EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101982/2020 (V)

Heard on the Cloud Video Platform on 5 November 2020

Employment Judge S. Walker

Ms P Jones	**Claimant** **Represented by:** **Mr Briggs** **Solicitor**
Scottish Federation of Housing Associations	**Respondent** **Represented by:** **Mr Hay - Advocate** **Instructed by:** **BTO Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

1 If the claimant was dismissed because of seeking permission to stand in a General Election, and that permission was refused because of the respondent's policy of political neutrality, that would be a reason that relates to her political opinions or affiliations in terms of section 108(4) of the Employment Rights Act 1996.

2 The claimant has a protected belief under the Equality Act 2010, specifically that "those with the relevant skills, ability and passion should participate in the democratic process".

3 An email of 16 October 2019 to the respondent from Law at Work containing legal advice may not be produced by the claimant in the proceedings.

The claim will now be listed for a hearing on the merits.

REASONS

Introduction

1 This claim is for unfair dismissal and religion and belief discrimination. A number of preliminary issues have been identified to be considered at this preliminary hearing as follows:

Issue 1

2 The claimant does not have 2 years service which is usually required to claim unfair dismissal. She relies on section 108(4) of the Employment Rights Act 1996 (the ERA). That provides that where the reason for dismissal is, or relates to, the employee's political opinions or affiliations, the claimant does not require any qualifying service to bring a claim of unfair dismissal.

3 The first preliminary issue to be determined is "If the claimant was dismissed because of seeking permission to stand in a General Election, as she contends, is that a reason that is or relates to her political opinions or affiliations?"

Issue 2

4 The discrimination complaint is based on a belief, which the claimant says is a protected belief under the Equality Act 2010 (the EA), that "those with the relevant skills, ability and passion should participate in the democratic process".

5 The second preliminary issue is whether the claimant has a protected belief under the EA?

Issue 3

6 An email of 16 October 2019 containing legal advice to the respondent from their legal advisers, Law at Work, was provided to the claimant in response to a Subject Access Request under the Data Protection Act.

7 The respondent contends that the document is subject to legal advice privilege and may not be produced during this litigation. The third preliminary issue is whether that email is admissible in these proceedings.

The hearing

8 The hearing took place by video on the Cloud Video Platform. The claimant gave evidence in relation to the second issue. Sara Jackson, Head of Business Services, gave evidence for the respondent in relation to the third issue.

9 An agreed bundle of documents were produced, together with authorities, and Mr Briggs and Mr Hay made detailed submissions on each point for which I thank them. I will consider each issue, including any relevant findings in fact, the relevant law and submissions, in turn.

Issue 1

10 The claimant was employed as Head of Membership and Policy reporting to the Chief Executive Office, Ms Thomas. She claims that she was dismissed because she asked for approval to be allowed to stand as a candidate in a General Election. There was a clause in her contract headed “Political Activity”. This permitted membership of a political party, provided that the claimant should not hold any formal role. “Formal role” was not defined.

11 The claimant says that permission was refused with Ms Thomas identifying the need for “political neutrality” in the claimant’s role as the reason why the respondent would not allow her to stand.

12 It was agreed that the Tribunal should consider this issue with the claimant’s case taken at its highest and, therefore, without making any findings in fact.

Claimants submissions

13 Mr Briggs made the following submissions on behalf of the claimant.

14 The specific statutory provision under consideration is s.108(4), ERA. This is quite an unusual provision. It is also a relatively recent addition to the ERA and therefore there is scant authority as to its application.

15 The first subsection of s.108 qualifies the right under s.94, ERA (the right not to be unfairly dismissed) by requiring employees to accumulate a minimum of two years continuous service before being endowed with this right. The following two subsections ((2) and (3)) disapply this qualification in relation to a number of reasons for dismissal which are themselves automatically unfair.

16 Subsection 4 takes a similar approach insofar as it disapplies the two year qualification period in relation to a particular reason for dismissal. What distinguishes it from the grounds contained within in s.108(3) however is that it is not a reason for dismissal that will create an automatic breach of an employee's right under s.94, ERA.

17 The issue of the fairness or otherwise of the dismissal is not, however, a matter which falls to be determined at this hearing. The claimant submits that, insofar as is material for the purposes of this hearing, the approach of the tribunal to determining the operation of s.108(4), ERA should be no different from the approach a tribunal would take in relation to any automatically unfair ground of dismissal: that is, to adopt a two stage process, in which the Tribunal should:

a. Determine the factual basis of the employer's *reasons* for dismissal; and

b. Ask whether those facts satisfy the particular ground set out in the relevant statutory provision.

18 The reason for dismissal is a matter of fact for the tribunal to determine. For the present purposes, the Claimant's case should be taken at its highest. The factual basis of the respondent's reason for dismissal should therefore be taken to be that the Claimant "*had sought permission to stand as a candidate*" in last December's General Election (para.11, ET1).

19 The sole question therefore is whether or not those facts satisfy the wording of s.108(4). That is, whether such a reason "*is, or relates to, the employee's political opinions or affiliation*".

20 While it is a matter of dispute between the parties whether or not this seeking of permission is the respondent's reason or principal reason for dismissal (and one that falls to be resolved at a final hearing on the merits), the fact that such permission was both sought by the Claimant and refused by the respondent is a matter of agreement.

