EMPLOYMENT TRIBUNALS

Claimant: MR S THOMAS

Respondents: 1. SURREY AND BORDERS PARTNERSHIP NHS FOUNDATION TRUST
2. MS A BRETT

OPEN PRELIMINARY HEARING

Heard at: London South **On:** 17 July 2020

Before: Employment Judge C Hyde, sitting alone

Appearances
For the Claimant: Mr O Davies, Counsel
For the Respondents: Ms R Azib, Counsel

RESERVED PRELIMINARY HEARING JUDGMENT

The Judgment of the Tribunal is that: -

1. the Claimant's belief in English nationalism includes anti-Islamic views which do not fulfil the fifth criterion in the case of *Grainger v Grainger plc v Nicholson* [2010] ICR 360 and is therefore not capable of being a protected characteristic.

2. The discrimination complaint under the Equality Act 2010 is therefore dismissed.

REASONS

1. Reasons are provided for the Judgment above as the Judgment was reserved. They are set out here only to the extent that it is necessary to do so for the parties

to understand why they have won or lost, and only to the extent that it is proportionate to do so.

Open Preliminary Hearing Issues

2. At a Closed Preliminary Hearing on 18 March 2020, Employment Judge Hargrove ordered that this Preliminary Hearing should take place to determine the following issues (p71):
    a. Is English nationalism capable of constituting a philosophical belief under section 10 of the Equality Act 2010?
    b. Did the Claimant hold anti-Islamic views as part of his philosophical beliefs at the relevant time?
    c. If so, were those anti-Islamic views incompatible with the fundamental rights guaranteed under Articles 2, 5 and 9 of the European Convention on Human Rights, such that they would prevent the Claimant's belief in English nationalism from being a protected characteristic?

3. Although both Counsel addressed the Tribunal at some length about the effect of the Convention rights in this case, the majority of the submissions addressed the five criteria in the case of *Grainger plc v Nicholson* [2010] ICR 360 set out below. It appeared to me therefore, by the end of the hearing, that the last question was more properly posed thus:

    > If so, were those anti-Islamic views worthy of respect in a democratic society, incompatible with human dignity and did they conflict with the fundamental rights of others, such that they would prevent the Claimant's belief in English nationalism from being a protected characteristic?

4. The Respondents did not dispute that the Claimant's belief was genuinely held, and that it was not an opinion or viewpoint based on the present state of information available. Further, no admissions were made by them about the third *Grainge*r criterion below about which they put the Claimant to proof, or about the requisite level of cogency and coherence required to satisfy the fourth criterion. In Ms Azib's submission, the most material or important issue in this case was raised by the fifth criterion: paras 28-29 [R2].

5. I was very mindful that for this Preliminary Hearing, I could make no findings of fact about the First Respondent's reasons for termination of the engagement. I share the concerns which have been expressed elsewhere about the challenges of deciding this issue as a preliminary issue.

6. In two Employment Tribunal claim forms presented on 1 November 2018, Mr Thomas complained about the termination of his engagement on 24 July 2018 as an act of discrimination related to religion or belief under the Equality Act 2010. He made other complaints which were not the subject of this preliminary hearing.

7. In addition, the question of which parties were actually Respondents was not a matter to be determined at the preliminary hearing. It was not in dispute that the

two parties listed in the heading to this Judgment were Respondents. Therefore, they are the only Respondents listed in the heading to this Judgment.

Evidence Adduced and Submissions

8. The parties produced a joint and agreed bundle of documents in two lever arch files numbering 828 pages [R1].

9. The Claimant gave evidence and relied on a witness statement dated 1 May 2019 (pp74 - 79. He provided no further statement, despite having been given permission to do so by EJ Hargrove, by no later than 13 May 2020.

10. Ms Azib had prepared a written skeleton argument running to 17 pages [R2] and a bundle of submissions and authorities, numbering approximately 250 pages. Mr Davies had prepared a written closing submission marked [C1], and relied on a list of authorities, with the relevant extracts of the Articles of the European Convention on Human Rights, of the Equality Act 2010 and of the Human Rights Act 1998, and commentary on one of the authorities cited. Reference to the case of *Miller v College of Policing* [2020] EWHC 225 was added at the hearing, as it had been omitted inadvertently from Mr Davies' list. As they were exchanged, it is not necessary to repeat the full lists in these Reasons.

11. Both Counsel had the opportunity to address the Tribunal orally and to respond to the other side's submissions. Mr Davies also handed to the Tribunal further written Notes he had prepared, which he described as a Speaking Note.

Outline of Relevant Law

12. Section 4 of the 2010 Act provides that religion or belief is a protected characteristic for the purposes of that Act. Section 10, so far as relevant, provides:

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

13. The 2010 Act does not define "philosophical belief" but guidance is provided by paragraphs 2.52 and 2.57-59 inclusive of the Code of Practice on Employment 2011 as follows: -

> "2.52. The meaning of religion and belief in the Act is broad and is consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion). ... Meaning of belief ...

2.57. A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism and Atheism.
2.58. A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world.
2.59. For a philosophical belief to be protected under the Act:

a. it must be genuinely held;
b. it must be belief not an opinion or viewpoint based on the present state of information available;
c. it must be a belief as to a weighty and substantial aspect of human life and behaviour;
d. it must attain a certain level of cogency, seriousness, cohesion and importance;
e. it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others."

14. The five bullet points set out at paragraph 2.59 of the Code of Practice are derived from the judgment of Burton J in the EAT in *Grainger plc v Nicholson* [2010] ICR 360 and are known to employment lawyers as "the *Grainger* criteria".

15. The above statement of the law is taken from the Court of Appeal Judgment in the case of *Gray v Mulberry Company (Design) Ltd* [2019] EWCA Civ 1720. That case turned on the Court's assessment of the fourth criterion only.

16. Further, the Court of Appeal in *Gray*, approved the relevant summary in the Judgment of Choudhury J, the President of the Employment Appeal Tribunal, reported at [2019] ICR 175 when he dismissed the appeal, as follows:

> "(1) that to qualify as a philosophical belief under section 10(2) of the Equality Act 2010 a belief had to attain the same threshold level of cogency, seriousness, cohesion and importance as a religious belief; that the proper approach to whether the required threshold level had been attained was to ensure that the bar was not set too high, since it was not for the court to judge the validity of such beliefs; that, similarly, in focusing on the manifestation of a philosophical belief, the same threshold requirements applied and whether or not doing, or not doing, a particular act, amounted to a direct expression of the belief concerned, and was intimately linked to it, was a question to be determined on the facts of each case; and that, although the claimant's refusal to sign the agreement might have been dictated by her stated belief, she had not made that known to the company and, accordingly, the tribunal was right to conclude that that belief was not sufficiently cohesive to form any cogent philosophical belief so as to achieve protection under the Act."

