



EMPLOYMENT TRIBUNALS

Claimant: Mr Jeremy Sleath

Respondent: West Midlands Trains Ltd

Heard at: Birmingham **On:** 25 June 2021 and
14 July 2021 (without the parties)

Before: Employment Judge Battisby (sitting alone)

Representation

Claimant: In person

Respondent: Mr J Wallace, counsel

RESERVED JUDGMENT

1. The specific beliefs that the Claimant holds as determined in the reasons, are philosophical beliefs protected by the Equality Act 2010.
2. The respondent's application for a deposit order succeeds as far as the claims for direct and indirect discrimination are concerned and is dealt with in a separate order. The application fails in respect of the claim of unfair dismissal.

REASONS

Introduction

1. In this case the claimant is making claims of unfair dismissal and discrimination on the ground of his beliefs.
2. On 23 February 2021 there was a preliminary case management hearing before EJ Kelly (the 'CMH'). She identified the issues, made a directions order and listed the case for a final hearing on 23 and 24 September to deal with liability only ('the CMO'). In addition, she listed this preliminary hearing to determine the following issues:
 - 2.1. Whether or not the religion or belief relied on by the claimant at the material time (July to November 2020) is protected by the Equality Act 2010, unless the respondent concedes this issue;

- 2.2. If the respondent makes an application for deposit or strike out, to hear such an application.
3. The respondent did not concede the issue at paragraph 2.1 and made an application for just a deposit order under rule 39 of the Employment Tribunals Rules of Procedure 2013 ('the Rules'). This judgment deals in the first part with the issue at paragraph 2.1.
4. This hearing was conducted in person at the Birmingham hearing centre with all parties present.

Background undisputed facts

5. The claimant was employed by the respondent rail operator as a senior conductor from 18 December 2003 until his dismissal with effect on 16 September 2020.
6. On 4 July 2020, the claimant made the following Facebook post on his personal social media account (46):

*'Thank F+++ our pubs open up today. We cannot let our way of life become like some sort of muslim alcohol-free caliphate just to beat Covid19. We must button up, face it, stiff upper lip, if necessary herd immunity it, but we must learn to live with it & not let our fantastic culture & way of life be trashed. **Rmt Leamingtonbranch**'*

7. As indicated, the claimant's union branch Facebook account was tagged at the end of the post, meaning the branch members would be able to see it if they were followers on social media of the account.
8. An anonymous person, said by the respondent to be a senior conductor at its Snow Hill station, took offence and complained about the post.
9. In a follow-up Facebook post, the claimant stated (47):

'Apparently someone has complained about a comment I made about hoping UK never becomes an alcohol-free muslim caliphate! (Or Islamic State). Unbelievable but true! If that's a controversial statement now, the world's gone mad! – Incidentally, I wouldn't want UK to become any sort of religious or theocratic State, whether muslim, hindu, buddhist, Jewish, Chinese politburo, or even Christian. I wouldn't even want an atheist state, my faith, if it involved banning other beliefs!'

10. An investigation followed with the claimant attending a fact-finding meeting on 9 July 2020 and a formal investigation hearing on 12 August 2020. An investigation report was prepared recommending that the claimant should attend a disciplinary hearing to face an allegation of: 'Posting racially offensive and discriminatory posts on Social Media in contravention of WMT's Code of Conduct'.
11. A disciplinary hearing took place on 3 September 2020. The allegation was

found to have been substantiated and he was dismissed for 'gross misconduct' by a letter dated 16 September 2020. The claimant appealed against dismissal and the appeal hearing took place on 12 October 2020. The appeal decision initially was that the claimant be re-instated subject to conditions. An appeal review meeting took place on 29 October 2020 at which the same appeal hearing manager reversed his previous decision and decided not to uphold the appeal, which was dismissed by a letter dated 9 November 2020.

Procedural history

12. The claimant presented his claim on 9 November 2020, following a period of early conciliation through ACAS between 13 and 23 October 2020.

13. In the CMO the claims were identified as:

- 13.1. Unfair dismissal;
- 13.2. Direct discrimination based on religion or belief; and
- 13.3. Indirect discrimination based on religion or belief

14. The belief relied upon was stated to be 'secular atheism' and EJ Kelly recorded this meant 'that he does not believe in a god or the afterlife and he believes that, in any society, everyone should be free to express their beliefs; and live how they want to live, as long as they do not cause harm'.

