Case Number: 2301442/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr. Graham Moore**

Respondents: **Southern Housing Group**

Heard at: **London South Hearing Centre**

On **02-04/3/22 and in Chambers 31.3.22**

Before: **Employment Judge McLaren**
Members: **Ms. H Carter**
Ms. C Oldfield

Representation
Claimant: Mx. O Davies, Counsel
Respondent: Mr. Goodwin, Counsel

JUDGMENT

The unanimous decision of the tribunal is that: -

The respondent did not contravene s 13 of the Equality Act 1996. The claims of direct discrimination do not succeed.

REASONS

Background

1. We heard evidence from the claimant on his own account The witnesses for the respondent were Adrian Lewis, Operations Manager and the claimant's line manager during his employment, Carl Dewey, Southern Maintenance Services Director, and Luke Chandler, Director of Development Delivery.

2. We were initially provided with a bundle of 280 pages. The claimant objected to the inclusion of the document at page 277 which was said to

be included by the respondent at the last minute and to be of no relevance to the hearing. Having heard the parties' submissions on this document, we concluded that it was potentially relevant to the issues in the case, that the was little prejudice to the claimant in allowing the document in, and there would be greater prejudice to the respondent if it was not included. Its inclusion was within the overriding objective.

3. During the course of the hearing, it became evident that the notes of the interview held with the claimant were available. We were provided with a copy of the handwritten notes of 10 October 2019 and an email sent by Mr Lewis on the 2 December to a number of recipients, including the claimant. These were added to the bundle. On the third day of the hearing, we were again provided with additional documentation. These were emails relating to the appeal process. These were also included in the hearing bundle.

4. In reaching our decision we took account of all the pages in the bundle to which we were referred, the witness evidence, the skeleton argument produced on behalf of the claimant, the respondent's opening note and the parties' helpful written submissions and expanded oral submissions.

Issues

5. The issues in this matter were agreed as follows

Direct discrimination on the grounds of race

The Claimant is an English national.

1.1 Has the Respondent treated the Claimant less favourably than it treated or would treat others? The Claimant alleges that the following acts or omissions of the Respondent constitute discrimination on the grounds of race:

1.1.1 Failing to have a box labelled "English" for employees to select on its recruitment monitoring form;

1.1.2 Adrian Lewis told the Claimant that a complaint had been made against him;

1.1.3 Adrian Lewis only reacted in a negative way after he had look at the English Democrats' website;

1.1.4 Adrian Lewis lied about knowing that the Claimant was standing in the General Election;

1.1.5 Evidence was ignored at the probation review meeting;

1.1.6 The probation review meeting outcome was premeditated;

1.2 If there has been less favourable treatment, was the reason for such treatment the protected characteristic of race?

1.3 In respect of the allegations of discrimination on the grounds of the Claimant's race the comparator relied on by the Claimant is a hypothetical comparator.

1.4 Has the Claimant brought the claim in respect of the above allegations of discrimination within time taking into account any extension of time for taking part in Acas Early Conciliation?

The Respondent contends that the allegations of discrimination which occurred on or before 26 November 2019 occurred more than three months before the Claimant commenced Acas Early Conciliation and the tribunal therefore does not have jurisdiction to hear those parts of the claim.

1.5 If not, would it be just and equitable to extend the time limit for the Claimant to do so?

The Respondent contends that it would not be just and equitable to extend time for submission of the claim because the Claimant has given no explanation why these allegations have been submitted out of time or stated why it would be just and equitable to extend time.

The claimant withdrew issue 1.1.7(Failing to provide the Claimant with the outcome of his grievance), during closing submissions.

<u>Direct discrimination on the grounds of religion or belief</u>

The Claimant has a belief in England, English identity, English culture, English independence and actively promotes the English constitution and legal system, and English system through various media outlets.

The Respondent will contend that this does not amount to a protected characteristic within the meaning of section 10 of the Equality Act 2010.

2.1 Has the Respondent treated the Claimant less favourably than it treated or would treat others? The Claimant alleges that the following acts or omissions of the Respondent constitute discrimination on the grounds of religion or belief:

2.1.1 Failing to have a box labelled "English" for employees to select on its recruitment monitoring form.

2.1.2 Terminating the Claimant's employment.

2.2 If there has been less favourable treatment, was the reason for such treatment the protected characteristic of religion or belief?

2.3 In respect of the allegations of discrimination on the grounds of the Claimant's religion or belief, the comparator relied on by the Claimant is a hypothetical comparator.

2.4 Has the Claimant brought the claim in respect of the above allegations of discrimination within time taking into account any extension of time for taking part in Acas Early Conciliation?

The Respondent contends that the allegations of discrimination which occurred on or before 26 November 2019 occurred more than three months

before the Claimant commenced Acas Early Conciliation and the tribunal therefore does not have jurisdiction to hear those parts of the claim.

2.5 If not, would it be just and equitable to extend the time limit for the Claimant to do so?

The Respondent contends that it would not be just and equitable to extend time for submission of the claim because the Claimant has given no explanation why these allegations have been submitted out of time or stated why it would be just and equitable to extend time.

Remedy

3.1 Is the Claimant entitled to a compensatory award and, if so, what level of award it would be just and equitable for the Claimant to receive?

3.2 Is the Claimant entitled to an award for injury to feelings and, if so, at what level?

Finding of facts

Application process

6. The claimant was employed by the respondent from late October 2019 until the 9 January 2020 as a Project Supervisor for Fire Risk and Remedial Project Work. The role was newly created on a fixed term basis following the Grenfell Tower fire in June 2017 and the implications for the housing sector. The respondent describes itself as a business with social objectives, providing high quality housing across a range of markets– from supported living and affordable homes to full market rented shared ownership and outright private sales. Profits are reinvested into new homes and their stated strategy is to make meaningful contributions to people's lives and help local communities thrive.

7. The claimant applied for this role via an application form. It was agreed that the role was not noted as politically restricted in any of the documentation. It was accepted that the respondent had a policy of political neutrality and was entitled to have such a policy.

8. The application process included a request for information on things such as gender, marital status, nationality and ethnic origin. This was at page 239. For nationality, while there were options for an individual to identify their nationality as Scottish or Welsh, it is agreed that the application form did not contain a category or box to state, as nationality, 'English'. The claimant therefore noted his nationality as British. He noted his ethnic origin as "other ethnic group". This was to reflect his English origin.