17. I was grateful to Mr Davies for referring to a number of cases decided under this section of the Equality Act in which a political belief was held to be a philosophical belief. I considered that this submission on behalf of the Claimant reflected settled law, as set out in para 28 of the *Grainger* Judgment.

18. In his submission, Mr Davies helpfully set out the articles of the *European Convention of Human Rights* listed in the Issues above. These are set out below.

1. Article 1 of the Convention is entitled "Obligation to respect Human Rights". It states that "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*" The "*High Contracting Parties*" are the states that are signatories to the Convention.

2. Article 2 of the Convention is entitled the "Right to life". It states:

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

3. Article 5 stipulates that "Everyone has the right to liberty and security of person", subject to a number of exceptions which are not relevant here.

4. Article 9, entitled "Freedom of thought, conscience and religion", states the following:

> *"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> *2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."*

19. I also had regard to Article 10 which protects freedom of expression. It is subject to limitations which are wider than those set out above in relation to Article 9, as follows:

> "*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of*

information received in confidence, or for maintaining the authority or impartiality of the judiciary."

20. In this outline of the relevant law is also included reference to the case law relied on by Mr Davies in which judicial comment has been made about the importance of free speech and its essential role in our democracy. Thus in the case of *Miller v College of Policing* [2020] EWHC 225 Admin by Julian Knowles J recently stated: -

> 1. In his unpublished introduction to Animal Farm (1945) George Orwell wrote:
>
> > "If liberty means anything at all, it means the right to tell people what they do not want to hear."
>
> 2. In R v Central Independent Television plc [1994] Fam 192, 202-203, Hoffmann LJ said that:
>
> > "… a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."
>
> 3. Also much quoted are the words of Sedley LJ in Redmond-Bate v Director of Public Prosecutions (1999) 7 BHRC 375, [20]:
>
> > "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having ... "
>
> 4. In R v Shayler [2003] 1 AC 247, [21], Lord Bingham emphasised the connection between freedom of expression and democracy. He observed that 'the fundamental right of free expression has been recognised at common law for very many years' and explained:
>
> > "The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated …".
>
> **5.** Article 10 of the European Convention on Human Rights (the Convention) also protects freedom of expression. It provides:
>
> > "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This

> Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

6. In Handyside v United Kingdom (1979-80) 1 EHRR 737 the European Court of Human Rights (the Court) considered an Article 10 challenge by Mr Handyside following his conviction for obscenity. The Court said at [49]: "Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

21. Mr Davies also referred to the Judgment in the case of *Redfearn v United Kingdom* [2013] IRLR 51 (ECtHR) at para 24 of [C1] – a case concerning the dismissal of an employee on account of his affiliation with the British National Party. This case related to events which had occurred in 2004, at a time when the scope of protection for religion and belief in this country was narrower than it is currently and did not include protection of political affiliation or belief. The claimant did not have the requisite length of service under UK law to bring his complaint of unfair dismissal, so the issue was whether his rights of freedom of association under Article 11 had been violated by the absence of a judicial process by which his complaint about having been dismissed by reason of his political affiliation could be assessed. He succeeded on this issue. In the Judgment a description of the race-based tenets of the BNP are also set out.

22. The race discrimination complaint had been held not to be apt by the Court of Appeal.

23. Many of the background circumstances in *Redfearn* are similar to those of Mr Thomas' case, but importantly the claim under consideration in the *Redfearn* case was for unfair dismissal not religion or belief discrimination. Further and in any event, by the time of the events in the Thomas case, domestic law as to what constituted a philosophical belief under the 2010 Act had developed further, as set out in the *Grainger* criteria and the 2011 Code of Practice. I considered nonetheless that it was instructive to set out part of the reasoning of the majority in the European Court in which the gap in protection and the potential for abuse were identified, as a yardstick against which to measure the arguments in the present case, especially at paragraphs 44 – 46 and 55:

> *"2. The Court's assessment*

42. Although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, the national authorities may in certain circumstances be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the right to freedom of association (see, *mutatis mutandis*, *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, §§ 32-34, Series A no. 139, *Gustafsson v. Sweden*, 25 April 1996, § 45, *Reports of Judgments and Decisions* 1996-II, and *Fuentes Bobo v. Spain*, no. 39293/98, § 38, 29 February 2000).

43. Therefore, although the matters about which the applicant complained did not involve direct intervention or interference by the State, the United Kingdom's responsibility will be engaged if these matters resulted from a failure on its part to secure to the applicant under domestic law his right to freedom of association. In other words there is also a positive obligation on the authorities to provide protection against dismissal by private employers where the dismissal is motivated solely by the fact that an employee belongs to a particular political party (or at least to provide the means whereby there can be an independent evaluation of the proportionality of such a dismissal in the light of all the circumstances of a given case).

44. The Court has recognised that in certain circumstances an employer may lawfully place restrictions on the freedom of association of employees where it is deemed necessary in a democratic society, for example to protect the rights of others or to maintain the political neutrality of civil servants (see, for example, *Ahmed and Others v. the United Kingdom*, 2 September 1998, § 63, *Reports of Judgments and Decisions* 1998-VI). In view of the nature of the BNP's policies (see paragraph 9, above), the Court recognises the difficult position that Serco may have found itself in when the applicant's candidature became public knowledge. In particular, it accepts that even in the absence of specific complaints from service users, the applicant's membership of the BNP could have impacted upon Serco's provision of services to Bradford City Council, especially as the majority of service users were vulnerable persons of Asian origin.

45. However, regard must also be had to the fact that the applicant was a "first-class employee" (see paragraph 7, above) and, prior to his political affiliation becoming public knowledge, no complaints had been made against him by service users or by his colleagues. Nevertheless, once he was elected as a local councillor for the BNP and complaints were received from unions and employees, he was summarily dismissed without any apparent consideration being given to the possibility of transferring him to a non-customer facing role. In this regard, the Court considers that the case can readily be distinguished from that of *Stedman v. the United Kingdom* (cited above), in which the applicant was dismissed because she refused to work the hours required by the post. In particular, the Court is struck by the fact that these complaints, as summarised in paragraph 10, were in respect of prospective problems and not in respect of anything that the applicant had done or had failed to do in the actual exercise of his employment.