15. The provision, criterion or practice ('PCP') relied upon by the claimant for his claim of indirect discrimination was identified in the CMO as "application of its disciplinary procedure, and in particular, the listing as an act of gross misconduct 'deliberate discrimination or harassment, or incitement to harass or discriminate on the grounds of race, sex or gender reassignment, religion, disability, age or sexual orientation'".

The evidence

16. I heard evidence from the claimant, who was cross examined by Mr Wallace.

17. I received a bundle of documents running to 110 pages, which included the claimant's witness statement in the form of an e mail to the respondent's solicitor dated 19 May 2021 (106-108). Where I refer to a document and provide a page number, it relates to this bundle.

The findings of fact

18. The claimant is 63 years old, lives alone and has no dependants. His social life revolves around the public house, where he likes to engage in discussion and debate about various matters. I found him to be very open and talkative, polite and serious about his beliefs. I do not find him to be a person who would deliberately seek to upset anyone, but, on the other hand, would not shrink from saying what he thought about anything. He is prepared to be controversial. He is what one may describe as a 'character', namely one who is unafraid to express his own individuality.

19. He stands by his first Facebook post and can see nothing wrong with it, believing it to be factually accurate. He makes regular posts on Facebook with a view to stimulating discussion and debate and, with that in mind, often tags his local union branch so work colleagues can see it and debate with him.
20. As to his beliefs and how he describes them, his ET1 form at box 15 (11) states: 'I am secularist, pluralist, free thinker, who wants all religions & none to exist in harmony, and value Freedom of Speech highly.'
21. His witness statement says (106): 'I am secular, pluralist, atheist who wants to live in a State where all political, religious, or philosophical beliefs can be expounded and where freedom of speech exists'. He went on to state (107): 'My strongly held secular, pluralist, and atheist views have been ignored by WMT. They are as important to me as a religious person's beliefs are to them. I strongly believe that a Muslim Senior Conductor stating that he did not want to live in an alcohol-free muslim caliphate, (or that he did, for that matter) would not have been treated in the disgraceful way I have been, so it is a clear case of discrimination.'
22. In giving his oral evidence, he accepted there is no known definition of the term 'secular atheism' as used to define the issues at the CMH. However, he explained what it means to him is that he has no religion, but he respects the right of others to hold a religion. He stated everyone should be free to hold whatever belief they wish, and also be free to criticise the beliefs of others, whether religious or political. He agrees with the way of life of the humanists. For these reasons, he said it would be anathema to him to live in a 'Muslim caliphate', even if it did permit the drinking of alcohol, because he is against one-religion or one-party States, where no other religion or belief is permitted, or where one has to be an atheist.
23. He defined a Muslim caliphate as a one-religion state and said that he had been thinking of ISIS (The Islamic State of Iraq and the Levant) when referring to a Muslim caliphate, where he understood no other religion or belief was permitted. This is in line with what he said at the fact-finding meeting with the respondent on 9 July 2020 (47) where he said he believed the term 'caliphate' was used by extremists such as in Syria. He accepts he may have misunderstood the exact meaning of 'caliphate' when he made the post (and much was made of this by the respondent), but stated he was simply giving a name to what he believed was a single-belief system where alcohol is forbidden.
24. He made clear he would not want to cause harm or be disrespectful to anyone else, but it was important to him to be free to criticise a religion. He believes Remembrance Day should be a non-religious ceremony. He does not believe Church of England bishops should have the right to sit in the House of Lords. As evidence that he is not anti-Muslim, he said he has always supported the right of Palestinians to hold a state of their own, yet many Palestinians are of the Muslim faith.