21 Moreover, the reason why the respondent refused permission also appears to be a matter of agreement: that is, that it would have not been "*compatible with the political neutrality*" of the respondent (para.13, ET3; para.8, ET1).

22 This, the Claimant says, should be both the beginning and the end of the Tribunal's inquiry in relation to this issue. The matter can be expressed as follows:

a. The respondent has a policy of political neutrality;

b. A necessary precondition of political neutrality is the absence or suppression of an individual's political opinions or affiliation;

c. Any breaches of this policy must therefore be indicative on the opposite; that is, relate to the presence or expression of an individual's political opinions or affiliation;

d. A reason for dismissal which relates to a breach of a policy of political neutrality (as is the Claimant's pled case) must therefore be a reason which "*relates to [that] employee's political opinions or affiliation*".

23 In the present case therefore, applying the particular facts of this case as pled to the legislation, it must be the case *a priori* that the Claimant's dismissal related to her political opinions or affiliation.

24 In the event that the tribunal is not with the Claimant in respect of this aspect of her submission (that is, that any dismissal for threatening a policy of "political neutrality" must of itself necessarily *relate to [her] political opinions*

or affiliation), then the Claimant submits that the particular reason she alleges she was dismissed for satisfy the wording of the s.108(4), ERA.

25 The subsection itself is a relatively recent addition to the ERA. It was amended into the existing provisions by way of the Enterprise and Regulatory Reform Act 2013 following the case of *Redfearn v United Kingdom* [2013] IRLR 51 in the European Court of Human Rights. In the case of *Redfearn*, a bus driver with insufficient qualifying service to bring a claim for unfair dismissal was dismissed because of his membership of a far right political party.

26 Mr Redfearn took a case to the ECtHR who found that the UK had been in breach of his art.11 right to freedom of assembly. The basis of Mr Redfearn's allegation was that by failing to provide any form of opportunity to legally test the fairness of his dismissal, the UK had been in default of its positive obligation to safeguard his right to freely associate.

27 The solution the UK government arrived at was to amend s.108(4) into the existing provisions. This did not create a new ground of automatic unfairness but instead simply allowed individuals who had been dismissed because of their political opinions or affiliation to test the fairness of that dismissal.

28 The UK was found to be in breach of its safeguarding obligations in respect of this right conferred by Article 11. Parliament addressed this mischief by the amending s.108(4) into the ERA.

29 The submission in the present case is that given the mischief s.108(4), ERA intended to solve was a shortcoming in the UK's domestic provisions in the respect of individuals' Convention Rights, it should be read in such a way as to give effect not only to a Claimant's right under art.11, but to any convention rights in respect of which the UK has a positive obligation. Indeed, such an approach is already required of this tribunal in line with s.3 of the Human Rights Act 1998 ("HRA"), which requires this Tribunal read and give effect to primary legislation "*in a way which is compatible with convention rights […] so far as it is possible to do so*".

30 The right to stand in an election is a key component of art.3 to the First Protocol, ECHR, which is the right all citizens must enjoy to free elections. The right to stand in elections is regarded in case law from the ECtHR as being "*inherent in the concept of a truly democratic regime*" (*Podkolzina v Latvia* application no.46726/99 at para.35) and therefore something falling squarely within the protection afforded by this Article.

31 The rights under art.3 to the First Protocol fall expressly within the definition of the "Convention Rights" (s.1(1)(b), HRA) for the purposes of the HRA interpretative duties under ss.2 and 3.

32 It is therefore submitted that when applying s.108(4), ERA to the facts of the present case, the only way to do so which is compatible with the Claimant's right under art.3 to the First Protocol is to read "*relates to the employee's political opinions or affiliation*" in such a way that encompasses not only *passive* political affiliation (such as was the case in *Redfearn*), but also *active* political affiliation (such as in the present case). This would undoubtedly catch not only the somewhat narrow protections of art.3 of the Frist Protocol (which is what concerns the Claimant at present), but also some of the broader aspects of the art.13, ECHR right to free expression.

33 Applying this interpretative approach, the dismissal of the Claimant for the reason that she had sought permission to stand in an election, is a reason which *relates to her political opinions or affiliation*.

Respondent's submissions

34 Mr Hay made the following submissions on behalf of the respondent.

35 Mr Hay agrees that s108(4) arose as a result of what he submits was a controversial decision in *Redfearn*. He submits that that case is particularly instructive and useful as an interpretative guide to what the section means. Mr Redfearn was a member of the BNP. The case was not concerned with just his beliefs in private life but they came to his employer's attention because he subsequently gained public office as a councillor. He was dismissed. His employer considered that for Mr Refearn to hold BNP views

were unacceptable taking account of the client base of the respondent – customers were children with learning difficulties from ethnic minority groups. Once Mr Redfearn was elected his views became known and this would cause reputational damage. Mr Hay submitted that it was the application of his political views that was the issue for the respondent. The Strasbourg court focussed on political opinion and repugnancy of the racist views of the BNP. The ECHR did not consider this was just like anyone else seeking public office. The fact of public office was the amplification of his political views.

36 Mr Hay submitted that here is a distinction to be drawn between the holding of political views and political office. The link drawn by the claimant goes too far. Holding of political office did feature in *Redfearn* but was not a factor in the ECHR reasoning nor in earlier case of *Podkolzina*. That case was considered to be of no assistance in *Redfearn*. Clearly the ECHR was concerned about the holding of political views and the right to ventilate claims.