46. Moreover, although the applicant was working in a non-skilled post which did not appear to have required significant training or experience (compare, for example, *Vogt v. Germany*, 26 September 1995, Series A no. 323, and *Pay v. the United Kingdom*, no. 32792/05, 16 September 2008), at the date of his

dismissal he was fifty-six years old and it is therefore likely that he would have experienced considerable difficulty finding alternative employment.

47. Consequently, the Court accepts that the consequences of his dismissal were serious and capable of striking at the very substance of his rights under Article 11 of the Convention (*Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, §§ 61 and 62, ECHR 2006-I and *Young, James and Webster v. the United Kingdom*, cited above, § 55). The Court must therefore determine whether in the circumstances of the applicant's case a fair balance was struck between the competing interests involved, namely the applicant's Article 11 right and the risk, if any, that his continued employment posed for fellow employees and service users. It is also to be borne in mind that what the Court is called upon to do in this case is not to pass judgment on the policies or aims, obnoxious or otherwise, of the BNP at the relevant time (the BNP is, in any case, not a party to these proceedings), but solely to determine whether the applicant's rights under Article 11 were breached in the particular circumstances of the instant case. In this connection it is also worth bearing in mind that, like the *Front National-Nationaal Front* in *Féret v. Belgium* (no. 15615/07, 16 July 2009) the BNP was not an illegal party under domestic law nor were its activities illegal (see, by way of contrast, *Hizb Ut-Tahrir and Others v. Germany* (dec.) no. 31098/08, 12 June 2012).

48. The Court has accepted that Contracting States cannot guarantee the effective enjoyment of the right to freedom of association absolutely (*Plattform "Ärzte für das Leben" v. Austria*, cited above, § 34). In the context of the positive obligation under Article 11, it has held that where sensitive social and political issues are involved in achieving a proper balance between the competing interests and, in particular, in assessing the appropriateness of State intervention, the Contracting States should enjoy a wide margin of appreciation in their choice of the means to be employed (*Gustafsson v. Sweden*, cited above, § 45).

49. Therefore, the principal question for the Court to consider is whether, bearing in mind the margin of appreciation afforded to the respondent State in this area, the measures taken by it could be described as "reasonable and appropriate" to secure the applicant's rights under Article 11 of the Convention (see, *mutatis mutandis*, *Plattform "Ärzte für das Leben" v. Austria*, cited above, §§ 32 – 34, *Gustafsson v. Sweden*, cited above, § 45, and *Fuentes Bobo v. Spain*, cited above, § 38).

50. In the opinion of the Court, a claim for unfair dismissal under the 1996 Act would be an appropriate domestic remedy for a person dismissed on account of his political beliefs or affiliations. Once such a claim is lodged with the Employment Tribunal, it falls to the employer to demonstrate that there was a "substantial reason" for the dismissal. Following the entry into force of the Human Rights Act 1998, the domestic courts would then have to take full account of Article 11 in deciding whether or not the dismissal was, in all the circumstances of the case, justified.

….

54. However, it observes that in practice the one-year qualifying period did not apply equally to all dismissed employees. Rather, a number of exceptions were created to offer additional protection to employees dismissed on certain prohibited grounds, such as race, sex and religion, but no additional protection

was afforded to employees who were dismissed on account of their political opinion or affiliation.

55. The Court has previously held that political parties are a form of association essential to the proper functioning of democracy (*United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 25, *Reports of Judgments and Decisions* 1998-I). In view of the importance of democracy in the Convention system, the Court considers that in the absence of judicial safeguards a legal system which allows dismissal from employment solely on account of the employee's membership of a political party carries with it the potential for abuse."

24. Mr Davies continued with the following submission:

25. As early as *Young, James and Webster v United Kingdom* (1989) 11 EHRR 439, the pluralism of individual interests has been considered by the courts as central to the functioning of a legitimate democracy (at [112]):

"pluralism, tolerance and broadmindedness are hallmarks of a "democratic society" (p. 23, par. 49). Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."

26. Whilst the Claimant appreciates that *Grainger* has been followed in a number of domestic authorities, he is of the view that *Grainger* has been superseded by *Redfearn*. *Grainger,* a case decided prior to the EA 2010 coming into force, implies that the Convention rights are directly applicable between individuals, though the correct approach is that it binds states or public bodies (e.g. courts). Accordingly, it does not follow that individuals can invoke Convention rights against other individuals (such as Articles 2, 5 and 9), since there is no power for that in either the HRA 1998 or Article 1 of the Convention.

25. I did not accept the submission that *Grainger* had been superseded by *Redfearn*, not least because as set out above the domestic law applied in *Redfearn* pre-dated that in *Grainger* and the *Grainger* approach has been judicially approved recently by the President of the EAT in the case of *Gray*.

26. I accepted his submission at para 30 of [C1] that following the Judgment of the EAT in the case of *Harron v Chief Constable of Dorset Police* [2016] IRLR 481, when determining what constitutes a belief qualifying for protection, there is no material difference between the domestic approach under the Equality Act 2010 and that under Article 9 of the Convention. I treated this as also applying to Article 10.

Background

27. From the beginning of May 2018, the Claimant was engaged through an employment agency, Hays Specialist Services ("Hays"), to deliver Consultancy services to NHS Commercial Solutions, a company under the control of the First Respondent and used by it for strategic procurement and commercial support. The First Respondent is an NHS Trust. The Second Respondent was Managing Director of NHS Commercial Solutions, and an employee of the First Respondent.

28. The Claimant's role was Interim Category Manager (temporary worker). In the Temporary Assignment Confirmation Schedule dated 30 April 2018, the anticipated initial duration of the contract was 3 months, from 2 May 2018. It was thus due to end on 2 August 2018 but could have been extended thereafter for a further 3 months.

29. On 24 July 2018, the Claimant was informed by Hays that his placement with the First Respondent was being terminated with immediate effect because he had failed to disclose a spent conviction during the application and registration process (p95).

30. It is the Claimant's case that the Respondents had discovered his political affiliations with the English Democrats and English nationalism and terminated his contract for that reason.

31. The Claimant argued that the relevant date on which the Claimant's belief in English nationalism should be determined was July 2018, since this is when the index events occurred. The Respondent argued that 2 May 2018 and 24 July 2018 was the material and relevant period for the purposes of establishing whether the Claimant's belief falls within the Equality Act 2010. I accepted this submission as the decision to terminate was taken and communicated to the Claimant between 19 and 24 July 2018, and the events which the Respondents relied on to justify the termination occurred just prior to or at the very beginning of the Claimant's employment when they say he failed to disclose his prior conviction and put misleading information in his application.