9. While the claimant was not sure of the date on which he completed this form, he agreed that it was before he was advised that he was shortlisted. It was therefore sometime before the first interview in August 2019.He only completed this form once and was not asked about it at any time in his employment.

10. He did not raise any complaint about this form at the time that he submitted it. Before the tribunal the claimant explained that if he had done so, and identified as English, he believed that he would not have been employed at all. He had no evidence for this comment as it was his belief. He did raise it as a complaint during the probationary review meeting on 6 January 2020.This was a number of months after the event.

11. The grounds of resistance set out the respondent's position on this. It specifies that the categories were set out in a standard form provided by a third-party provider as part of the respondent's job application tracking system. The respondent subsequently raised the missing category with the third-party provider and the form has now been amended to include a box labelled "English". This evidence was not challenged by the claimant, and we accept that this is what occurred, and that the categorisation was provided to the respondent by a third-party company as part of the standard process. It was not specific to the claimant but was common to all applicants.

12. The claimant was advised on 3 October 2019 that he was shortlisted and told to attend an interview with Carl Dewey and Adrian Lewis on 7 October 2019. We were provided with Mr Lewis's handwritten notes taken at this interview. They record in answer to the second question asked, which was about effective communication, "hobby constitutionalist expert layperson presentation to 200 people". Mr Lewis did not believe that the claimant had told him about his political beliefs during this interview or had explained that this was expertise on the English constitution. He simply noted it as constitutionalist expert. The claimant was given three out of four for this criteria. We find that Mr Lewis did not explore what this meant at the time and was not made aware of the claimant's political views, his specific interest in English constitutional history or his nationalist views. Indeed, the claimant's witness statement identifies that on his account the first occasion in which he told Mr Lewis about his belief in English independence and self-determination for England was on 31 October 2019.

13. The claimant was successful and was offered employed with the respondent on 14 October 2019 with the start date of 28 October 2019.

14. The claimant attended a pre-employment meeting with Mr Lewis on 22 October at which he brought initial paperwork and was formally introduced to the office. The pre-paperwork included a declaration of interest form, a copy of which is a page 95, and the claimant completed this on 30 October 2019 indicating that he had no interests that he wished to declare. The form has a box at question six which is a drop-down menu with two options, yes or no. It was accepted that if an employee answered yes, a further box appeared asking for details. That form would then be reviewed by the line manager and there would be a meeting with the employee to discuss whether or not the matter raised on the form as a conflict was an issue or not. This meeting did not occur because the claimant answered the question "no".

15. The claimant did not believe that he had any conflicts to declare and believed he had answered the form entirely accurately and appropriately. He only became a potential mayoral candidate on 31 October 2019. He had, however, stood as a candidate for Mayor of London previously. We find therefore he had pre-existing political affiliations before he completed the form based on the previous candidacy, even though his 2019 candidacy post-dated the form by one day. The claimant was also regularly broadcasting a one-hour U-tube show "The Full English", which addressed his political views and had around 25,000 followers. This was not declared.

Contract of employment and policy documents

16. The claimant was employed under the terms of the contract of employment which was included in the bundle at page 79 – 86. The first six months of continuous employment were stated to be a probationary period during which the respondent would assess his performance and suitability.

17. The contract provided under the heading "Duties" that the claimant would comply with all applicable rules, regulations, procedures and policies that are in force at any time. It also provided that he must use his best endeavours in the interests of the respondent and not at any time do anything that could bring the respondent into disrepute or harm in any way. That included a restriction not to use websites, social networks, blogs, discussion/webinar forums, Twitter, personal email et cetera to discuss any aspect of his employment or to give an opinion about the organisation, its staff or service users.

18. The contract provided that any known breach of confidentiality or Group policy would be investigated and might lead to disciplinary or legal action being taken against him

19. The respondent also has in place a number of policy documents. This includes a resolution (grievance) policy and procedure, and a probation policy and procedure. The probation procedure set out how this would be assessed and included a reference to conduct and working according to policies and procedures.

20. The respondent also has in place a Code of Conduct. This is said to be a legal requirement because of the respondent's role as a social housing landlord. This was not disputed and we accept that.

21. On the 29th and 30th of October the claimant completed a number of online training courses which included training on the Code of Conduct. This training identified that political campaigning and public activities were covered by the Code of Conduct. The training stated that employees should be wary of undertaking activities which could be perceived as linking the group with a particular organisation or political party. The training provided that if an employee found themselves in a situation where a conflict of interest could arise, they should either cease that activity or complete a conflict of interest form which could be found on the intranet.

22. The Code of Conduct includes two particular requirements.

12.Declaration of interest

12.1 As a social landlord we are legally required to formally record actual or potential conflict of interest in a register of interests, whether or not financial or more general, and make them available for public inspection, and that is a valid reason to keep confidential.

12.2 you will be expected to sign an initial declaration of interest form and you must use this form to declare any actual or potential conflict of interest, which affect you or your close family, friends, and associates as they arise. You will be asked to complete a new declaration of interest form every year.

15.Political campaigning and public activities

15.1 we are impartial organisation and should not be viewed as having political bias. As such, you should be wary of undertaking any activities which could be perceived as linking the Group with any particular organisation or political party. You should not bring the Group into disrepute at any point.

15.2 this can include, is not limited to, seeking to become a local councillor or canvassing on behalf of a prospective parliamentary candidate.

15.3 if you wish to be involved in such activities you should:

- *discuss your intentions with your line manager before taking any action, and follow that advice or instructions regarding your involvement…*

23. While the claimant accepted that he had undertaken this training he described it as being sat in a cupboard like room pressing buttons. He believes that he had a printed out copy of the Code of Conduct in his locker but had not had the opportunity to read it. The training log, page 97, suggests that he both started and finished the course at 16.46, although it also indicates that he finished the previous course at 15.50. In cross examination the claimant accepted that he spent 55 minutes on the Code of Conduct training and we accept that.

24. A printout of screenshots from the training was included in the bundle. This specifies that a conflict of interest included political and also specified that if an employee found themselves in a situation where a conflict of interest could arise, they should either cease that activity or complete a conflict-of-interest form which could be found on the Intranet.

25. The claimant was sent a further copy of the Code of Conduct and asked to read and sign it on 2 December 2019. The claimant could not recall whether he did in fact read and sign it as he was requested to do so.

