decided this would be appropriate because the claim involved the use of hypothetical comparators. The House of Lords in the case of **Shamoon** (above) observed that it was sometimes not possible to decide whether there was less favourable treatment without deciding the reason why. This, it was said, was particularly likely where a hypothetical comparator was being used. A Tribunal, in deciding the reason why, must take into account all potentially non-discriminatory factors which might explain the conduct of the alleged discriminator, as well as those indicative of discrimination.

173. In the case of **R (on the application of E) v Governing Body of JFS and the Admissions Panel of JFS 2010 IRLR 136** the Supreme Court summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. It was emphasised that in deciding what were the grounds for discrimination, a court or Tribunal was simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. It was stated that in some cases there is no dispute about the factual criterion applied by the respondent, so it will be obvious why the complainant received the less favourable treatment. If the criterion or reason is based on a prohibited ground, direct discrimination will be made out. If the reason for the less favourable treatment is not immediately apparent, it will be necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

174. In the case of **Amnesty International v Ahmed 2009 ICR 1450** Mr Justice Underhill, the then President of the EAT expressed the view that the "but for"

test recommended in the earlier authorities could be applied to both types of direct discrimination (inherent and subjective) but its real value lay in its application to the latter: it was a simple shorthand for determining whether the proscribed factor operated on the alleged discriminator's mind. However, he stressed that it was not intended as an "all purpose substitute for the statutory language".

175. The EAT in **Martin v Lancehawk Ltd (t/a European Telecom Solutions)** (above) noted the "but for" test was not one which provided the most helpful assistance to the resolution of the type of problem raised in the present case, and that the situation in **James** was "very different from the type of sex discrimination issue which most commonly arises in the workplace, namely one involving an inquiry as to whether the employer's treatment of a particular employee amounted to discrimination against her on the ground of her sex. In such cases there will usually be no scope for assessing from a supposed objective standpoint whether the employer's acts have been relevantly discriminatory. It will instead be essential to enquire why the employer acted as he did, a question which, once answered, will usually show whether there has been any unlawful discrimination."

176. We, having had regard to these authorities, concluded it would be appropriate in this case to ask what was the reason why, in factual terms, the employer acted as it did, and to consider what facts operated on the minds of the decision-makers in this case either consciously or subconsciously. We noted at this stage that the decision-makers in this case were the UKSV, who carried out the investigation into the AIR and other concerns, and the DSR, who had instructed that investigation and who would ultimately consider the recommendation made and make a decision regarding the claimant's suitability for security clearance. The decision-makers were not "G", "C" or "D".

177. We asked ourselves 'what was the reason why the employer suspended the claimant. The facts (as set out above) demonstrated the respondent suspended the claimant because his security clearance had been confirmed in error and because there was an outstanding AIR which required to be

investigated. The claimant sought to (a) contrast his suspension with the fact that he had not been suspended whilst the first AIR was investigated and (b) refer to the Sunday Express article to argue this was the reason for the suspension. We have dealt with both of these points (above) and do not repeat them here: suffice to say, we were entirely satisfied the facts operating on the minds of the decision – makers related to the security clearance and outstanding AIR.

178. We next considered the raising of additional issues by "G". We had regard to a number of points. Firstly, we had regard to the fact "G" was the Head of Establishment at Beith and was in a position where, on the one hand, he knew "I" was going to recommend the reinstatement of the claimant's security clearance which would mean he could return to work on site; yet on the other hand, he had been told by "C" and "D", Head and Assistant Head of Security at Faslane, that the claimant had leaked information and taken photographs of the base. These allegations were not part of the AIR which had been investigated by "I".

179. The claimant, in his evidence to the Tribunal, said he did not know "G", nor "G" him, beyond saying hallo to him on one occasion. The claimant told the Tribunal "*I don't see why he would dislike me unless he had been told things about me"*. The claimant went on to suggest "G" may have been told "stereotypical things" about him, for example, that the claimant was "*a Nat"; "against Trident"; "not fit to be on site"* and that *"he supports independence"*. We concluded this was nothing more than supposition by the claimant, who, in reality, did not know if "G" had been told anything about him. The material fact regarding "G" was that he had been told by "C" and "D" on the 18 and/or 19 August of the further allegations that the claimant had leaked information and taken a photograph, and "G" acted on that information.