32. It was not disputed that the Claimant was the subject of a criminal conviction in 2016 at the Maidstone Crown Court, for electoral fraud (submitting false nomination forms for candidates to become English Democrat councillors), following a trial by jury, and for which he served a term of imprisonment of 7 months, with a further 14 days imprisonment for breaching his bail (p80).

33. The Respondents' case was that they were unaware of this criminal conviction as the Claimant had failed to disclose it, prior to starting his engagement. The Claimant asserted that he had notified the First Respondent of the situation by letter prior to 19 July, but this was disputed by the Respondents and was not an issue dealt with in evidence. It was not in dispute that the Claimant attended a meeting at another Trust on 19 July 2018, at a department in which he used to work. The Respondents contended in the Grounds of Resistance (p67) that the Second Respondent then received a telephone call from a member of staff of that Trust. The caller stated that the Claimant had a criminal conviction and that his name was not Steven Thomas.

34. It is not disputed by the Claimant that he was also known as Steven Uncles, the name in which the conviction was recorded.

35. As a result of receiving this information, the Respondents contend that they reviewed the situation and made enquiries, including of the Claimant at a meeting on 20 July 2018 (p67). The Claimant was asked by the Respondents not to come

into work pending their further investigations. Following these further investigations, which included meeting with the Claimant to hear his explanations and an account of his political activity, the First Respondent decided on 23 July 2018 to terminate the Claimant's engagement. The decision was communicated to Hays on that day. It was not in dispute that Hays sent an email to the Claimant the following day notifying him of the termination of the engagement.

36. The Respondents' case was thus that the engagement was terminated because the Claimant had provided misleading information on his CV and candidate application form.

37. In Mr Thomas' witness statement, he explained what his belief in English nationalism was. As stated above, the Respondents did not seek to challenge that account, as far as it went, but sought to elicit evidence more specifically about Mr Thomas' views on Islam, and their connection to his views on English nationalism. In this context the Respondents also sought to establish that earlier Tribunal findings about his views, still applied in the time frame with which the Tribunal was concerned in this case.

38. In his witness statement dated 9 May 2019, Mr Thomas outlined the history of how he had discovered his English identity, from about the age of 8 in the context of supporting a national sporting team. He then described how his sense of his English identity grew as he grew older, influenced, for example by learning about the problems in Ireland. He was born in 1964.

39. At the age of 38 his English identity moved out of the realms of international sport and into the world of politics. He believed that the country was being poorly run and with a friend with whom he used to discuss politics, he decided to become actively involved in politics. He rejected the three main UK parties as vehicles for his political involvement as they were just that - parties of the whole United Kingdom. He identified that the other nations of the United Kingdom all had nationalist parties i.e. parties just representing that nation. Thus, he selected The English Democrat Party and joined it.

40. In his closing submission, Mr Davies summarised why the Claimant's belief in English nationalism was capable of constituting a philosophical belief as follows:

> 12. The Claimant's belief in English nationalism is set out in his witness statement [74]-[79], dated 9 May 2019. In summary:
>
> 12.1 He has had a long-standing interest in the identity of being English, though it was not until he discovered the 'English Democrats' that his interest in politics deepened. He joined the English Democrats' National Council in early 2004 [77/33].
>
> 12.2 To the Claimant, English nationalism is the nationalism that asserts that the English are a nation and promotes the cultural unity of English people. In a general sense, it comprises political and social movements and sentiment inspired by a love for English culture,

language and history, and a sense of pride in England and the English people. English nationalists see themselves as predominantly English rather than British [77/35].

12.3 On a political level, some English nationalists have advocated self-government for England. This could take the form of either a devolved English Parliament within the United Kingdom or the re-establishment of an independent sovereign state of England outside the UK [77/37].

12.4 The Claimant's English nationalism, in its full flowering, welcomes the inclusion of those who choose to live in England to adopt English identity and with it, allegiance to England [79/46].

12.5 The Claimant's focus is on national identity (which does not depend upon ancestry or race) rather than common descent or race [p79/49].

12.6 His belief in English nationalism has manifested itself in a period of 13 years of voluntary political activism in which he has invested time, money, his personal image and name p[77/38].

12.7 He was also a Parliamentary candidate in the 2010 and 2015 General Elections, a candidate in the GLA elections in 2008 and 2012, in the 2012 and 2016 Police & Crime Commissioner Elections and in various other local council elections in Kent [77/41].

41. The first numbers in square brackets are the page numbers in the Preliminary Hearing bundle, followed by the paragraph numbers on those pages. The Tribunal has amended errors in the page and paragraph references in [C1].

42. In the circumstances, I accepted that these were the Claimant's beliefs. Had this been the extent of the Claimant's English Nationalism beliefs however, the issues which arise in this case as to his entitlement to claim that his English Nationalism was a philosophical belief were unlikely to have arisen.

43. In the Claimant's witness statement, he did not address the issue as to his anti-Islamic views as part of his English nationalism political beliefs or at all, nor did he address his anti-Islamic views at the material time. These were explored largely in cross-examination.

44. In accordance with the discussion of the scope of an employment tribunal's enquiry into a claimant's religious or philosophical belief, I considered that I was entitled to and indeed had to make findings based on the evidence before me and arising from cross-examination of the Claimant, as to what his beliefs about Islam were, whether they were part of his belief in English nationalism and then to apply the *Grainger* criteria to the whole picture of the Claimant's beliefs.

October 2017 Employment Tribunal Hearing on Philosophical Belief

45. The Claimant presented a claim in the Leeds Employment Tribunal in 2016, which included complaints of harassment related to philosophical belief (pp 82-89). He relied in that case on the same philosophical belief as he relied on in this case. I discussed with the parties the extent to which I could revisit the factual issues and legal determinations made by that Tribunal, given that its decision related to the same issue between the same parties. I took the view that the findings and conclusions in that case were helpful and persuasive to me but were not binding as I was hearing evidence and had to make a determination about a different time frame from that which the Leeds Tribunal had to consider. Further I took into account that the findings of fact followed a more extensive exploration in the Leeds Tribunal which also consisted of a full tribunal.