26. The claimant accepted that he did not at any time complete a conflict-of-interest form as required by the Code of Conduct and the training that

he undertook some two working days before he became a political candidate. Other than a note on the absence request form (addressed below), the claimant accepted that there was no written document that he submitted to the respondent identifying this potential conflict of interest.

27. It was suggested that the Code of Conduct was not clear that the declaration was required when circumstances changed because the Code talks about signing an initial declaration of interest and being asked to complete a new declaration every year. It also states, however, that individuals are expected to sign a form to declare any actual or potential conflict of interest "as they arise".

28. We find that these words in the Code, coupled with the training does indicate both that political activities are a conflict of interest, and the change of circumstances must be notified. The claimant did not do this, and we find that is a breach of the Code of Conduct and that he was aware of the terms of this Code. We also find that both Mr Lewis and Mr Dewey believed that there was an ongoing obligation to update the form and believed that it was the claimant's responsibility to do so. They believed that it was not only an annual obligation, but one that had to be updated whenever there was a change in personal circumstances. They both considered political candidacy needed to be declared. We are satisfied that both had a genuine belief that the claimant had failed to act appropriately as the Code of Conduct required.

Awareness of the claimant's political affiliation

29. On 31 October 2019 the claimant said that he attended a 'Meeting SMS' (Southern Maintenance Supervisors) which was the first of weekly meetings where non-cleared jobs (outstanding maintenance work) which were on-going were discussed. After this meeting, Adrian Lewis, and another supervisor (Ben Stringer) stayed behind. The claimant said that he told Mr Lewis, in the presence of Mr Stringer, that the English Democrats were standing in the London Mayoral Elections and that he, together with another individual, could be their candidate. He recalls that they discussed the expense of the election which was in the region of £100,000.In cross examination the claimant accepted that he did not discuss his beliefs.

30. In cross examination Mr Lewis did recall that following this meeting on 31 October as he was leaving the meeting room, he had a brief conversation with the claimant. He could not recall many details about this but accepted that some conversation had taken place. The bundle, however, contained some responses from Mr Lewis on this point given much closer to the events in question.

31. Mr Lewis was asked to provide a response to Mr Dewey during the probationary review process, and in an email at page 147 of the bundle, dated 7 January 2020, he answered the question about the date when he was first made aware by the claimant of his intention to engage in political activity. The answer given was that there was a conversation about the claimant being interested in becoming the Mayor of London

which took place after a lean board meeting in early November (Mr Lewis accepted this was 31st of October) but they did not get into this, and he said quite honestly he did not take this seriously. As part of the later investigation of the claimant's grievance, Ben Stringer were interviewed about this. Mr Stringer's account is at page 220 of the bundle. He could not recall any conversation when the claimant said he was standing as a candidate in the general election or the mayoral election.

32. There is some level of agreement between Mr Lewis and the claimant, and we agree that there was a conversation which involved the claimant saying that he was standing for mayoral election but we find that this did not reference the claimant's specific political views or identify the party for which he might stand. Mr Lewis was criticised by the claimant in submissions as being vague in his evidence. He was not always able to recall in great detail events that had happened. While there is a conflict between the claimant and Mr Lewis as to exactly what was said in this meeting, we form our view about what was said based on the documentation that was completed very much closer to the events. The claimant's evidence also contained a number of contradictions and inaccurate recollections. We recognise that the passage of time means that memories have faded, and we conclude that they are less reliable than the contemporaneous on near contemporaneous documents, and we therefore prefer the documentary evidence where it is available and conflicts with recollection.

33. On 6 November 2019 a surprise snap general election took place. On 10 November 2019 the claimant decided to stand in Bexleyheath and Crayford Constituency for the English Democrats. On 12 November 2019 the claimant's deposit was paid (£500) and nomination papers accepted by Bexley Council. The claimant accepted that he did not talk to his line manager, Mr Lewis, before he was accepted as a candidate. On his account, he felt it was his line manager's responsibility to tell him if he needed to do anything as he was the new employee, and his manager had been there for five years.

34. In the claimant's witness statement, he said that he spoke to Mr Lewis the following day, 13th November, after he had been confirmed as a candidate and he stated to Mr Lewis "I've done it, I was nominated as a candidate", or words to that effect. Nothing negative was said in response. In evidence before us, and as was reflected in what he said during the appeal meeting on 20 January 2020, the claimant could not recall if Mr Lewis was in the office on 13th November and therefore whether he had told him about this on that date. Mr Lewis has no recollection of this conversation and is also uncertain whether he had been in the office. He explained that he worked from both the Maidstone premises and the London office. We conclude that Mr Lewis was not present and was not made aware of the claimant's candidacy on 13 November.

35. On 5 December 2019 the claimant requested three days leave for 11-13 December 2019. Prior to sending this request, on the day and previously the claimant said he had discussions with Mr Lewis about

whether the respondent would consider this as public service and not take it off his holiday. The inference is that he discussed it was to stand as a candidate It was the claimant's evidence that Mr Lewis said, "take it as holiday".

36. In oral evidence Mr Lewis could not recall any such conversation having taken place. We were provided with an email from Mr Lewis to Mr Chandler dated 28 January 2020 and prepared as part of the appeal investigation. This asked about the claimant's request for leave and whether he had asked if he could claim for paid leave because he was standing as a PPC at the general election. The answer given then was that the claimant had never explained formally or informally that he was standing as a candidate, but did state he wanted to take time off during the election. He was told that that would be annual leave. Mr Lewis also stated in this email that in his conversation with the claimant on 11 December he told the claimant he was not aware of the candidacy until 11 December and Mr Lewis notes that the claimant conceded that point and simply stated that he thought he had made Mr Lewis aware.

37. We find that there was a conversation about leave, but it did not include the claimant raising his candidacy or asking whether he could have paid leave because he was a candidate. It did not include reference to the claimant's personal beliefs. We find that Mr Lewis was not made aware of the candidacy during this conversation. We make this finding based on the documentary evidence and prefer this over later recollections.

38. Subsequently, that day the claimant proceeded to make an absence request for 11-13 December 2019. He did so by completing the leave on the respondent's system. The absence request form contains the following information Absence type: Holiday & Annual Leave; within the notes "Election PPC Candidate Bexleyheath and Crayford". It does not refer to the English Democrat party or to the claimant's beliefs. The screenshots in the bundle at pages 94 and 99 are said to be the self-service view that the claimant would see and not the manager's view. We accept the respondent's evidence on that point which was not challenged by the claimant.