37 S108(4) was introduced as consequence of *Redfearn*. This is a powerful factor when considering what is meant by "*political opinion or affiliation*". Applying common sense to the meaning, it is about political views not political office. Mr Briggs says they go hand in hand. Mr Hay submits that they can do but don't have to. It is open to any adult to stand for political office. Although dominated by political parties it is open to someone to stand as an independent.

38 S108(4) is about holding specific views not about standing for office. It would be a very broad approach to adopt the claimant's argument. It is not supported by *Redfearn* and takes a very broad meaning of "related to". The OUP dictionary definition is "associated with the subject especially causally" so that would be related to political affiliation which is distinct from political office.

Decision

39 As noted above, I have considered this issue taking the claimant's case at its highest. I have made no findings in fact. It would be a matter for a subsequent

tribunal to determine what the reason for dismissal was. I have considered the extent of section 108(4) as it would apply to a reason for dismissal which was that the claimant sought permission to stand as a candidate in a General Election and also, where the refusal was because of policy of political neutrality. That is the only conclusion that would bind a future tribunal.

40 Both parties refer to *Redfearn* in support of their different positions. It is not in dispute that s108(4) was introduced as a direct consequence of the decision of the ECHR in Redfearn. It is therefore relevant to look to that judgment in some detail for assistance in interpreting that provision.

41 At paragraph 43 of its majority decision, the ECHR states **"***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).”*

42 The principal question for the Court to consider was 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 art.11 of the Convention and they concluded that a claim for unfair dismissal would be an appropriate domestic remedy for a person dismissed on account of his political beliefs or affiliations.

43 In paragraph 55, the Court says this *“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.”*

44 The majority conclude in paragraph 57 “*that it was incumbent on the respondent State to take reasonable and appropriate measures to protect employees, including those with less than one year’s service, from dismissal on grounds of political opinion or affiliation.”*

45 The failure by the UK to do this, either through unfair dismissal or discrimination complaints was a violation of the Mr Redfearn's Article 11 rights.

46 It is clear from the above excerpts from the judgment that the Court was considering a dismissal that was "on grounds of" political opinion or affiliation. On more than one occasion they refer to a dismissal that was "*solely"* on grounds of political opinion or affiliation.

47 it is also important to note that Article 11 is the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. It is a protection for people to join trade unions and to join political parties. It is not directed at the political democratic process. In *Redfearn*, I agree with Mr Hay that the fact that Mr Redfearn had been elected as a councillor was only relevant to the case as the means by which his political affiliation to the BNP became public and caused a difficulty for his employer. The case was not about protecting his right to stand for election as a member of the BNP but about his dismissal for being a member of that organisation.

48 Even taken at its highest, the claimant's case does not suggest that the reason for her dismissal was her particular political opinions or affiliations. There is no suggestion that the dismissal was solely on grounds of her particular political opinion or affiliation nor that her dismissal was motivated by that.

49 However, section 108(4) appears to go further than was strictly required by the *Redfearn* decision (as of course, Parliament is entitled to do). The requirement for continuous service is disapplied not just where the reason for dismissal **is** the employee's political opinions or affiliations but also where it **relates to** the employee's political opinions or affiliations. Does this cover dismissal for asking to stand as a candidate in a general election?

50 The respondent's admitted policy of political neutrality does not require that an employee has no political opinions or affiliation nor that she must suppress them. The policy does not preclude membership of a political party. The

claimant was in fact a member of the Scottish Labour Party and, it is clear, an active member of that party. It is not contended by the claimant that she was restricted in her membership or activities with that party until she wishes to stand as a candidate. It is not contended that it was her intention to stand as a candidate for a particular policy that was the reason for dismissal. It appears to be accepted that the respondent's policy prohibited a formal role and that the respondent considered that standing for election contravened the policy. It is not suggested that the claimant was dismissed because of her political opinions or affiliations.

51 The claimant's argument is:

- The respondent has a policy of political neutrality;
- A necessary precondition of political neutrality is the absence or suppression of an individual's political opinions or affiliation;
- Any breaches of this policy must therefore be indicative of the opposite; that is, relate to the presence or expression of an individual's political opinions or affiliation;
- A reason for dismissal which relates to a breach of a policy of political neutrality (as is the Claimant's pled case) must therefore be a reason which "*relates to [that] employee's political opinions or affiliation*".

52 I considered the ordinary meaning of the words in section 108(4). Mr Hay submits that "related to" means "associated with the subject especially causally". I am content to accept that definition subject to a caveat that it is well-established in other areas of employment law, such as harassment, that "related to" is a wider concept that "because of" or "on the grounds of".

53 The question here is whether the alleged reason for dismissal was related the claimant's political opinion or affiliations. The alleged reason is that the claimant sought permission to stand as a candidate in a General Election". It is accepted that the same decision would have been made had the claimant been standing for a different party. It was not her specific political affiliation that caused a difficulty for the respondent.

54 The claimant's request to stand was, without doubt, closely related to her political affiliations. She was asked to stand by the Scottish Labour Party and planned to stand as a candidate for that party. However, it is the reason for dismissal that must relate to the claimant's political opinions and affiliations, **not** the reason for the claimant's request. I do not consider that every refusal of a request to stand as a candidate in a General Election would be covered by section 108(4). As Mr Hay correctly says, an employee may wish to stand as an independent candidate with no political affiliation.