180. Second, we had regard to the claimant's evidence when he told the Tribunal that it was well known he was an SNP activist and supporter of independence. The independence referendum had been openly discussed on the base because of Trident. The claimant felt that the majority of those at Faslane and

Coulport were not in favour of independence and those who were had, with the exception of the claimant, kept their views quiet.

181. Mr Briggs, in his submission, suggested it would be within the industrial knowledge of the Tribunal that members of the UK's defence community would more likely than not favour maintaining a union with the country they serve. We could not accept that this was within the industrial knowledge of the Tribunal, and we declined to draw any inference as suggested by Mr Briggs.

182. We considered the claimant's evidence regarding this matter to be very general and light on substance. We did not doubt the subject of independence would have been discussed, but there was no evidence, for example, to suggest who had been a party to those discussions, whether the discussions had caused upset or tension on site, or whether "C" and "D" would have known of them.

183. It was clear from the claimant's own evidence that he was not the only person on site who supported independence. There was no evidence to suggest supporters of independence were treated differently by the respondent, or monitored more closely, or were the subject of more AIRs.

184. Third we had regard to witness "A"'s evidence, which was not disputed, that the respondent actively encourages the raising of concerns which may impact on security clearance. It was the job of "C" (and "D") to raise concerns. There was no evidence to suggest they only raised concerns, or raised more concerns, regarding the claimant.

185. Fourth, we had regard to witness "A"'s evidence that "C", "D" and "G" had genuine security concerns which had to be investigated. Witness "A" told the Tribunal that "C", "D" and "G" genuinely perceived the claimant to be a security threat and that they had raised genuine concerns. Witness "A" confirmed he would not criticise the raising of these issues. He acknowledged the fact "C" and "D" did not like the claimant, but was satisfied they believed and had formed a view that the claimant presented a security risk. All of the matters raised in the AIR, and after it, had the potential to be a security concern. There

was, as witness “A” described it, a “cumulative effect which gave rise to a real security concern”.

186. Fifth, witness “A” repeatedly told the Tribunal that membership of a political party and/or an employee’s political beliefs are not a security concern unless they suggest support for a terrorist or extremist organisation. We accepted this evidence as accurately reflecting the respondent’s position, and we considered we were supported in that view by the fact it was reiterated by “F” and by “G”. There was no suggestion that the claimant’s belief in Scottish independence had the potential to amount to an extreme view.

187. Sixth, there was no dispute regarding the fact the matters raised in the AIR had occurred, and by this we mean that the claimant had posted the lyrics from a pro-IRA song; he had made comments which resulted in sectarian abuse from Rangers fans; he had been absent with depression and the claimant had raised two grievances. These were legitimate security concerns which had to be investigated.

188. Seventh, there was no dispute regarding the fact the claimant had challenged the decision of “C” to impose the regulation regarding no mobile phones on site in restricted areas.

189. We next stood back and asked what was the reason why the respondent extended the investigation. We answered that question by relying on the facts which demonstrated that the respondent extended the investigation to look into the further concerns raised by “G”. Further, “G” raised those concerns because he had been informed by “C” and “D” of allegations relating to leaking of information and taking a photograph, which had not previously been investigated. We considered the factors set out above supported a conclusion that “C” and “D” raised the additional allegations with “G” because they held concerns that the claimant presented an ongoing security risk. “C” and “D” were acting within their role in identifying security concerns, against a background where people were encouraged to raise concerns, and where a person’s membership of a political party or philosophical beliefs were not a security concern, unless extreme.

190. The claimant invited the Tribunal to accept "C" and "D" were motivated to raise concerns about him because of his philosophical belief. We questioned the basis for the claimant asserting this in circumstances where a person's membership of a political party or philosophical beliefs were not a security concern. The claimant brought forward no information to support his position other than telling the Tribunal the issue of independence had been discussed on site.