39. This leave was then authorised by Mr Lewis the following day on 6 December 2019 and the claimant was sent an automated email, "Your absence request from the 11/12/2019 to 13/12/2019 has been authorised".

40. The claimant had no first-hand knowledge of the way in which the respondent's absence request system worked or who saw which piece of information that was submitted on the form or in the notes. The evidence of Mr Lewis and the other two respondent witnesses who are all managers who have dealt with many holiday requests, confirmed that management visibility of the information submitted by an employee does not include anything written in the notes section. We accept therefore that Mr Lewis did not see the note completed by the claimant for the reason for his absence. The absence process did not, therefore, make Mr Lewis aware of the claimant's candidacy, or his affiliation to any

particular political party which was not referenced, even if Mr Lewis had seen the notes. It certainly did not make him aware of the claimant's beliefs.

Events around the election

41. On 10 December 2019, Mr Dewey was approached by a member of staff, Daniel O'Brien, who told him that he had heard the claimant speaking in the office about his affiliation with the English Democrat party and that he had been asked to stand as a candidate in the general election. Mr O'Brien said colleagues had been distressed by the conversation.

42. Mr Dewey did not take Mr O'Brien's information about the discussion of politics in the office as being a complaint. He took no steps to investigate this, it was never treated as a complaint or investigated by anyone. No action followed from it.

43. Mr Dewey did take steps to investigate the suggestion that the claimant was standing as a political candidate. He spoke to Mr Lewis on 11 December and asking if it was something that he was aware of. He said that he was not, and Mr Dewey asked Mr Lewis to look into it further. Both men then looked at the English Democrat party's website on Mr Dewey's computer. Mr Dewey said that he looked only to check whether the claimant was in fact a candidate. He did not look at the site particularly, formed no view of what the English Democrat party were and was unaware of what exactly they stood for, both then and now.

44. We accept his evidence on this point. While it was submitted that this is a surprising reaction, there is no evidence to suggest that Mr Dewey's account of his own reaction is anything but accurate, nor was this challenged in cross examination We accept that he had no knowledge of exactly what this party stood for, either before the process began or indeed by its end. We also find that he had no knowledge of the claimant's individual beliefs about England, English identity, English culture, English independence or the English constitution and legal system. No evidence was presented to us that the claimant had ever explained his particular views to Mr Dewey. The most that the claimant says is that Mr Dewey was aware of the English Democrat parties' views which, we have accepted he was not.

45. Mr Lewis told us that he had looked at the first page of the website only and had identified this as a nationalist party which is potentially racist and xenophobic. He did look at it negatively as he does not subscribe to those views. He did not look at it very long as he did not want to become involved in looking at the content and he did no more research on the English Democrats. His interaction was limited to a short look, in the company of Mr Dewey, at the first page on the website.

46. We do not accept, as was submitted by the claimant's representative, that Mr Lewis' reaction can be described as being revolted by the sight of the website. Mr Lewis did not use any such language when describing his reaction. We accept, as he described, that he did look at it negatively

and we also accept that he did not look at it for long or research it further. The claim around the website relates to race, not belief.Looking at the website can not have identified the claimant as “English”, but only as a candidate for this party.

47. As part of the grievance investigation Mr Dewey was asked what he did once he had been advised by Mr O’Brien about the claimant’s political aspirations. At page 219 of the bundle, he set out that he duly informed Mr Lewis and issued two instructions to Mr Lewis. Via a verbal instruction Mr Lewis was tasked with asking the claimant to retrospectively complete a declaration of interest form and to safeguard the respondent’s position from disrepute. Mr Lewis was instructed to investigate whether the claimant had declared his political aspiration to the respondent. Once he was informed of the phone communication between Mr Lewis and he was made aware that the claimant had not done so, Mr Dewey instructed Mr Lewis to confirm the conversation in writing.

48. Mr Lewis carried out Mr Dewey’s instructions. He checked the claimant’s conflict of interest form and saw that no conflict had been noted. All agree that Mr Lewis then telephoned the claimant. The claimant’s account is that on the call Mr Lewis was aggressive and said he knew that the claimant was standing for English Democrats, he had looked at the English Democrats website and that the claimant’s candidacy would bring the respondent into disrepute.

49. Mr Lewis account differs. He recalls that the claimant confirmed he was standing for election as a member of the English Democrat party. His recollection is his response was to say the claimant had not told him this previously, and he should have declared this in advance on the declaration of interest form or by informing him of the point. The claimant had done neither. This would have to be dealt with by referring the matter to HR to consider whether this was a conflict of interest or political bias issue as described in the Code of Conduct. Mr Lewis also recollected that he went through the Code of Conduct with the claimant and raised concerns that there may have been a breach. He recollected that the claimant became defensive in this conversation and felt that he was discriminated against because of his political ideology. The claimant makes no reference to his nationality at all.

50. At page 108 – 109 was a statement from Mr Lewis made in an email 16 December, which related the conversation of 11 December. This was therefore written a few days after the conversation. This gives an account which is consistent with his witness evidence. This email explains that he discussed the Code of Conduct with the claimant who raised the issue of discrimination because of his ideology. It does not reflect Mr Lewis raising an issue about the party he was standing for or making any comment that standing for the English Democrat party brought the respondent into disrepute. We prefer the account given by Mr Lewis to that of the claimant as it is supported by near contemporaneous documents. We find, therefore, that the conversation was not about the candidacy for any particular party, but about a failure to comply with the Code of Conduct.

51. We find that Mr Lewis in making this call was acting on a management instruction to do so. His tone as reflected in the note of the conversation is a reasonable and appropriate one. It appears that the claimant was aggressive and threatened to record the conversation.

52. We also find that in this conversation Mr Lewis did not inform the claimant that any complaint had been made about him. That is not reflected in Mr Lewis's evidence nor in the note. While that is an issue in the case, the claimant makes no reference to this having been said during this meeting in his witness statement.