55 I consider that it will depend on the circumstances in the case and, in particular, the reason why the request was refused. It could be, for example, that an employer is unable to allow an employee the time off to campaign or has other concerns that are entirely unrelated to political affiliation or opinions.

56 However, in this case, the claimant alleges that Ms Thomas identified the need for "political neutrality" in her role as the reason for refusal. Even if the specific party was not relevant, I agree with Mr Briggs that a requirement to appear to be politically neutral is a requirement that relates to someone's political opinions or affiliations in that the respondent does not wish these to be made public.

57 I therefore consider that the claimant's case, taken at its highest (which includes her contention that that the request was refused because of the respondent's policy of political neutrality) , does fall within section 108(4) and she is entitled to proceed with her claim without having 2 years service.

58 As noted above, I have made no findings in fact that would bind a further tribunal. It will make a finding as to what the reason for dismissal was. If the Tribunal finds that the reason alleged by the claimant is the reason for dismissal, the Tribunal will then go on to consider the reasonableness of the dismissal under section 98(4). If the Tribunal finds that the reason for dismissal was not the reason provided by the claimant (it being for the claimant to prove the reason) then the claim will fail and there will be no need for the Tribunal to consider section 98(4).

Supplementary submissions

59 I am not therefore required to consider Mr Briggs other arguments. However, for completeness, and in case I am wrong in my primary conclusion, I will deal with them.

60 The claimant asks me to consider other convention rights when interpreting this provision, in particular, Article 3 of Protocol No. 1 which provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. "Mr Briggs contends that the right to stand in elections is "*inherent in the concept of a truly democratic regime*" (*Podkolzina v Latvia* application no.46726/99 .

61 In *Podkolzina*, the ECHR stated that the rights to vote and to stand for election are implicit in Article 3. They also note that although those rights are important, they are not absolute. There is room for "implied limitations" and contracting states may impose conditions on those rights which are not in principle precluded under Article 3 and they have a wide margin of appreciation in this sphere. The ECHR will only intervene to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.

62 I do not consider that Article 3 (which is about how states set up and run elections) assists me in interpreting s108(4). I accept that implied into Article 3 is a right to vote and stand in elections subject to the implied right of the state to restrict these rights. I do not consider that section 108(4) can be interpreted to include a blanket protection where the reason is that the employee stood or proposed to stand as a candidate in an election. Section 108(4), as has been discussed above, was introduced because the United Kingdom had failed to protect rights under art 11. It was not about the rights protected under art 3. While I appreciate there is an obligation to interpret all legislation where possible to give effect to all convention rights, I do not

consider it is possible or appropriate to interpret s108(4) in this way. S108(4) is clearly intended to protect political opinion and affiliation and I consider it would be would be a step too far to use art.3 to imply a right to stand in elections into section 108(4).

Issue 2

Findings in fact

63 The following facts, relevant to the second issue, are admitted or found to be established:

64 The claimant believes that those with the relevant skills, ability and passion should participate in the democratic process at whatever level is appropriate to those skills and abilities.

65 She has held this belief since she was at school and has been politically active in some way, since she was a teenager. She was fascinated by apartheid in South Africa and tried to encourage her parents to join the boycott of South African produce and to stop buying Nestle products due to their unethical practices.

66 At school, the claimant campaigned on disability rights and for the rights for girls to wear trousers. She was elected school captain and later student president. After school, she went to university to read Social and Political Studies. She chose this because she wanted to understand the system a bit more and in order that she could get involved and change things.

67 The claimant was involved in student politics at the university and was elected onto student committees. She was elected to the sabbatical post of Student Activities Secretary, one of eight elected roles governing the students' union.

68 After she finished her undergraduate degree, the claimant took a Masters in Development Studies at the School of Oriental and African Studies. Development in the global south was something that she had taken a

particular interest in at this time, particularly the role played by the United Kingdom.

69 The claimant has spent 20 years since graduation working in campaigns regarding the UK's role in overseas development. She first worked for the World Development Movement (WDM) which campaigned on and lobbied in favour of 'justice for the world's poor'. The organisation was a democratic membership organisation which was important to the claimant who believes that members should be guiding organisations, particularly ones of an overtly political nature.

70 The claimant believes in participatory politics which includes standing and voting in elections but also campaigning and lobbying.

71 After 3 years with WDM, the claimant moved to a role within the trade union Unison. This was another democratic membership organisation. The claimant worked as Unison's International Officer for 10 years before going back to the WDM, now known as Global Justice Now.

72 She then moved to Scotland and worked for Oxfam before taking up her position with the respondent.

73 The claimant believes that people who do not necessarily share her political perspectives and values should also participate in the democratic process which allows constituents to choose who they want to represent them.

74 The claimant also believes that people who enter the democratic process for improper purposes or with ulterior motives are damaging to that process. She believes strongly that the role of a member of parliament is to represent the views of their constituents, and act in the best interests of their constituents and the best interests of the country. She is concerned about the motivations of people who go into politics because they have connections and think it will be an easy career path, but who don't necessarily have any particular passion or convictions that drive them to do so. She is also concerned about politicians who seek to promote the

interests of powerful or wealthy backers, rather than those of their constituents if those individuals are disingenuous about their motives.