46. The Respondents contended in this hearing that the Judgment and Reasons of the Leeds Tribunal after a hearing on 4 and 5 October 2017 and sent to the parties in writing on 13 October 2017 were relevant for a number of reasons:

    a. The Leeds Tribunal concluded that the philosophical belief relied upon did not amount to a protected belief. The Respondents asserted that the Leeds Tribunal's reasons for its conclusions were the same reasons why this Employment Tribunal should also dismiss the Claimant's claim of a protected belief;
    b. The Claimant's anti-migrant and anti-Muslim views were explored in detail at that hearing and are referenced in the Reasons. The Leeds Employment Tribunal also had the benefit of social media posts by the Claimant explaining his views. The Respondents submitted that these amounted to clear and incontrovertible evidence of the Claimant's anti-Muslim views;
    c. The Leeds Employment Tribunal concluded as a question of fact that the Claimant's anti-Islamic beliefs were part of his belief in English Nationalism at the time of the termination of his assignment, which took effect on 6 May 2016; and
    d. The Leeds Employment Tribunal hearing took place in October 2017 and referred to a period of employment in 2016. The Respondent submitted that it was highly unlikely that the Claimant's extreme views, as expressed and explored by the Leeds Employment Tribunal, would have changed by the time he started his engagement with the Respondent a few months later in 2018. Accordingly, it was submitted that the Leeds Employment Tribunal judgment reflected the Claimant's political beliefs at the material time for this claim.

Evidence of the Claimant's anti-Islamic and anti-migrant views

47. The bundle of documents produced at the July 2020 hearing included transcripts of hundreds of pages of tweets sent by the Claimant as well as evidence of two articles about his comments. Questioning was focussed on a sample of these, as found by the Leeds Tribunal. I am grateful to the Respondents' Counsel for summarising these in her Skeleton Argument, from which much of the account of the Claimant's views on Islam, Muslims and Islamic practices has been taken for the purposes of these Reasons. At the hearing in July 2020, the Claimant did not

dispute the accuracy of the tweets or their authorship, nor did he dispute the accuracy of the comments attributed to him in the articles. He merely sought to establish mitigating context for some.

48. At paragraph 73 of the Reasons, the Leeds Tribunal set out anti-Muslim comments which the Claimant had posted on social media about Islam and Muslims after the termination in 2016. This included use of the hashtag "*RemoveAllMuslims",* and his tweets included the following:

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

49. The Claimant had also said in cross examination at the Leeds Tribunal (and therefore under oath), that Islam in its current form should be banned from England unless it were *"Anglicised"* and *"toned down"* to fit in with society in England (p83, para 74).

50. At this hearing, he did not dispute that these comments were consistent with his views on English Nationalism. He elaborated on them by explaining that in England we eat pork as tapeworm has been eradicated here, and that rabies was eliminated in dogs in the UK in 1922. Thus, he maintained, both pork and dogs could be classified as clean.

51. He explained in relation to his comments about toilet paper that he did not believe that special arrangements should be made to 'cater for different interests', by introducing 'Islamic toilets' which had a shower attachment. It was unclear to the Tribunal on what Mr Thomas based his contempt for the Islamic toilets, other than the fact that this was not something to which he was accustomed. He acknowledged that his attitude to their use in a foreign country could be different, but he maintained, 'this is England'. He later stated in his oral evidence that he was saying that there were cultural challenges to having people of the Islamic faith living in the country.

52. He clearly had a very static and somewhat simplistic view of what constituted all things English.

53. He also considered that the existence of Islamic schools caused divisions, as he said, did Christian schools, as they both introduced religion into education. However, there was no reference to the Claimant having expressed this view prior to giving evidence in this case. I was not satisfied that this or other similar comments about his views on religion generally and the manifestations of other religions reflected his views at the relevant time. As stated above the Claimant had not taken up the possibility of committing these to a witness statement prior to the hearing.

54. He reaffirmed his opposition to wearing the burka or Muslim headscarf in public in England, although a headscarf could be worn as a garment to keep the head warm. He repeated his belief that religious symbols caused division.

55. He stated that only 4% of his tweets concerned Muslims. The rest dealt with English nationalism and Brexit and other subjects. This was not challenged by the Respondents.

56. There was no evidence that he had directed his tweets or other public pronouncements in the same way to any other religion.

57. In re-examination he was questioned about his views on multiculturalism. He expressed opposition to this as he believed that integration into the host culture was preferable and more unifying. Rather, he believed in a multi-racial England, in which, as in Brazil, all the people from different races had a common culture and were not culturally segregated.

58. In cross-examination at this hearing, the Claimant asserted that he had not included his views on Islam in his statement as he was English Nationalist and not anti-Islamic, and that he saw himself as campaigning for things, not against things. I did not find this explanation convincing, given the issue which the Claimant knew had to be addressed at this hearing. He had made other amendments to his statement but had not incorporated this issue in it.

59. His explanation for the use of the *#RemoveAllMuslims* post on 4 June 2017 was that this was done while he was in a very emotional state in the wake of the London Bridge/Borough Market terror incident as his daughter was in Borough market at the time. He stated that it was a mistake to have done it and that it was out of character in that it was an irrational comment. That was the only occasion on which he had used that hashtag.

60. He could not however discount the possibility that he had posted or reposted a tweet which was negative about Muslims coming to the UK or being made to leave the UK. He described having recently voted for his MP who is Muslim and that he worked with Muslim people. Once again, I considered that whilst this hashtag was used just the once in unique circumstances, it was characteristic of the views generally expressed by the Claimant about Muslims.

61. Further evidence of this was the tweet in which the Claimant had said "*This is why Japan had the sense to ban Islam*" referred to in para 73 of the Leeds Tribunal's Reasons. He was swift to state in evidence to this Tribunal that this was factually incorrect, in that he now understood that Japan had not banned Islam. However, he did not dispute that he had posted this comment in the 2016-17 time-frame.

62. I was satisfied that these provided more than an adequate basis for finding that the Claimant held anti-Muslim views, and that they were part of his belief in English nationalism. There was little basis for thinking that the Claimant's antipathy to what he saw as Muslim practices and beliefs and to the followers of Islam was based on any real acquaintance with the tenets of that religion. He was unaware for example of such basic matters as the existence of different schools of thought in Islam. Much of his information about Islam and Muslims appeared to have come from other tweets, social media communications and apparently poorly informed sources. He was unable to say whether there was any serious public health or

hygiene learning on the superiority of the use of toilet paper over other methods of self-cleansing associated with Muslims, and indeed with many other societies in Europe and the Far East where the use of a bidet in the bathroom is considered more hygienic.