53. Following this telephone conversation at 16.55 on 11 December Mr Lewis emailed Mr Dewey to let him know that the claimant was standing in the general election which he had not previously discussed with him. He records that he had had a conversation with the claimant, that they discussed the Code of Conduct regarding the organisation's political neutrality, and he believed his standing as a candidate would need to be stated as part of a declaration of interest. This email was at page 224 of the bundle. It's opening sentence said, "I just thought I'd make you aware as it has just been brought to my attention". It was suggested that this was contradictory to Mr Dewey's evidence as he suggested that it was Mr Lewis who had first been made aware. Mr Lewis said that with hindsight he could perhaps have used different language, but that he was simply reconfirming the position back to Mr Dewey. We understand that this looks confusing, but we accept the chronology as set out by Mr Dewey and Mr Lewis that it was Mr Dewey who was first alerted to the claimant's candidacy and Mr Lewis then investigated it on Mr Dewey's instructions. These individuals are in a position to be aware of what happened whereas the claimant is not.

Probation review

54. On 13 December Mr Lewis set up a meeting with the claimant and Mr Dewey to take place on 16 December to discuss his concerns about the claimant's conduct. The claimant asked for a postponement which was agreed. In his witness statement the claimant recollected that it was on 17 December that he received an email stating he had a probation review and they wanted to schedule it straightaway. He says this is to terminate his employment. That date does not agree with the chronology from documents in the bundle and we accept that he was initially asked to attend a meeting by email of 13 December and that was to take place on 16 December.

55. On 16 December 2019 at 09:59 the claimant emailed Mr Lewis and others raising a complaint of harassment and victimisation against Mr Lewis based on the claimant's philosophical beliefs, stereo typing him and clear discrimination from the respondent against him. As the grievance was in part directed against Mr Lewis, it was agreed with Mr Dewey that Mr Lewis would have no part in any probationary meeting or any decision making. That would be solely Mr Dewey's decision and from this point he took sole conduct of the investigation.

56. Sometime between the 12 and 16 December, Mr Dewey was contacted by HR who explained that the respondent's press team had been approached by a freelance journalist who claimed to have spoken with the claimant. The journalist reported that he had been told by the claimant that he had had a phone call from his manager, Adrian Lewis, on 11 December who told him that he would be fired from his position because of him standing as an English Democrat candidate in the election. He reported to the journalist that he was also told that the English Democrats beliefs go against the respondent's Code of Conduct. The press enquiry and HR response and the journalist's further response are at page 102 – 103 of the bundle.

57. The journalist had information that Mr Lewis was the claimant's manager. He had both the first and surname of that manager. He had information about the existence of a Code of Conduct, and that there had been a telephone conversation between the two on 11 December.

58. Having received this information, Mr Dewey then emailed the claimant on 16 December and received a reply on the 17 December. This email exchange is at page 113 – 114. The claimant's response was that during the election campaign he was interviewed by number of people from the press. He concluded with "once the election result is declared it is also common for the people of the press to come and ask questions regarding the campaign and the subsequent results. This was the case with Charlie Parry"

59. Mr Dewey considered the matter and on 17 December sent the claimant an invitation to a probation review meeting to be heard on 23 December. The invitation indicated that the meeting was to discuss concerns regarding a breach of the Group's Code of Conduct and allegations of misconduct that the claimant had brought the Group into disrepute during his probationary period. It enclosed six pieces of documentation which included Mr Lewis's email note of the conversation that had taken place on 11 December. We accept Mr Dewey's evidence, supported by Mr Lewis, that it was the interaction with the journalist that meant the meeting then became part of a more formal process.

60. In order to accommodate the claimant's trade union representative, the meeting was rescheduled to 6 January 2020. The notes of the meeting at page 136 -140 of the bundle.

61. The meeting concentrated on two points, whether the claimant had notified his manager in advance of the candidacy as required by the Code of Conduct and completed the declaration of interest and whether he had spoken to the journalist and said that he was to be fired from his position because he was standing as an English Democrat candidate and the party's beliefs go against the respondent's policy.

62. The claimant's explained that he had made a written request for annual leave which noted it was because he was standing as a candidate in the general election. He also said that a conversation had taken place regarding this with Mr Lewis. He explained that he believed Mr Lewis would have known about the candidacy from the beginning of

employment. He explained that he felt Mr Lewis should have explained to him that he needed to sign the declaration of interest.

63. Mr Dewey confirmed that he saw the annual leave documentation during the probation review meeting. We accept that this was the case. We also find that the issue was extensively discussed during this meeting.

64. As to the conversation with a journalist, the claimant did not remember having a conversation, but did mention he had a very large U-tube platform and anyone could have seen that and used it against him. He said he did receive a call from a journalist but told the journalist he had not had a meeting and he(the claimant) would have to wait until after the meeting to find out any information. He denied he had given the journalist Mr Lewis's name or the respondent's name.

65. Mr Dewey considered all information available to him. He also adjourned the meeting to obtain further information to clarify with Mr Lewis when he first became aware that the claimant was standing for election. Page 146 – 147 are the questions that he asked and Mr Lewis' response.

66. He concluded that there had been a breach of the Code of Conduct by the claimant's failure to record all actual or potential conflicts of interest. He had not seen any evidence to support the claimant's allegation that Mr Lewis was lying and the claimant did not provide an adequate explanation for why he had not declared this declaration of interest form. While Mr Dewey took into account the fact the claimant had joined the respondent recently, he balanced this against the fact he had received adequate and effective training and was aware of the requirements of the Code of Conduct, including the obligation to report actual or potential conflict of interest.

67. Mr Dewey also concluded the claimant's actions could have potentially brought the respondent into disrepute because on the balance of probabilities he concluded that the claimant had spoken to the journalist, had given his manager's name and told the journalist that he was to be fired. He concluded that the only explanation for the journalist having the information was if the claimant had told him. This potentially brought the respondent into disrepute as it suggested that respondent took sides politically which would undermine public trust in the organisation.

68. While the claimant appears to have concluded that there was only going to be one outcome from this meeting, we have found no evidence that this was the case. We find that the outcome was not premeditated. The meeting gave the claimant a full opportunity to put his side of matters which were further investigated. We are satisfied that Mr Dewey was the sole decision maker and reached this conclusion only after hearing the claimant's position and considering all the evidence in front of him.

69. The outcome letter dated 8 January 2020, page 151 – 152 of the bundle, set out this conclusion. The claimant's employment was ended

with effect from 9 January 2019 as his probation was not confirmed. Mr Dewey explained that had the issue been limited to failure to complete the declaration of interest form, it is unlikely to have led to dismissal. If the issue had been limited to the contact with a journalist, this on its own would be likely to lead to dismissal. The two together therefore left him no option but to dismiss the employee.