75 She believes that there is space within politics for the legitimate representation of business interests, however when those representing those interests attempt to conceal or disguise their true purpose behind rhetoric, she believes this to be very damaging to the political process and not good for democracy.

76 The claimant believes that work should be done to make participatory politics - in the sense of people actually standing for elections - accessible to all groups in society, and especially groups which have historically been under-represented. She believes that the democratic process works best when those making the decisions about society are representative of society as a whole rather than being drawn from a small group of people with similar attributes and similar life experiences.

77 The claimant considers that barriers to participation — whether financial, practical or through opaque selection processes or prejudicial attitudes of constituency parties — tends towards politics being dominated by men. As this is not representative of society, she believes that this harms the democratic process.

78 She believes that work should be done to redress the underrepresentation of women in politics. She attended 'Scotland's Women Stand' in September 2019, an event run by the Parliament Project to inspire, empower and encourage women to run for political office.

79 The claimant had first joined the Labour party in 2010. She considered it her duty to become as actively involved as she could. She participated in campaigning and door knocking and attended monthly meetings of her constituency party.

80 Since living in Scotland, the claimant has organised a local campaign stall in her local town centre and has built relationships with neighbouring constituency Labour parties.

81 The claimant decided to stand for election in 2019 for the Scottish Labour Party feeling at that time that her experience, knowledge and skill gave her something to offer in her community through an elected position.

Claimant's submissions

82 For the claimant, Mr Briggs made the following submissions on the second issue.

83 This relates to whether or not the Claimant has the qualifying protected characteristic of religion or belief in terms of s.10, EA. It is not submitted that the Claimant shall rely on any protected characteristic of religion, but instead that she has a "philosophical belief" in terms of s.10(2), EA, and for the purposes of Part 2 Chapter 2 and Part 5 of that Act.

84 The leading case on the proper approach for determining whether or not any particular philosophical belief amounts to a protected characteristic for these purposes is *Grainger Plc v Nicholson* [2010] IRLR 4. There were 5 criteria set down in *Grainger*. These were drawn together from the existing UK and European case law and summarised at para.24 as follows:

a. The belief must be **genuinely held**;

b. It must be a **belief** and not, as in *McClintock*, 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**, be not incompatible with human dignity and not conflict with the fundamental rights of others.

85 It is submitted that in the present circumstances, all five criteria are present. The third and fifth criteria speak for themselves: the belief is as to the

principles which govern the very workings of the democratic system and operate so as to ensure an open and free a political culture with the benefits this will provide for society as a whole.

86 The first and the second criteria follow from the Claimant's evidence. The particular philosophical belief held by the Claimant is more than a mere passing interest or affirmation of the rights and wrongs of participatory politics. These are deeply held beliefs which the Claimant has lived her life by from an early age and which have guided decisions she has made in her personal, professional and academic life.

87 The fourth criterion really relates to the substance of the views. Again, the Claimant's submission is that this criterion is entirely satisfied by the Claimant's evidence. The belief is undoubtedly serious and important. It is also cogent, in the sense of being a clear, logical and convincing belief; and cohesive in the sense of being a belief which can be expressed in simple terms in one sentence, but one which nonetheless has been applicable to numerous situations encountered by the Claimant throughout her life from a young age.

Respondent's submissions

88 For the respondent, Mr Hay made the following submissions on the second issue.

89 He agrees that *Grainger* is the key authority and *McLintock* earlier at the EAT. He submits that *McLintock* failed for complex reasons. They noted that the ECHR says there requires to be *"sufficient cogency, seriousness, cohesion and importance and be worthy of respect in a democratic society"* This is different from an opinion or a view based on logic. In *Grainger*, the qualifying belief does not need to be a philosophy (an "ism") but it does need to be of sufficient weight to bear the trappings of a philosophy. That is what takes it from a strongly held opinion. Mr Justice Burton in *Grainger* says it must have a "*similar status or cogency to religious belief*" (para 26).

90 Mr Hay refers to the discussion at para 30 of *Grainger*. A qualifying belief can be a one off but needs to have the potential that it could be shared by others. Mr Hay submits there needs to be a framework that others could adopt if they wanted to.

91 There is no dispute that the claimant genuinely holds the belief and it is worthy or respect in a democratic society. However the respondent says that it lacks the cohesion and cogency required and that was obvious from the evidence. It was an individually held opinion. When the claimant was asked, "*What was the difference between just taking part and standing?*" she was vague.

92 Mr Hay submitted that the purported belief lacks cohesion and cogency. He submitted that from paragraph 9 of the claimant's witness statement it was unclear who decides if someone is standing for an improper purpose. The answer given in cross-examination was vague. It could be aspects of society and the electorate. If you attempt to construct a framework that someone else could sign up to you are not able to do it. It is not saying there is anything improper about the claimant's opinion but that is all it is - an opinion on a variety of issues. As stated, the belief is overly broad, lacking in cogency and cohesion.

93 Mr Hay submitted that when he sought to explore what was meant by participation, the claimant accepted her belief was broader than standing for office and was based on her own experience. Mr Hay submitted that there are all manner of ways of participating, not just standing for office. There is insufficient material to form into a qualifying belief. This is different from *Grainge*r, there were things he chose to do and not to do and others could sign up to that.