191. We next had regard to an email sent by "F" (page 162) where he expressed frustration at what he considered to be inappropriate discussion about the allegations against the claimant. "F" went on to say that "*It is not lost on this office that Mr M clearly upset the establishment but left a [sic] pay-off, the detail of which is subject to a confidentiality agreement. Ergo he wasn't dismissed and must be treated with fairness and impartiality. Unless all SNP supporters are to be disallowed from having NSV clearance I am leaving this argument off the shelf …*"

192. "F" subsequently sent his recommendation (page 236) where he stated "*I am left with an overriding sentiment that HMNB were probably "miffed" that he …. got another job, so much so that every little disagreement, inference or dislike of Mr McEleny has become almost "fact" but fact without evidence. I get a sense that the HMNB hierarchy, with the west of Scotland being particularly politically charged over the whole SNP/independence debate, look upon Mr McEleny as a "spy in the camp" but having served there for many years Mr McEleny has had plenty of opportunity to "do damage" and despite this they have no evidence of any wrongdoing on his part. Yes Mr McEleny could have passed info onto the SNP, but so could any number of the staff at HMNB I would assume? Paul …. offered that the nature of the PMQs that have been received would suggest Mr McEleny to be one of a few people who would have known the info that was the basis of the question. Why then have we had no AIR for the "others" within this small number? What are HMNB doing to find the culprit/s? Could Mr McEleny have been singled out simply because of his prominence within the party? …*"

193. We next asked whether the emails from “F” undermined a conclusion that “C” and “D” raised further concerns with “G” because they believed the claimant presented an ongoing security risk. We, in considering this matter, acknowledged the issue of Scottish independence generally was part of the background circumstances in this case, and we accepted the claimant’s evidence that it had been discussed on the base. We also accepted the claimant was not the only supporter of Scottish independence on site. We were not provided with any information regarding this matter, but inferred from the claimant’s evidence and this Tribunal’s general knowledge of the number of people who voted for independence, that the claimant would not have been alone (on site) in his view.

194. We further acknowledged the emails from “F”, recognised there was a difficult relationship between “C” and “D” and the claimant; and recognised the claimant may be regarded as a “spy in the camp”. This matter (that is, their motivation in raising complaints) was explored by “F” when he interviewed “C” and “D”. Witness “A” told the Tribunal he had spoken with “F”, and “F” had been satisfied genuine security concerns had been raised. We accepted the evidence of witness “A” and further accepted his evidence when he told the Tribunal that he could not question the raising of the concerns, in circumstances where there were genuine security concerns.

195. We also considered the email from “F” which, whilst recognising “C” and “D” did not like the claimant, asked the question whether this was because of his prominence within the SNP. We noted the claimant initially sought to argue that his philosophical belief was a belief in Scottish independence and the social democratic values of the Scottish National Party. The Employment Judge hearing the preliminary hearing to determine whether the claimant’s belief amounted to a philosophical belief, decided the claimant’s belief in Scottish independence amounted to a philosophical belief within the meaning of section 10(2) of the Equality Act, and could be relied upon by the claimant as a protected characteristic. The Employment Judge did not find the claimant’s belief in the social democratic values of the SNP to be a philosophical belief.

196. We also had regard to “F”’s response to the claimant’s email dated 20 June 2017, where the claimant had made reference to “*MOD personnel urging his security clearance be removed on grounds that I am a member of the SNP ..”* “F”, in his letter, made very clear to the claimant, that *“a person’s specific political stance is of no interest unless of course it is vehemently opposed to the UK’s democratic principles from a National Security point of view. … It was not lost on this office that all MOD sites probably have a cross section of “voters” within its personnel and so your specific party membership (of the SNP) was not a consideration ..”*

197. We concluded that the emails from “F” did not undermine the conclusion that “C” and “D” raised concerns with “G” because they considered the claimant presented an ongoing security risk.

198. We, in conclusion, decided the key facts demonstrated the respondent encouraged the raising of security concerns (and the leaking of information and taking of photographs amounted to potential security concerns) and it was the job of “C” and “D” to raise security concerns. We acknowledged there was a poor relationship between “C” and “D” and the claimant, but the reason for this was as suggested in the email when there was a reference to the claimant “*clearly [having] upset the establishment”* when he left with a payment and avoided the investigation into the AIR.