70. The claimant alleges that the dismissal was because of his political beliefs. We find no evidence that this was the case. He did not raise these in the meeting which addressed only his candidacy.There is no evidence the decision maker knew what these were, beyond the candidacy for a party of which he knew no details. We accept the decision maker's account, which is supported by the contemporaneous documents, that the decision was not because of the particular candidacy, but because the claimant had breached the Code of Conduct. We have found that the claimant had not made any written notification of his political candidacy to the respondent. He had not completed a declaration of interest and we find that this requirement is set out in the Code of Conduct and in the training. The claimant should have been aware of this obligation and had not acted in accordance with the Code.

71. As to the conversation with the journalist, in cross examination the claimant expanded significantly on his explanation as to how this might have happened. While he had referred to his U-tube platform in the probation review meeting, he now explained that at the time he made a broadcast on his channel, which had some 25,000 subscribers, in which he said that he was going to be sacked. This was before election day. He was adamant he did not name his employer or his line manager but told us that it would be very easy for anybody to research both these items which can be done very quickly via for example LinkedIn. He believed that Charlie Parry was an investigative journalist, and therefore could have found this information, which was not given to Mr Parry by the claimant.

72. We find that the claimant's account of the conversation with the journalist has been muddled and inconsistent throughout the probationary meeting, subsequent appeal and before this tribunal. His explanation as to what could have occurred and why the information did not come from him was significantly expanded and we find is not consistent with the information he volunteered during the internal process.

73. We find that, on the balance of probabilities, the claimant did talk to the journalist. We find it improbable that the journalist would have been able to research so many details with such a degree of accuracy based on having heard a U-tube broadcast. We also find that Mr Dewey genuinely believed that the claimant had contacted the journalist and had provided the information the journalist recorded and that this was the main influence for his decision to dismiss the claimant, as he considered that this brought the company into disrepute.

74. We accept that it was these reasons that were the sole reasons for the decision. Mr Dewey's decision was not influenced by the claimant's political belief, philosophical belief, membership of any particular party or his identity as English.

Appeal

75. The claimant appealed against the termination of employment and attended an appeal hearing which was chaired by Luke Chandler. He had no involvement in the matter prior to this. He had only started at the respondent organisation himself in around October 2019. He had had no contact with either Mr Lewis or Mr Dewey. He worked in the London office and in entirely different teams.

76. The claimant's letter of appeal was at page 157 – 160. This set out 16 points of appeal. This included the company withholding evidence of an investigation pack and the sanction of dismissal being disproportionate to the issue raised.

77. In advance of the appeal hearing Mr Chandler reviewed the probation review meeting outcome letter from Mr Dewey, written statements from Mr Lewis, the claimant's training records, the claimant's declaration of interest form, an email from the freelance journalist, and the holiday absence request screenshot at page 94.

78. The appeal hearing took place 28 January 2020, and the notes of meeting were page 182 – 119. The claimant was supported by a trade union representative. He had a full opportunity to go through the grounds of his appeal and explain the chronology as he saw it.

79. The claimant was asked about the conversation with the journalist. Mr Chandler asked him if he was saying there was never a first-hand conversation with Charlie Parry. The claimant confirmed that there was a first-hand conversation. When he was asked if it was linked to the case his response was if you want to know you need to speak to Charlie Parry. He accepted that there was a conversation. He also recalled that Charlie Parry asked him whether he'd been sacked and asked him general questions. The claimant was adamant that he did not say who he was working for. The claimant explained that after he had the conversation with Mr Lewis he was on leave, and he was talking to people about the fact he was going to be sacked. It was completely obvious as the first hearing was predetermined.

80. Mr Chandler also asked the claimant about the declaration of interest form and asked him why he had not declared a conflict of interest on 29 October as potentially at that time he thought about running for London Mayor. He questioned why, having just completed the e-learning in the period between 29 October 5 December, the claimant did not give notice of his intention. The claimant said that he had done so via the absence request form. He also explained again that he felt his manager was much more experienced than he was, and it should not be put on him.

81. Mr Chandler told us that he spoke to 2 senior members of the respondent's communications team about whether he should or could

speak to the journalist. He was advised that it was not respondent policy to do so and therefore made no direct enquiries of the journalist.

82. Mr Chandler also made further enquiries with both Mr Lewis and Mr Dewey. These enquiries and responses were disclosed on the third day of the employment tribunal hearing and were added to the bundle.

83. Having made these enquiries and considered the responses, Mr Chandler concluded that there was no evidence that the claimant's dismissal was due to his political beliefs. Mr Chandler found that dismissal was because the claimant had breached the Code of Conduct and had undertaken actions which potentially brought the respondent into disrepute. In Mr Chandler's view, on the balance of probabilities, the date and the timing of the information reported by the journalist in the correspondence made it highly likely that the claimant had spoken to the journalist about matters relating to his employment. For these reasons the claimant's appeal was not upheld.

84. Mr Chandler does not believe that the claimant was discriminated against because of his race, that evidence was ignored at the probation review meeting, or the outcome was premeditated. In looking at the evidence at the appeal hearing Mr Chandler was clear that all the available evidence had been considered when the original decision was made, and he concluded that a fair and thorough process had been carried out in accordance with respondent's policies and procedures. He confirmed that neither the claimant's race or beliefs played any part in the decision to uphold the termination of employment.

85. We accept that Mr Chandler was an unbiased chair. He carried out a reasonable investigation and we accept that he genuinely believed that the claimant had both breached the Code of Conduct in failing to make a declaration of interests and had potentially brought the company into disrepute by talking to a journalist in the way that he did. We accept that it was these reasons that were the sole reasons for his not upholding the appeal.

86. His decision was not influenced by the claimant's political belief, philosophical belief, membership of any particular party or his identity as English. Indeed, there is no evidence that the claimant ever explained his beliefs to Mr Chandler. At the most, Mr Chandler would have been aware that he was standing as a candidate for a particular party but there is no evidence that Mr Chandler was aware of what the English Democrat party stood for and we find that he had no knowledge of either the claimant's beliefs or of the English Democrat party's particular philosophy.