Decision

94 It is not disputed that the claimant genuinely holds the belief set out. I do not understand it to be disputed that that is a belief that is worthy of respect in a democratic society nor that it relates to a weighty and substantial aspect of human life and behaviour. However, for completeness, I accept that the

claimant did hold the belief, that it is a belief worthy of respect in a democratic society and that it relates to a weighty and substantial aspect of human life and behaviour.

95 The focus of debate was whether that belief attained the level of cogency, seriousness, cohesion and importance set out in *Grainger so as* to amount to a philosophical belief rather than a strongly held opinion.

96 I am persuaded by Mr Briggs' submissions on this point. The claimant believes it is important for people to participate in democracy and that this includes standing for elections and that she believes people should do this for proper motives. That is a serious and important belief.

97 I accept, as Mr Hay suggests, that the claimant also believes in the importance of participating in other ways in the democratic process, such as lobbying or fundraising. She also clearly believes in the importance of the representation of women in an elected democracy and has views about world poverty. I do not see those wider beliefs as inconsistent with the belief which is contended for in this claim. A person may have many beliefs. That does not mean that any one of those beliefs lacks cohesion or cogency.

98 Mr Hay suggests that the belief lacks the necessary cohesion and cogency as required by *Grainger*. I do not agree. As Mr Briggs submitted, the belief can be set out in one short sentence. It is cogent and easy to understand. It is serious and important and does not lack cohesion. The claimant has manifested that belief by seeking to stand for election. She sought to manifest that belief at a stage in her life when she felt able to do so.

99 I consider that the claimant has established that she has a protected belief under the Equality Act, specifically that "those with the relevant skills, ability and passion should participate in the democratic process at whatever level is appropriate to those skills and abilities".

100 Of course, that does not mean that her claim of discrimination will succeed. All this judgment does is to allow the claim to proceed.

Issue 3

Findings in fact

101 I find the following facts to be admitted or found to be established.

102 After the claimant was dismissed but before her internal appeal had been considered, the claimant made a Subject Access Request to the respondent under the Data Protection Act.

103 This was in the form of a schedule and asked for a number of items relating to the claimant's period of employment. The schedule included an item about emails relating to the claimant between named people and also a final item "*emails or any IM or SMS communication relating to PJ between the Chief Executive and any other parties".*

104 Ms Jackson dealt with the Subject Access Request which was sent to her as the claimant understood her to be the Data Protection Officer. Ms Jackson is not a lawyer.

105 Ms Jackson took advice from Sentinel Law Solutions. She asked for advice about what the response to the Subject Access Request should say, what should be included and whether anything should not be included. She did not consider whether any document was legally privileged. She did not consider any impact on future legal proceedings. Her focus was on ensuring that other people's personal information was redacted before being provided to the claimant.

106 Ms Jackson asked 2 members of staff, Nicola Adams and Alison Grady, to collate the information requested. Ms Jackson emailed the claimant on 19 December 2019 confirming that some information would be sent to the claimant's home address. Ms Jackson noted more time was required to provide the other information. This included the final request for emails, IM or SMS messages.

107 The remainder of the information was sent with a compliments slip to the claimant in January 2020. This included an email sent to the respondent on

16 October 2019 from Law at Work their legal advisers at the time. This included legal advice relating to the claimant. Ms Jackson had simply directed that a search be done of emails which included the claimant's name or initials and that that information was to be sent to the claimant.

108 Ms Jackson was unaware that the information sent to the claimant included an email providing legal advice that was legally privileged.

109 Ms Jackson was aware that the claimant had been dismissed and had appealed her dismissal. She was not aware of any actual or planned proceedings in the employment tribunal.

Claimant's submissions

110 Mr Briggs made the following submissions on behalf of the claimant.

111 This issue relates to the admissibility of a particular document in proceedings. Broadly put, the Claimant's position is that there is absolutely no reason why this document should not be admissible. It is relevant to the proceedings and came into the Claimant's possession through entirely lawful (albeit, accidental) means. This document was not obtained by the Claimant through deception. She did not steal the document. She entered no lockfast places in order to procure it and did not hack into any email accounts. That the respondent disclosed this document to the Claimant in error is to its misfortune, however neither the rules of admissibility nor legal privilege offer the respondent any remedy to this misfortune. The mere fact of a document having once been subject to legal privilege does not make that document inadmissible once privilege ceases to operate.

112 As a starting point it is perhaps useful to begin by defining what legal privilege is and (as importantly) what it is not: privilege is a right to resist the compulsory disclosure of information, no more and no less. This definition has appeared in numerous authorities, including the Privy Council *B v Auckland District Law Society (New Zealand)* [2003] 2 AC 736. The *Auckland* formulation was approved by the Inner House of the Court of Session in the

case of *Scottish Lion Insurance Co Ltd v Goodrich Corporation and Others* 2011 SC 534 per Lord Reed at para.46:

"*Privilege is the name given to* ***a right to resist the compulsory disclosure*** *of information. […] It exists in order to maintain the confidentiality of the information in question. It follows that* ***privilege will be lost if the information in question ceases to be confidential****. […] Waiver of privilege can be distinguished from loss of privilege*".