63. It was in short, pure prejudice.

64. At paragraphs 84 - 94 (pp85-86), the Leeds Tribunal found as a fact that the Claimant's anti-Islamic beliefs were part of his belief in English Nationalism at the time of the termination of his assignment. They referred to numerous matters which evidenced the strong anti-Islamic theme in the Claimant's beliefs which included:

    a. The Claimant's references to using automatic weapons to take out illegal immigrants coming through the English Channel: the Leeds Tribunal concluded that the Claimant had clearly advocated killing some illegal immigrants to deter others (para 85). The Facebook posts and articles on which these findings were based also appeared in the bundle for this hearing (pp823- 827);
    e. Making Facebook posts about "Banning the Burqa" and how a woman wearing a headscarf was not welcome in the UK (para 86);
    f. The Claimant had attempted to argue those were not his views at the time (of his employment), but the Leeds Tribunal rejected this unanimously (para 88).

65. The public Facebook post by the Claimant in mid-2015 (p824) stated: "*The only cost-effective way to stop illegal immigrants trying to storm through the Channel Tunnel is to set up a machine gun and take out a few people – that would stop it very quickly and immediately cut dead this tactic…who has got the guts to do this in our politically correct society?".* Unsurprisingly, especially as the Claimant was attempting to be elected to local public office at the time, his comment was picked up by the local media and reported in two articles shortly afterwards (pp823 and 827). In a further post issued apparently at around the same time, the Claimant appeared to back-track on what he had said by stating that he did not want to see migrants killed, but still advocated the use of armed violence against migrants by saying in effect that guards should be able to fire warning shots and if they went unheeded to consider shooting arms or legs (p825).

66. These latter posts appeared to me to be differently targeted as compared to the specifically anti-Islamic/Muslim posts, directed as they were at migrants, apparently regardless of race or religion. They were also the only occasions cited when violence was advocated by the Claimant.

67. I was satisfied however that they served to demonstrate the Claimant's intolerance of illegal immigrants/migrants, as an extension of his nationalist views.

68. The Respondents further relied on numerous examples in the bundle of the Claimant's social media posts. These were set out in small print over some 600 pages, thus rendering them virtually illegible. I was only taken to a few as examples, about which findings had been made in the Leeds Tribunal. I found that

they demonstrated varying degrees of antipathy towards and disdain for Muslims and various ethnic minority groups. The following were some examples:

a. *"the BBC complain that there aren't enough ethnic minorities on TV and they go and axe Crimewatch…go figure"* 19 October 2017 (p759);
b. *"Soldier was asked where do you stand on Muslims? The windpipe usually does the trick he replied"* 14 October 2017 (p772);
c. *"Imam says "We Hav 2 accept Child Brides" MUSLIM paedophilia is part OF THEIR Culture"* re-tweeted from Death2RapeGangs on 14 February 2016 (p715);
d. *"Lets "Trump Muslims" in England with a complete temporary ban also":* 8 December 2015 (487); and
e. Various references to the hashtag *"BanTheBurka"* August 2015 (pp526-527), alongside the suggestion that a woman wearing a headscarf was not welcome in the UK (para 86).

69. I was satisfied that these represented a snapshot of the views the Claimant had publicly posted and demonstrated his attitudes over a number of years, primarily towards Muslims, but also about what English nationalism meant to him.

70. Mr Davies pointed out that the voluminous social media posts were from a period which went as far back as 2008, that the sheer volume of posts produced by the Respondents for the hearing was disproportionate, and that this was compounded by the lack of pre-warning of which ones would be relied upon. Whilst I had sympathy for this concern, it appeared to me that it was always likely that the Respondents would rely on those posts and public comments which had featured, to the Claimant's detriment, in the Leeds Tribunal's reasons.

71. He further argued that any posts which predated July 2018 had little or no relevance to the preliminary issue and that I should attach little or no weight to them. I did not agree. Whilst I took into account the time frame of the agreed expressions of the Claimant's views, I also considered it very unlikely that views of this sort held by him, as an adult, from 2008 to 2017, would have changed for some reason by May or July 2018. He did not suggest that his views or outlook on the world had changed by then, nor did he point to any event or influence or experience in his life which might have led to this. Indeed, he had not taken the opportunity to provide a different picture in an updated witness statement, for this hearing. Moreover, his evidence at this hearing in July 2020 did not display any shift in his views of any substance.

72. Mr Davies also argued that as many of the 600 or so pages of 'tweets' were actually retweets, the Tribunal should not attach any weight to them as indicating what the Claimant's own beliefs were. Given the scale of the Claimant's admitted involvement in the retweeting, I considered it proper to conclude on the balance of probabilities that to the extent that those retweets contained text which was in a similar vein to the Claimant's own expressed views, it was proper to conclude that the Claimant endorsed the sentiments expressed. However, the central factual picture on which I based my findings, was that of the Claimant's own comments.

Assessment and Conclusions

73. It was not suggested that the termination of the Claimant's engagement was based on the standard of the Claimant's work, or on anything he had done as part of his job. Nor indeed did the Claimant give expression to or manifest his beliefs at work. Nor was it suggested that any of the anti-Islamic sentiments were expressed during the time he was employed from May to the end of July 2018. Further, there was no suggestion that the Claimant had ever been involved with or stood for election for a political organisation that was not legal in the UK. Nor indeed was it suggested that his affiliation with the English Democrat Party itself disqualified the Claimant from protection.

74. Having found that the views about Islam or Muslims expressed in the Claimant's tweets and retweets and Facebook posts reflected his views on the subject at the material time for this case, namely May to July 2018, I applied the *Grainger* criteria to the facts.

75. The first criterion is that the belief must be genuinely held. I was satisfied given the Claimant's long involvement with English nationalism and the evidence of the anti-Islamic views being part of that, as well as the issues identified in para 42 of Mr Davies' submissions, that the belief was genuinely held. Further, the Respondents did not challenge that this criterion was met.

76. The second criterion was that his belief must be a belief and not an opinion or viewpoint based on the present state of information available. The Respondents did not dispute that this criterion was made out. I was satisfied that the belief in question fulfilled the criterion, being a settled view of his English identity and how society in England should function.

77. The third *Grainger* criterion is that it must be a belief as to a weighty and substantial aspect of human life and behaviour. The Respondents put the Claimant to proof on this.

78. I accepted the Claimant's submission that national identity and how the country is governed are necessarily weighty and substantial aspects of human life and behaviour. A belief in "Scottish independence" was recently held to have amounted to a philosophical belief (*McEleny v Ministry of Defence* [ET case number 4105347/2017] entered in the Register on 30 July 2018).