25. As to the post, he said he believed only those following him on Facebook would see it even though he 'tagged' the local RMT branch. However, he was happy for anyone to see it, as he did not see anything wrong with it.
26. Under cross examination and by reference to his various interviews with the respondent prior to dismissal, he agreed his post was about celebrating the fact that public houses had re-opened, but was also expressing his dissatisfaction at the restrictions to combat the Covid-19 pandemic, which he equated to life in a Muslim caliphate, where there would also be a ban on alcohol consumption and other restrictions. In the investigation meeting on 12 August 2020, it was recorded in the minutes (40) that the claimant said: 'Most Muslim states in the world are alcohol-free – e.g. Dubai. I don't think it's slurring the Muslim religion; not all Muslims don't drink. Some people might be Jewish by faith but still eat bacon.' He agreed he said this. He agreed that Dubai would not be regarded as a caliphate. He did not think most people had heard of a caliphate till ISIS came to the fore in recent times. He did not accept the suggestion that his post had nothing to do with pluralism, secularism, or atheism. He challenged the suggestion that his comments about a Muslim state were gratuitous.
27. In the disciplinary hearing on 3 September, the claimant was clarifying what he had meant and, as recorded, he said (57): 'I did clarify [previously] that I was saying that I did not want to live in a Muslim caliphate – I meant no theocratic hard-line state. We do live in a Church of England [state] but it doesn't have an impact apart from Sunday working hours. My ideal is a secular society where all religions can be together. Thought that made it quite clear and then when XXX said that someone might be offended I deleted the post'.
28. I find the claimant to have been an entirely open and honest witness and accept his evidence entirely. Based on that, I find he is a humanist, who believes in secularism and rejects religious dogma. I define his beliefs as based on secularism, meaning that all perspectives on belief and non-belief can be freely expressed in society, and that the state should not actively promote one belief or religion, rather than another, or indeed none at all. Whilst he is an atheist, he does not believe atheism should be imposed. He believes all have the right to believe in a religion or otherwise with total unencumbered freedom from interference by the state or others. He totally rejects the notion of a religious theocracy. He wants to live in a state where all political, religious, or philosophical beliefs can be expounded and where freedom of speech exists. He believes in the right to criticise others and their religion, even if offence is given, as long as that does not go too far in the sense of being abusive and causing harm.

Submissions

29. Mr Wallace made his submissions first at my request. He provided a skeleton argument running to 15 pages in which he summarized the background, detailed the relevant law and made his submissions, for which I am grateful. He provided a bundle of 11 authorities running to 194 pages. I will not list

them here, but I refer to a number of them below.

30. Likewise, I will not repeat the submissions here, but will deal with them in my conclusions.
31. I gave the claimant the opportunity to respond to Mr Wallace's submissions. He did not refer me to any authorities. He re-stated his beliefs and that they were genuine and not manufactured after the event, and that he should have the freedom to express them. The fact that somebody may have been offended was not a basis for denying him his right to such freedom.

The law

32. Section 4, Equality Act 2010 ('EqA') identifies the characteristics that are "protected characteristics". These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Sections 5 to 12 EqA set out the circumstances in which a person "has" a protected characteristic.
33. Section 10, EqA deals with religion or belief. It provides:
- (1) *Religion means any religion and a reference to religion includes a reference to a lack of religion.*
 - (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."*
34. It is essential to define the belief relied upon with precision in determining whether that belief is protected under s10 EqA: **Gray v Mulberry Company (Design) Ltd** [2020] IRLR 29. Rather than setting out a detailed treatise of a claimed philosophical belief, it is sufficient to give a precise definition of those aspects of the belief that are relevant to the claims being made: **Forstater v CGD Europe and Ors** UKEAT/0105/20/JOJ at para 45.
35. The EAT in **Grainger plc & others v Nicholson** [2010] IRLR 4 reviewed the jurisprudence relating to belief in considering the materially similar predecessor provisions (contained in the **Employment Equality (Religion or Belief) Regulations 2003**) and endeavoured to set out the criteria to be applied in determining whether a belief qualifies for protection. At para 24, Burton P held as follows:

'24 I do not doubt at all that there must be some limit placed upon the definition of "philosophical belief" for the purpose of the 2003 Regulations, but before I turn to consider Mr Bowers' suggested such limitations, I shall endeavour to set out the limitations, or criteria, which

are to be implied or introduced by reference to the jurisprudence set out above.