199. We decided the claimant had not shown the alleged less favourable treatment occurred. Further, if the less favourable treatment was the raising of further concerns by “G”, the reason for that treatment was because he had been provided with further information by “C” and “D” whose role it was to raise potential security concerns for investigation.

200. We decided to dismiss this aspect of the claim.

***Dismissal***

201. The claimant sought to argue that the respondent had, by discriminating against him, breached the implied term of trust and confidence and thereby repudiated the contract entitling the claimant to resign and claim constructive

dismissal in terms of section 39 of the Equality Act. We have set out above our conclusions that the respondent did not discriminate against the claimant and accordingly this claim must fail.

202. We should state that even if we had found the respondent did discriminate against the claimant, he can only claim constructive dismissal if the resignation was caused by the breach. An employee who waits too long before resigning, or who acts in a way as to indicate he wishes the contract to continue, will be taken to have waived the breach and affirmed the contract.

203. The claimant was told on 12 June 2017 that the decision to suspend his security clearance had ended on 10 June, and that he was to resume normal duties on 15 June.

204. The claimant had, in October 2016, sent an email to the respondent indicating he believed the handling of the situation and the perception of his work colleagues made a return to work not feasible. The claimant suggested a protected conversation be facilitated to allow a reasonable settlement to be reached. The respondent did not respond to this email.

205. The claimant, on 20 June 2017, emailed HR stating he had decided his employment with the respondent was no longer tenable. He referred to the employer’s actions having destroyed any hope of an ongoing relationship. He informed HR of his intention to resign and go to an employment tribunal claiming constructive dismissal. The claimant again referred to a protected conversation. The respondent did not reply

206. The claimant attended a meeting with the respondent on 27 July 2017 to discuss his wellbeing. The respondent wrote to the claimant after that meeting and noted he felt he was suffering from anxiety as a result of his suspension, and had stated that he was unable to return to work at any point now or in the future, because he felt he could not work within the organisation.

207. The claimant resigned on 15 September 2017.

208. We accepted the claimant’s evidence that he had not resigned in October 2016 because he needed, for the sake of his health, to await the outcome of

the investigation. However the claimant knew, as at 12 June 2017, that his security clearance had been reinstated and he could return to work on 15 June. The claimant told the respondent on the 20 June that he intended to resign, but he did not do so until 15 September. The claimant delayed for three months.

209. The claimant invited the Tribunal to accept that he had delayed because he was mentally ill and slow to process what he had been told on 12 June; and that he was distressed and anxious, and wanted a protected conversation because if things had become public in the week he was going for the Depute Leader role, there would have been a media frenzy.

210. We did not doubt the claimant was anxious about what had happened, but he knew the outcome of the investigation on 12 June. He had, by the 20 June, processed that information because he was able to inform HR of his intention to resign. The claimant brought forward no medical evidence to support his position that notwithstanding informing the respondent of his intention to resign, he could not make the final decision until September.

211. We considered the material fact to be that the claimant repeatedly asked the respondent for a protected conversation. The claimant had used this format to agree a settlement with Babcock's when he left their employment. A protected conversation would have allowed the claimant to seek a settlement to leave the employment of the respondent, and a confidentiality clause regarding the allegations against him. These factors were important to the claimant for the reasons set out above.

212. We considered those facts supported a conclusion that the claimant did delay in resigning: he delayed from 12 June to 15 September, a period of three months. Further, he delayed because he hoped the respondent would enter into a protected conversation with him to allow him to leave on acceptable terms. The respondent refused to do so. We noted that throughout this period of time the claimant continued to benefit from his contract insofar as he was paid his salary.

213. We concluded that even if the respondent had discriminated against the claimant and thereby breached the implied duty of trust and confidence, we would have decided the claimant delayed too long before resigning and affirmed the contract. We would have dismissed the complaint of constructive dismissal for this reason.

214. We, in conclusion, decided to dismiss the claim in its entirety.

**Employment Judge: L Wiseman**
**Date of Judgment: 27 August 2019**
**Date sent to parties: 03 September 2019**