113 The corollary of privilege being no more than a right to "resist disclosure", is that once information has been disclosed – whether accidentally or otherwise – the right has no further application in relation to that information. Privilege protects an individual from releasing a genie from a bottle, however once released, it does not assist that individual in putting it back in.

114 This principle extends not only to the disclosure of *information* in some ethereal sense, but also to the disclosure of documents. This point was made by Hoffman J in *Black & Decker Inc v Flymo* [1991] 1 WLR 753, at 755: "*it is not possible to assert a right to refuse to disclose in respect of* ***a document which has already been disclosed****. Once the document has passed into the hands of the other party* ***the question is no longer one of privilege but of admissibility***".

115 This is undoubtedly the correct position. Applied to the present circumstances, it is therefore of no consequence whatsoever that the document was disclosed to the Claimant accidentally, or even whether it was disclosed by the respondent itself or its legal agents. This document, being both in the Claimant's possession and something upon which she wishes to find upon in evidence, can only be excluded according to the Tribunal's own rules of procedure. Privilege is a right against involuntary disclosure of information. It is not an "undo" button.

116 Privilege may be waived either expressly or impliedly, and the test for whether or not an individual has waived privilege, either wholly or in part, is an objective one (*Scottish Lion Insurance*, per Lord Reed at para.46):. The

court or tribunal will ask themselves whether it can be inferred from the individual-in-question's conduct that the person has given up their right.

117 In this instance, the Claimant accepts that the respondent has not waived its right to privilege. The document was clearly disclosed to the Claimant in error and on an objective standard, there is nothing to suggest that it intended to forego its right to resist disclosure.

118 However, the sole implication of the respondent's retention of privilege is that it will maintain its right to resist any further disclosure of information or documents of a privileged nature. Again, once information has been disclosed, privilege does not operate as to force that genie back into the bottle. The presence of this document within the Claimant's possession will of course add another feature to the respondent's decision making landscape in determining whether or not to now waive the right further. However this is an issue of litigation strategy for the respondent and not an issue that either the Claimant or the Tribunal ought to concern themselves with.

119 The admissibility or otherwise of any evidence in the employment tribunal is a matter which falls within the Tribunal's broad power to determine procedure for its own hearings. In particular, r.41 of the Rules states that:

> "*The tribunal may regulate its own procedure and shall conduct the hearing in the manner is considers fair, having regard to the principles contained in the overriding objective. […] Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.*"

120 The overriding objective, found at r.2, the rules, requires the tribunals to deal with cases "*fairly and justly*".

121 The balance of fairness in these circumstances falls overwhelmingly in favour of the Claimant. The Claimant is in possession of a document which she believes is material to her case.

122 Left with just the issue of admissibility, the respondent's position in respect of this issue appears unassailably weak: the sole basis upon which the

respondent says that it would be unfair and not in line with the overriding objective to admit this document is that it was disclosed to the Claimant in error; this was a document the Claimant was never intended to see.

123 If this matter reaches a final hearing, the key factual dispute the Tribunal will be asked to resolve is as to the respondent's reasons for dismissal. The respondent has set out its purported reason in its ET3. The Claimant's position is that this is not the real reason. Her position is that the true reason was something else. In support of this, the Claimant intends to rely on a document which she says will show that the respondent seeking advice as to whether or not it could lawfully dismiss her for something other than the respondent's purported reason entirely. This was answered in the negative.

124 This document is absolutely crucial to the most fundamental factual dispute at issue in this case. To deprive the Claimant of being able to place reliance this document on the sole basis of the respondent having not actually intended her to see it in the first place would simply be an abrogation of all and any notions of fairness and justice.

125 Moreover, it would place the Claimant at a substantial disadvantage in attempting to litigate her case: the Claimant would have to simply pretend that she was not aware that the respondent sought legal advice in respect of dismissing her for standing in an election not days before it purportedly dismissed her for something else.

126 In all the circumstances, Mr Briggs submitted that there is no basis upon which the Tribunal should exclude the document in question from evidence as inadmissible

Respondent's submissions

127 For the respondent, Mr Hay made the following submissions on the third issue.

128 It is correct to say that the ET is not bound by ordinary rules but it is recognised that exceptions can be introduced into case management. However, rule 31 provides that parties are entitled to documents they could

get in sheriff court where issues of admissibility arise. Even under rule 2, rules of admissibility are not just technical but strike at fundamental aspects of public policy. There is lots of case law that without prejudice privilege applies in the employment tribunal. It helps people to settle. Legal advice privilege must similarly be interpreted to give the broadest freedom available for parties to consult and get advice and for that to be confidential.

129 Privilege is held by the client and can be waived by them. In *R (ex p B) v Derby Magistrates Court* 1996 A.C. 487, the House of Lords made it clear that privilege was not just for the sake of the applicant but was absolute. In *Auckland* – there was no move from the that formulation but in fact applied it. In *Auckland*, the court looked at the factual scenario to see if privilege applies. It is not correct to say it just prevents involuntary disclosure. There was a deliberate disclosure in that case. The Inner House cited *Auckland*. The case was approved but implied that limited disclosure did not amount to a waiver of privilege. It remains a broad privilege rooted in public policy. It is held by the client and can be waived either explicitly or implied.