- (i) The belief must be genuinely held.*
- (ii) It must be a belief and not, as in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, an opinion or viewpoint based on the present state of information available.*
- (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.*
- (iv) It must attain a certain level of cogency, seriousness, cohesion and importance.*
- (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (para 36 of *Campbell v United Kingdom* 4 EHRR 293 and para 23 of *Williamson's case* [2005] 2AC 246.'.*

36. These five criteria, referred to in this judgment as 'Grainger I, II, III, IV or V', have since been applied in several cases and are reflected in the guidance on philosophical belief contained in the Equality and Human Rights Commission's Code of Practice on Employment (2011): see 2.59 of the Code. It is not in dispute that these are the appropriate criteria by which to assess whether a belief qualifies for protection under s.10 EqA. Paragraph 2.57 of the Code gives examples of philosophical beliefs as humanism and atheism. At paragraph 2.58 of the Code, the guidance states 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'.

37. Grainger I is relied upon by the respondent, which avers the claimant's espoused belief is not made in good faith. Therefore, the Tribunal must enquire into this and decide it as a question of fact. Lord Nicholls in **R (on the application of Williamson) v Secretary of State** [2005] UKHL15, [2005] 2AC 246, at paragraph 22, gave the guidance that this is 'a limited enquiry' to establish that the belief is made in good faith and is 'neither fictitious, nor capricious, and that it is not an artifice'.

38. Given the requirement under s.3 of the **Human Rights Act** 1998 to read and give effect to statutory provisions in a way which is compatible with the rights conferred by the **European Convention on Human Rights** ('ECHR'), it is necessary to consider the following Articles of the ECHR which are relevant to the preliminary issue.

ARTICLE 9

Freedom of thought, conscience and religion

- (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 the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

(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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

39. In **Forstater** the EAT considered the threshold requirements for a belief to be protected in the context of Articles 9, 10 and 17 at paragraphs 55 to 71 and concluded at paragraph 68 that they are 'modest'. It held at paragraph 79 that:

'only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society.'

It confirmed that, in determining whether a person falls within s10 EqA, the Tribunal is essentially undertaking the 'first stage' analysis in relation to the ECHR, namely whether the person's beliefs meet the modest threshold requirements to come within the scope of the relevant protection at all. The

language of s10 EqA is concerned with whether a person *has* the protected characteristic by being of the religion or belief in question, and not whether a person *does* anything pursuant to that religion or belief: **Forstater** at paragraph 78. However, at paragraph 79, the EAT went on to add that '*the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article 10(2) as the case may be*'.

40. In the EAT's discussion in **Forstater** as to the relevance of manifestation, there is a passage at paragraph 77 upon which Mr Wallace placed emphasis in his submissions. The President stated:

*'I was wrong to read the remarks of Lord Nicholls and Lord Walker in **R (Williamson)** as meaning that, at the stage of applying the Grainger Criteria, the focus should be on manifestation. Manifestation is not irrelevant: the belief may only come to the employer's attention because of some outward manifestation. The Claimant's tweets in this case are an example. Had she not sent those tweets or expressed her beliefs in any discernible way, then the issues giving rise to this appeal would not have arisen at all. Moreover, as I said in **Gray** (EAT) the manner in which a person manifests their belief might, in some cases, be relevant in determining whether the belief has the requisite degree of cogency or cohesion to satisfy Grainger IV. However, we accept Ms Monaghan's and Mr Cooper's submission that at this preliminary stage of assessing whether the belief even qualifies for protection, manifestation can be no more than a part of the analysis (assuming that there is any manifestation at all) and should be considered only in determining whether the belief meets the threshold requirements in general. It is also right to note that an approach that places the focus on manifestation might lead the Tribunal to consider whether a particular expression or mode of expression of the belief is protected, rather than concentrating on the belief in general and assessing whether it meets the Grainger Criteria'*.

41. However, having said this, the President went on, in my opinion, to give the ratio of the judgment on this point at paragraph 79 as quoted above. Further, in deciding the question as to whether Ms Forstater's beliefs fell within s10 EqA the EAT dealt solely with Grainger V (being the only relevant Grainger criterion) without any reference to manifestation: **Forstater** at paragraphs 110 to 117. In particular, at paragraph 111 it held '*the Claimant's belief does not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of Article 17. That is reason enough on its own [my emphasis] to find Grainger V is satisfied*'.