Grievance Outcome

87. The grievance the claimant raised was investigated by the Head of Property. A detailed report of the investigation was prepared and was included in the bundle at pages 193 – 221. The investigation included a review of a number of documents and policies, together with interviewing Mr Dewey, Mr Stringer and Mr Lewis

88. The investigation report notes that a number of attempts were made to encourage the claimant's participation in the investigation process, but he was not prepared to take part. The claimant confirmed that he refused an invitation to take part in this process. The bundle contains at page 168 an email of 9 January confirming that the grievance still stood, but as he was no longer an employee neither himself nor his union rep would be attending the meeting.

89. It is agreed that the claimant was not provided with an outcome of the grievance, and we find that the reason for this was because the claimant had expressed a wish not to be involved in the grievance process and by the time the outcome was reached, he was no longer employed. We find it had nothing to do with his nationality.

<u>The claimant's philosophical beliefs</u>

90. The nature of the philosophical belief relied upon is set out in the issues list as "a belief in England, English identity, English culture, English independence and actively promotes the English constitution and legal system, and English system through various media outlets."

91. As part of the proceedings the claimant had provided further particulars. This included information that he believed in self-determination for England. His claim form also set out a description of beliefs and included English common law, the English constitution and the "English nation, one nation under God".

92. In answer to cross examination questions as to whether there was any difference between the various descriptions that had been given, the claimant confirmed that he had a belief in self determination and that was wider than English independence. Self-determination should therefore expressly form part of a description of his belief system. His belief in English culture included his belief in the English constitution and therefore English common law. These were therefore part of that description. His belief in "England" is the same as a belief in an English nation, one nation under God.

93. It was difficult to understand the nature of the claimant's beliefs and what was covered by the various terms that he used. After detailed questioning and considering all of the documents in which the claimant has set out his belief, he describes it as a belief in England (English nation, under God), English culture (the English constitution and English common law), English independence and English self-determination.

94. The claimant had provided a lengthy further particulars which gave some details as to what he meant by these phrases. He is both a nationalist and a constitutionalist. He believes in the law of the land; the freedom and liberty English laws gave us, which the British have taken away. He believes in the nation state in England which gave us the laws starting with the English Magna Carta.

95. The further particulars also set out a detailed view of English history as the claimant sees that and he also confirmed that his hobby was English history and English legal history. These were, not just a hobby but

informed his belief system and were a passion of his. The claimant explained that he believes English history is being erased.

96. The claimant explained that while he talks of England and one nation under God, he did not limit being English to what he describes as white indigenous English, which he also described as being white Anglo-Saxon. He explained that individuals who are black can be English, although not indigenous English. Again, he stated that he did not have any issue with non-Christians, despite his belief in one nation being under a Christian God. As the claimant also referenced his tolerance of Catholics in his answer it appears that a reference to under God is to Protestantism.

97. The further particulars state that "the English common law constitution forbids Communism, Marxism and Fascism by default with the common law doctrine dating before the Magna Carta of "Restraint of Trade Is Unlawful". Any form of restraint of trade by the state (communism) or corporations (which includes Housing Associations) working with the state (Fascism) upon individuals is contrary to common law and strictly forbidden, the public interest and the English culture of freedom of markets (public policy)." It describes Communism, Marxism and Fascism as a" trilogy of evil".

98. The particulars talk about restraining the power of the state to ensure that sovereignty remains with the people. It states that he does not believe in a constitutional democracy but a constitutional monarchy. He states that a common religion plays a part in binding together a nation. That national self-determination is embedded in classic liberalism and underlines a democratic principle of government of the people by the people for the people. English nationalists want to preserve the English nation and promote its welfare and he is an English nationalist. This leads to a demand that the British state should formally acknowledge the existence of the English as an ethnic group so that the English can enjoy the same rights, benefits and privileges accorded to other such groups living in the UK.

99. We found these various statements to be somewhat confused and a large part of his beliefs is a treatise on the claimant's view of history.Nonetheless, we find that the claimant has articulated a cogent belief in England (English nation, under God), English culture (the English constitution and English common law), English independence and English self-determination.

100. In answer to cross examination questions the claimant expanded on these statements. He believed that the common law outlaws all forms of socialism and they should be banned. All seek to control the means of production and the common law says that is not permitted. This included the Labour Party The claimant accepted that his reference to housing associations was a reference to the respondent. We find that his views are therefore that all forms of socialism are unlawful and all those who engage in forms of socialism are acting unlawfully. This includes the respondent which exists to provide housing in various forms.

101. The claimant was asked questions about the BBC news report at page 277 – 279. This was a report of the trial of Amy Dalla Mura who was found guilty of targeting an ex-Independent group for change MP, Anna Soubry. The claimant had been asked to attend the trial on behalf of Amy Dalla Mura but did not give any evidence.

102. He accepted that this individual's views saw Ms Soubry as a traitor. The claimant confirmed that he shared this view. If there was a properly constituted trial and the decision of the jury was that an individual was found guilty of treason, then he would advocate for the death penalty. While we accept that he was not advocating direct action, we find that he did believe that individuals who hold views akin to Ms Soubry were guilty of one of the most serious acts against the state.

Law/Submissions

Jurisdiction – Limitation period

103. S123 Equality Act provides that

> "….a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> ……..
>
> (3)For the purposes of this section –
>
> (a) Conduct extending over a period to be treated as done at the end of the period
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

104. The claimant submitted that this was an ongoing act because it was part of a policy or practice that the respondent had not to include English as a category on its monitoring forms which you did not correct until after the claimant's employment ended. It was also submitted that it be just and equitable to extend time as the claimant's evidence was that he could not raise his claim at the point of hire in case he was not hired. It was agreed that he raised it on 6 January 2020.

105. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, the time only begins to run when the last act is completed. There is a distinction between a continuing act and an act that has continuing consequences. Where an employer operates a

discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where however there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing even though the act has ramifications that extend over a period of time.

106. We were referred by counsel for the respondent to the Court of Appeal decision in Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA Court clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA. "It is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. Thus, tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer".

107. We were also referred to Barclays Bank plc v Kapur and ors [1991] ICR 208 HL and Aziz V FDA [2010] EWCA Civ 304. It was submitted that there is a crucial difference in a single act that extends over a period and a single act that has continuing consequences. We should look at the substance of the complaint to determine whether it can be said to be one continuing act and in making our assessment we should look for links between the different allegations. It was also submitted that the claimant's complaint is one of a failure to act, and therefore that was done some considerable time prior to the limitation period for this claim.