79. It appeared to me that the Claimant's belief included views about the way in which a society in which those of varied racial origins, religions and cultures should be ordered.

80. I saw no reason to reach a different view from that in the *McEleny* case in relation to this case meeting this criterion.

81. The fourth criterion was that the belief must attain a certain level of cogency, seriousness, cohesion and importance. Here also, the Respondents put the Claimant to proof.

82. I reminded myself of what had been said about this criterion in the *Gray* and *Williamson* cases, which was conveniently set out in Ms Azib's submissions thus:

> In ***Gray***, Choudhry P stated at paragraph 28 that whilst setting the level required to satisfy the ***Grainger*** criteria at "no more than trivial" might be apt in assessing seriousness and importance, it is less apt in assessing cogency and coherence. He stated that *"The mere fact that a genuinely held belief relates to subject matter which is more than merely trivial does not necessarily mean that that belief was either cogent or coherent. The attributes of cogency and coherence are not susceptible to measurement against a standard of "more than merely trivial"* ". He confirmed the proper approach was simply to ensure the bar was not set too high and too much is not demanded in terms of the ***Grainger*** threshold requirements. The focus should be on the manifestation of the belief.
>
> In ***R (Williamson) v Secretary of State*** [2005] 2 AC 246, Lord Nicholls expanded on the meaning of manifestation of a belief. He stated at paragraph 23 that, *"when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements…The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance" (emphasis added).*

83. Mr Davies submitted that political beliefs have repeatedly been found to have the requisite level of cogency, seriousness, cohesion and importance. He relied on the cases of *Henderson v The General Municipal and Boilermakers Union* [2017] IRLR 34*, McEleny* above*,* and *Olivier v Department of Work and Pensions* (ET case no: 4105347/2013). This contrasts with *Gray v Mulberry Company (Design) Ltd* [2019], where the claimant's belief in "*the statutory human or moral right to own the copyright and moral rights of her own creative works and output*" did not pass this threshold. He further submitted that the Claimant's belief falls squarely within this bracket. His belief in English nationalism goes to the heart of how a democracy, in his view, should be run. He has a clear understanding of what his belief entails, as detailed in his witness statement at [77/36] - [77/45].

84. Whilst it was clear that the terms in which the Claimant expressed his views were, on the evidence before me, usually offensive and disparaging, I considered that the subject matter was not outside the bounds of democratic debate. I accepted these submissions.

85. I also respectfully adopted the conclusion on this criterion which the Leeds Tribunal reached in respect of this criterion as expressed in para 90 of those Reasons and was satisfied that the Claimant's belief met the fourth criterion.

86. The fifth *Grainger* criterion was that the belief must be worthy of respect in a democratic society, must not be incompatible with human dignity and not conflict with the fundamental rights of others.

87. This is the criterion designed to draw the boundaries of protection, in accordance with Article 17 of the ECHR, as outlined in para 28 of the Judgment of Burton J in *Grainger*, cited by Ms Azib in para 30 of her skeleton, by the application of a value judgment about the manifestation of the Claimant's belief. As suggested by Burton J, it was designed to exclude, for example, a racist or homophobic political philosophy. The central purpose of this hearing was to ascertain which side of the line the Claimant's beliefs fell, given that they involved the expressions of 'anti-Islamic' views found.

88. The Respondents relied on the finding by the Leeds Employment Tribunal in which the issue of whether the Claimant's views amounted to a philosophical belief under the 2010 Act were discussed at paragraphs 84 – 94 of the Reasons.

89. At para 92 the Leeds Tribunal found that the Article 9 right was infringed by the Claimant's views which were to the effect that Islam in its current form should be banned if not Anglicised and toned down. It found that the view was not compatible with Article 9 as it was based on two stereotypical assumptions: that offensive practices such as female genital mutilation and "grooming" are predominantly or peculiarly to do with the Islamic faith or Muslims, and that all behaviour by Muslims must be taken to be a representation of Islam as a religion (p86). This Tribunal heard no evidence about these views, but they are consistent with the evidence heard.

90. The Leeds Tribunal further concluded at [86] that the Claimant's beliefs were a violation of four rights under the European Convention of Human Rights, namely: Article 2 (the right to life), Article 9 (freedom of religion) and Article 5 (the right to liberty) and Article 14 (the right to enjoy substantive rights without discrimination on the grounds of religion). It also concluded that the Claimant's views advocated coercive removal dependent on religion, which would inevitably involve infringements of the liberty of Muslims who did not wish to be removed from the UK.

91. I accepted Mr Davies' general submission that the Claimant's version of English Nationalism did not seek to 'overthrow the state' nor to deprive individuals of property: see *Kelly v Unison* ET case no: 2203854/2008, decided in 2011. In *Kelly*, the Claimants subscribed to an extreme version of socialism that was dedicated to revolution and the overthrow of the state. Their views were held not to be worthy of respect in a democratic society and/or were incompatible with human dignity. He distinguished that situation from the present case. The Claimant's views did not incite violence towards other groups, but rather represented an opinion on matters that concerned the constitution of England.

92. No matter how objectionable, the Claimant's expressed anti-Islamic views did not amount to inciting violence. The Claimant was in no position to implement such a view and could not reasonably be taken to have that power. The manner of

expression of his views however, involved subjecting others to justified offence – a generalised form of harassment targeting one particular religion.

93. He submitted that the Claimant's views were not incompatible with the fundamental rights guaranteed under Articles 2, 5, and 9 of the Convention, such that it would prevent the Claimant's belief in English nationalism from being a protected characteristic.

94. Further, he submitted, the Respondents could not invoke Convention rights against the individual when neither party is a public body. No restriction can be invoked in terms of an individual's Convention rights except those that are already defined in the Convention of the HRA 1998.

95. The Tribunal accepted this latter submission. However, it appeared to me that this fifth criterion required regard to be had to the actual or potential effect of the expressions of the Claimant's views. It was difficult to conclude that the Claimant's focus on one religion, and ill-informed, disparaging and often recklessly offensive comments were worthy of respect in a democratic society or compatible with human dignity.

96. Mr Davies referred the Tribunal to a short blog by George Letsas entitled *Redfearn v UK: Even Racists Have the Right to Freedom of Thought* published online by the UK Constitutional Law Association on 13 November 2012. George Letsas was Reader in Philosophy of Law and Human Rights at University College, London. An excerpt is set out below.