130 In the present case the document was disclosed erroneously through the Subject Access request. There is nothing in that correspondence to show express waiver and nothing to suggest waiver ca be implied. In *Millar v Dickson* 2002 S.C. (P.C.) 30, the Privy Council gave a definition at para 43. *"Waiver is a voluntary informed and unequivocal election by a party not to claim a right or raise an objection open to it."* The circumstances of the present case do not meet that test. The request which came in was a Subject Access Request under the Data Protection Act. There was no specific reference to this document. The first email from Ms Jackson referring to partial disclosure makes no express reference to any right not being claimed. There is no explicit reference in the schedule except possibly the general catchall at the end. There is nothing beyond that email to construe a waiver. The rest of the documents were just sent out with a compliments slip.

131 There is nothing on which to construct a voluntary and informed choice to waive privilege. This was all prior to lodging the claim. Ms Jackson's evidence

that she and others had awareness of an internal appeal but not of an employment tribunal claim.

132 Having regard to the overriding objective and important public policy of legal advice privilege, this document should not be admitted in evidence. In 1960s, first instance decision of *McClintock v Department of Constitutional Affairs* UKEAT_0223_07 a privileged communication between the pursuer's solicitor and a witness was disclosed by the witness to the defender by mistake. Lord Cameron in the Outer House had to consider if it was available in the litigation. He said it was available but reserved his position about the situation where a communication between the solicitor and the pursuer had been disclosed.

133 There is a broad justice principle here. There are plenty of examples where a party would like to rely on a without prejudice communication, but they can't. This document is not crucial to the claimant. The decisionmakers can be cross-examined on their reasoning. Even if it was relating to a key issue, that does not mean these documents can be used. That is too broad and would disapply all sorts of privilege in connection with dismissal.

134 Witnesses can be cross-examined. The doctrine does not mean that the claimant has to "unsee" the document, just that the Tribunal cannot see it and it cannot be relied upon. It is not a weighty aspect of justice.

Claimant in reply

135 In reply, Mr Briggs said that with regard to the policy aspects, the only case that deals with it is *Black and Dekker* at p755. Lord Hoffman says you can't assert a right in a document that has already been disclosed. *Mcleish* is not binding but anyway, Lord Cameron reserves his position.

136 The Tribunal should apply the ordinary principles of the overriding objective.

Decision

137 It is not in dispute that, if the claimant was seeking an order for the respondent to produce the email of 16 October 2019, that would be covered by legal

advice privilege and the Tribunal would not order it to be provided to the claimant. Although rule 41 provides that the Tribunal is not bound by normal rules of admissibility, it can only order a person to disclose documents or allow inspection of material if that could be ordered by a sheriff (rule 31).

138 However, I am not being asked to order disclosure of a document under rule 31. The document has found its way into the hands of the claimant. There was no bad faith. The claimant made a Subject Access Request and the document was provided as part of the response. The question is whether the claimant can rely on that document in the current case.

139 Mr Hay submits that without a valid waiver of privilege it can't be, He refers to *Miller v Dickson* as authority that any waiver of a legal right must be "voluntary, informed and unequivocal". Mr Briggs refers me to the comments in *Black and Decker* where it is stated that

"*it is not possible to assert a right to refuse to disclose in respect of* ***a document which has already been disclosed****. Once the document has passed into the hands of the other party* ***the question is no longer one of privilege but of admissibility***".

140 My understanding is that these comments in *Black and Decker* relate to "disclosure" in the formal sense that it is used in English procedure as part of the obligation of a party to legal proceedings to disclose relevant documents. I do not understand "disclosed" in this context to mean that it has simply been provided to the claimant as in this case.

141 I am satisfied from Ms Jackson's evidence that she was unaware of these proceedings and of the right to assert legal privilege. I do not consider the respondent has waived privilege in this document either expressly or impliedly.

142 However, it seems to me that my decision is not strictly about whether the document is covered by privilege. That would arise in an application under rule 31 but not when a document is already in the hands of the party wishing to rely on it. I consider that the question for me is what would be in

accordance with the overriding objective , to ensure that the Tribunal deals with the case “fairly and justly” (rule 2) . The fact that documents containing legal advice are usually protected by privilege is a relevant factor but not a conclusive one in the circumstances.

143 I take into account that, the document is relevant to the issues to be determined in the case and may assist the claimant. The claimant is in possession of the email and is aware of its contents. She will clearly consider it is unfair if she is not able to produce it.

144 On the other hand, the document was provided to the claimant for one purpose and without awareness that a claim would be made to the employment tribunal. Ms Jackson had not considered that the document might be relied on in legal proceedings. It was provided without any consideration at all of legal advice privilege. It is not a document that the Tribunal could have ordered should be produced and, as Mr Hay submits, there are strong policy reasons why legal advice is privileged.

145 I also take into account that the claimant will be not be required to forget about the email. She is not required to “unsee” it as Mr Briggs suggests. She will be able to question relevant witnesses about the matter. The only thing she will not be able to do is to produce the document itself which contains the advice. Witnesses may, of course, refuse to answer questions and it would be a matter for the Tribunal hearing the case what weight they put on that evidence.

146 On balance, I consider the overriding objective supports the document not being allowed to be produced in these proceedings by the claimant and I so order.

Employment Judge: Susan Walker
Date of Judgment: 1 December 2020
Entered in register: 7 December 2020
and copied to parties