Conclusions

42. The first step is to define the beliefs relied upon by the claimant. The respondent accepts atheism and secularism defined narrowly qualify for protection. However, it submits the claimant's real beliefs relied upon are unclear and the evidence points towards them being more about a celebration of pub culture and anti-Muslim and anti-Islamic sentiment, none of which is entailed by atheism or secularism.
43. I find the claimant to have been an entirely open and honest witness. I accepted his evidence and defined his beliefs at paragraph 28 above. Whilst he may not have attached labels to his beliefs at the time, his beliefs have

been consistently expressed in terms from the time of his original two posts on Facebook.

44. I accept his first post was initiated as a result of the public houses re-opening. However, if one reads both his posts in full, it is clear he is also expounding in short and simple terms his beliefs about wanting to live in a free society without restrictions, such as on drinking alcohol, and being against religious theocracy. Whilst he may have been misguided or inaccurate in his interviews with the respondent and his cross examination by Mr Wallace about the meaning of 'caliphate' and the way of life in Dubai and other Islamic states generally, that does not detract from the core elements of his beliefs.
45. As to Grainger I, I disagree with the respondent's submission that the claimant's beliefs are not made in good faith. As stated, they have not changed in substance from the time he clarified his first post in the second and I found his evidence entirely honest.
46. On Grainger II, the respondent submits the beliefs are simply a viewpoint predicated on the opening of public houses, rather than being philosophical beliefs. Based on my findings of fact as to the beliefs held, that is patently unsustainable.
47. On Grainger III, the respondent refers to the claimant's beliefs as relating to 'libations, alcohol and pub culture' which are not weighty or substantial as far as human life and behaviour is concerned. Of course, this does not reflect the findings made as to the whole of the claimant's beliefs, which are clearly weighty and substantial matters. The respondent also contends there were anti-Muslim or anti-Islamic sentiments behind the beliefs, which, if strongly held, were undoubtedly weighty, but would fail under Grainger V. The submission further contends that anti-caliphate beliefs cannot be considered relevant to an aspect of human life or behaviour, since such beliefs necessarily speak to a by-gone era. I find the claimant's references in the post were his way of expressing his beliefs about religious theocracies such as in a territory run by ISIS, which is obviously contemporary and relevant.
48. On Grainger IV, the respondent repeats its submissions under Grainger III, but adds that the claimant's beliefs are ambiguous and incoherent. I repeat my conclusions under the previous paragraph and do not accept the submission based on my findings of fact about the claimant's beliefs. To the limited extent to which I take manifestation of the beliefs into account under **Forstater**, the two posts are a clear enough expression, which I do not find ambiguous or incoherent.
49. Regarding Grainger V and whether the claimant's beliefs are worthy of respect in a democratic society, the respondent refers to the beliefs expressed by the claimant as being anti-Islam and Anti-Muslim, so fail the test even under the heightened **Forstater** standard. Given the findings made as to the claimant's beliefs, I disagree with the submission. Again, considering manifestation in the limited way described in **Forstater**, I do not consider for the purposes of the present exercise that the claimant's views are, or were intended to be anti-Islam or anti-Muslim, but, in any event, to use the words of the President in **Forstater**, the Claimant's beliefs do not get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of Article 17. That is reason enough on its own to find

Grainger V is satisfied’.

50. Accordingly, I conclude the claimant’s beliefs as described in the findings of fact and summarized by me at paragraph 28 satisfy the threshold set out in Grainger and qualify as protected beliefs under s10 EqA. For the reasons above, this is my judgment whether one adopts the narrow application of the extent to which manifestation should be taken into account, or, as propounded by the respondent as a possible approach, the wider application involving what is described as the ‘second stage’, when one considers the effect of Articles 9(2) and 10(2) and whether any restriction on the exercise of the right is justified.
51. The issue now to be decided by the Tribunal is whether the claimant was discriminated against because of his beliefs and/or the way he manifested them and that will depend on hearing all the evidence and putting the beliefs into context. That is when the balancing exercise arises under the second stage of the analysis under Articles 9(2) and 10(2).