> "Now consider the second principle that anti-egalitarian opinions (such as racism, fascism or sexism) are as worthy of protection from discrimination as any other opinion. This principle does not mean that we should protect wrongful *actions* that may be motivated by these despicable views, such as race crimes or other horrible abuses. It simply means that in a democratic society we should respect the right of people to *have* such thoughts and beliefs. We should not, in other words, be engaged in 'thought control', which is what states do when they condition the distribution of vital opportunities or benefits (such as employment) on having particular beliefs. People have a right to have any thoughts they like, including bad thoughts. It is a different issue altogether, falling outside the protective scope of the principle, when racists thugs *act* in a way that harms or otherwise wrongs some vulnerable group. But merely holding certain beliefs, absent harm or a clear and present risk of harm to others, is no reason to dismiss anyone, including BNP members. The distinction between thought and action is here crucial. This is why the Court, rightly, found the fact that Mr Redfearn was a BNP member *irrelevant*, repeating its known slogan that the Convention protects not only ideas that are received favorably or with indifference, but also ideas that 'offend, shock or disturb' (para 56). In this respect, the Court clearly moves away from the view, mentioned in *Campbell and Cosans* (1982) and repeated in the explanatory notes to the UK Equality Act 2010, that only beliefs compatible with human dignity are protected by the Convention. As far as freedom of thought goes, this view is not defensible.
>
> In its third-party intervention against the applicant, the Equality and Human Rights Commission argued that employing known BNP members impacts on

> the employer's provision of services *regardless* of whether or not there are any complaints about the manner in which they do their job. It noted further that the justifiability of dismissing a BNP member could turn on a number of factors, including whether employing him undermines public trust and confidence or harms the employer's reputation. These are all bad arguments: the mere fact that service users refuse to be served by workers who endorse a particular ideology is no reason to dismiss them. Nor is it relevant that the employer's business interests will suffer as a result of this refusal. These are not legitimate bases for dismissing people. Just like the employer would be unjustified in firing a communist –or, for that matter, an HIV/AIDS- worker solely because clients do not want to be served by her or him, likewise it would be unjustified to fire BNP members, including those holding civil service jobs, solely because ethnic minorities do not want to be served by them. We shouldn't, absent any evidence or real risk of wrongful conduct, deprive people of employment simply because they may entertain anti-democratic or inegalitarian thoughts. And in any case, the crucial issue raised in *Redfearn v UK* was that UK employment tribunals were barred in the first place from pronouncing on whether such dismissals are proportionate to the legitimate aim of preventing a clear and present risk of racial violence."

97. This extract highlighted the highly sensitive and difficult nature of this exercise.

98. The Respondents' submissions stressed the objectionable nature of the Claimant's views on Islam, including the views expressed about Islamic toilets and women wearing burqas as set out above, but also the objection to the way halal meat was prepared. Ms Azib argued that the Claimant by expressing these views infringed the rights of other members of society, many of whom were entitled to protection under the Equality Act. She also cited his opposition to faith schools and overt religious paraphernalia as views which all ran counter to how this society was run.

99. She submitted that when the Claimant talked about Islam and Muslims, it was in disparaging and/or offensive terms. He did not make his comments specific to any particular part of Islam such as violent or extremist facets, and no other religion had been singled out in his posts.

100. The Tribunal has already commented that Mr Thomas' views about Islam and Muslims did not appear to have been the fruits of serious research, a task he was clearly intellectually well capable of undertaking, should he have been so minded. However, I considered that taken overall his views did not actually infringe the rights of Muslims, or indeed any other minorities to exercise their fundamental freedoms.

101. The discussion in the Tribunal included consideration of the position if the debate were about the antipathy towards the practices of one branch of Christianity by either another Christian or a non-Christian. There were many whose rights to poke fun at or disrespect a religion (be it Christianity or Islam) have been stoutly defended in this and similar modern democracies.

102. I considered that many of the views which were cited by Ms Azib as tending to show that he did not satisfy the fifth criterion, such as an opposition to faith schools and the wearing of overt religious paraphernalia, and opposition to the methods of

preparation of halal meat were shared by groups such as atheists, humanists, feminists and animal rights activists.

103. I was exercised by the meaning of the requirement not to conflict with the fundamental rights of others in the third limb of the fifth criterion.

104. If the Claimant had the authority to do so and attempted to implement any of the anti-Muslim actions he proposed on his social media platforms, one can readily foresee successful challenges to them on the grounds of breaches of the Equality Act 2010. No such action could be launched on the basis of his words alone, and I considered whether this was relevant to determination of whether there was a conflict with the fundamental rights of others.

105. I reminded myself that in the case of *Gray* above, albeit in the context of the fourth criterion, the President of the Employment Appeal Tribunal had confirmed that the proper approach was simply to ensure the bar was not set too high and that too much was not demanded in terms of the *Grainge*r threshold requirements. That was consistent with the need to balance the effects of depriving a claimant of the opportunity to complain about the loss of their job due to religion and belief discrimination and such a claimant's rights under Articles 9 and 10. I had regard to cautionary words about the potential for abuse highlighted in the *Redfearn* Judgment above (para 55).

106. On the other hand, under domestic law, there is no defence such as justification open to a respondent in a direct discrimination complaint which would allow a tribunal to consider matters such as the potential for discrimination by the Claimant at work or reputational damage to an employer as was apparent in the *Redfearn* case. This consideration had to take place at this stage in accordance with the fifth *Grainger* criterion and in the context of the wording of the qualifications set out in Articles 9(2) and 10(2).

107. I considered that the requirement of a conflict was not limited to a potential breach of the Equality Act 2010 by the manifestation or expression of the Claimant's views. This was consistent with the context of the three limbs of the fifth criterion, and with the submissions of the Equalities and Human Rights Commission cited in the Letsas blog above. It was also the sort of limitation anticipated in the wording of Articles 9(2) and 10(2). It did not prevent the Claimant holding or expressing his views, but it took him outside of the right to complain that he had been discriminated against in relation to those beliefs in the circumstances covered by the Equality Act 2010.

108. I concluded that the Claimant's disdainful and prejudiced focus on Islam, to the exclusion of all other religions or belief systems, and the language in which this was consistently cloaked meant that the belief did not meet the fifth criterion.

109. In summary I concluded that:
1. English Nationalism is capable of constituting a philosophical belief under section 10 of the Equality Act 2010.
2. The Claimant held anti-Islamic views as part of that philosophical belief at the relevant time, from May to July 2018.

3. Those anti-Islamic views did not satisfy the fifth *Grainger* criterion, such that they prevented the Claimant's belief in English nationalism from being a protected characteristic.

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Employment Judge HYDE

Dated: 19 February 2021