The respondent’s application for a deposit order

52. This application is made pursuant to Rule 39 of the Rules. This states that where the Tribunal considers any specific allegation or argument in a claim has ‘little reasonable prospect of success’, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
53. Mr Wallace referred me to the EAT case of **Van Rensburg v Royal Borough of Kingston-upon-Thames** [2007] All ER (D) 187 (Nov) where it was held that, when determining whether the threshold is met for the making of such an order, the Tribunal may take a view on the credibility of the claimant’s allegations and consider whether the claimant is likely to establish the facts alleged.
54. There is no overall cap on the amount a party can be ordered to pay as long as each individual award does not exceed £1,000. However, the Tribunal has to ‘stand back’ and consider whether the totality of the sums awarded is proportionate in the circumstances before finalising the orders: **Wright v Nipponkoa Insurance (Europe) Ltd** UKEAT/0113/14 at paragraph 78.
55. The respondent submitted that all three claims being made as listed at paragraph 13 above were lacking in merit and had little reasonable prospect of success. It applied for a deposit order of £1,000 in respect of the indirect discrimination claim; £800 in respect of the direct discrimination claim; and £600 in respect of the unfair dismissal claim.
56. I received Mr Wallace’s written submissions, for which I am again grateful, but do not intend to repeat here.
57. I took evidence from the claimant as to his means and it is clear he could afford to pay the totality of the sums sought, if ordered to be paid. He has more than sufficient savings.
58. On the allegation of indirect discrimination, the PCP relied upon by the claimant was identified in the CMO as ‘application of its disciplinary procedure, and in particular, the listing as an act of gross misconduct

‘deliberate discrimination or harassment, or incitement to harass or discriminate on the grounds of race, sex or gender reassignment, religion, disability, age or sexual orientation’. I agree with the submissions of the respondent. There is nothing identifiable in the beliefs of the claimant that conflict with the PCP such that persons holding such beliefs are likely to be substantially disadvantaged by the PCP. Further, given that direct discrimination and harassment are prohibited by law and that employers can be liable for the discriminatory acts of employees, the respondent is almost bound to succeed in its justification defence. I consider this claim has little reasonable prospect of success and the maximum deposit order should be made in respect of the continuance of this claim with the PCP formulated as it is. I will deal with this in a separate order.

59. As to the respondent’s submissions regarding direct discrimination, I do not necessarily accept its argument that the correct comparator is a theist and/or a non-secularist.
60. The claimant does not seek to rely on any actual comparator. His simple argument is that he would not have been treated as he was and dismissed, if a Muslim had expressed the same comments. The respondent argues that this is too narrow a comparator and, in any event, there is insufficient evidence, to prove this assertion. At the CMH, no hypothetical comparator was constructed. The claimant was not in a position to argue the point before me. The claimant may well be taking legal advice following this judgment. However, I do not accept the claimant’s current suggested comparator either.
61. The eventual task of the Tribunal will be to construct a hypothetical comparator and assess whether the respondent would have treated him the same as the claimant in materially similar circumstances. Given that the respondent’s anti-discrimination policy applied to all staff and the reasons given for dismissal, it is very difficult to see how the claimant will be able to show disparate treatment whatever hypothetical comparator is taken. Accordingly, I agree with the respondent that this claim also has little reasonable prospect of success. I consider the deposit payable in this case should be £500.
62. Finally, on the application for an order in respect of the unfair dismissal claim, I consider it is necessary for the Tribunal to hear all the evidence and see the witnesses to be able to make an assessment as to the reason for dismissal, and the fairness or unfairness of the dismissal. This is particularly so in the light of the fact that the appeal against dismissal was initially upheld, but later reviewed by the same manager, Mr McBroom. There does not appear to be such a review process built into the respondent’s disciplinary policy. That may, of itself, not be fatal but the Tribunal needs to hear evidence as to the reason for dismissal, what transpired at each meeting with the claimant, particularly in connection with the appeal, and why Mr McBroom changed his mind, and whether the overall procedure was fair and the decision to dismiss was within the band of reasonable responses. Accordingly, I do not accept this claim has little reasonable prospect of success.

63. Finally, as far as the claimant is concerned, he will still be able to argue his 'freedom of speech' point under this claim, even if he does not pursue the discrimination claims.

RESERVED JUDGMENT

Signed by: Employment Judge Battsby

Signed on: 19 July 2021