108. In considering the just and equitable extension, we considered the Court of Appeal decision in Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, that the onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit. The exercise of the discretion is an exception.

109. Previously, the EAT (British Coal v Keeble) suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

110. We reminded ourselves that the Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that the checklist should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). We also reminded ourselves that in Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 Equality Act that it would be wrong to interpret it as if it contains such a list.

Direct Discrimination

111. The claim is of direct discrimination. S13 of the Equality Act ("EqA") provides "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.".

112. S.13 EqA focuses on whether an individual has been treated 'less favourably' because of a protected characteristic, the question that follows is, treated less favourably than whom? The words 'would treat others' makes it clear that it is possible to construct a purely hypothetical comparison.

113. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. We were referred to Shamoon V the Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11. The comparator required for the purposes of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim so that he, or she, is not a member of the protected class. There must be 'no material difference between the circumstances relating to each case' when determining whether the claimant has been treated less favourably than a comparator.

114. The unfavourable treatment must be "because of" the protected characteristic. The protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause. Counsel for the respondent submitted that whether an act or omission amounts to less favourable treatment is an objective question for the tribunal to decide. While the claimant's perception of such treatment is relevant, it is not determinative. Further it is not enough the claimant to show that he was treated differently; you must demonstrate that such differential treatment was unfavourable. We were referred to Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065.

115. We were also referred to the Court of Appeal in *Peak v Automotive Products Limited* [1978] QB 233 that a very minor act can be disregarded. It was submitted that this remains good law and has been relied on in R (Dowsett) v The Secretary of State for Justice [2013] EWHC 687 (Admin).

116. The protected characteristics relied upon are philosophical belief and nationality. It was agreed that English amounted to a nationality.

117. S 10 of the EQA includes the following definition of belief

"(2)Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."

118. In Grainger plc and ors v Nicholson 2010 ICR 360, EAT, the Appeal Tribunal provided important guidance of general application on the meaning and ambit of 'philosophical belief'. It was held that a belief can only qualify for protection if it:

- is genuinely held
- is not simply an opinion or viewpoint based on the present state of information available
- concerns a weighty and substantial aspect of human life and behaviour
- attains a certain level of cogency, seriousness, cohesion and importance, and
- is worthy of respect in a democratic society, is not incompatible with human dignity and is not in conflict with the fundamental rights of others.

119. These criteria have been replicated in the EHRC Employment Code as official guidance on what comprises a 'religious or philosophical' belief for the purposes of the protected characteristic of religion or belief. The definitions are designed to be broad and in line with art 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights (ECHR)

120. The House of Lords in R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15, [2005] 2 AC 246, [2005] 2 All ER 1, made it clear that while it is the function of a court to enquire as to the genuineness of a belief, and to decide that as an issue of fact, this must be an enquiry essentially limited to ensuring 'good faith'. It is not the role of the court to enquire as to the validity of any belief or to test it by objective standards, as individuals are at liberty to hold beliefs, however irrational or inconsistent they may seem, and however surprising. The respondent accepted that the claimant had a genuine belief.

121. The EAT, in McClintock v Department of Constitutional Affairs [2008] IRLR 29, EAT, has explained that to constitute a belief there must be a religious or philosophical viewpoint in which one actually believes; it is not enough to have an opinion based on some real or perceived logic or based on information or lack of information available. In Grainger, Mr. Justice Burton expressed the view that there is no reason to disqualify from the statutory protection a philosophical belief based on science, as opposed to religion.

122. The claimant submitted that one needed to look at all aspects of the claimant's belief as set out as they are interchangeable and inexplicably linked together with his identity as English. They formed a belief system. In submissions, Mx Davies also set out that the belief was based on a vast array of evidence and historical material on England.

123. The respondent's counsel submitted that as the particulars showed, the claimant's belief in English culture being the English constitution and English common law were based on the claimant's understanding of evidence available to him, namely historical documents and historical commentary. They were not matters of philosophical belief, they were matters of the claimant's opinion on law and history.

124. As to cogency, the claimant submitted that the beliefs expressed by the claimant formed a coherent whole and his further and better particulars set out the component parts. It was submitted that he is clearly an authority on Englishness and his belief as he previously broadcast every night on a YouTube channel on this subject.

125. The respondent submitted to the contrary that the claimant had difficulty articulating any cogent belief and attempted to disguise his lack of cogency with references to things such as Magna Carta, Queen Anne's prorogation of 1703, and the 2007 UN declaration on the rights of indigenous people in the Bill of Rights 1688. Counsel made reference to the claimant's description of his beliefs given in cross examination," you take a bit from everything and get a nice cake, but if you take everything with salt on it you get a nasty tasting cake." This is described by counsel in submissions as a hodgepodge of views and opinions, lacking any coherence.

126. In Forstater v CGD Europe and ors (Index on Censorship and anor intervening) 2022 ICR 1, EAT, considered the scope of the limitation imposed by the fifth Grainger criterion. After reviewing the ECHR case law, Choudhury P held

> *"Article 17 provides the appropriate standard against which Grainger V is to be assessed: only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society. Accordingly, it is important that in applying Grainger V, tribunals bear in mind that it is 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. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on the circumstances, justifiably be restricted under art 9(2) or art 10(2) as the case may be. At the stage of applying the Grainger criteria, the focus should not be on manifestation: at the preliminary stage of assessing whether the belief even qualifies for protection, manifestation can be no more than a part of the analysis. There is no balancing exercise between competing rights at this first stage, because it is only a belief that involves*

in effect the destruction of the rights of others that would fail to qualify. The balancing exercise only arises under the second stage of the analysis under art 9(2) (or art 10(2)) in determining whether any restriction on the exercise of the right is justified"

127. On behalf of the claimant, it was submitted that the claimant's philosophical belief fell far short of this standard and could not be compared to a belief that was a grave violation of the rights of others

128. Counsel for the respondent submitted the opposite. In his submissions the claimant's views were not worthy of respect in a democratic society because the philosophy directly attacked the rights of others in particular Marxism and communism, both of which are protected beliefs. He referred to the fact in the claimant's evidence he had stated that all type of socialism should be outlawed.

129. It was submitted that the claimant's belief was a thinly veiled form of ethnic nationalism, and that his views are extreme. The claimant's evidence that Anna Soubry is a traitor and guilty in his opinion of treason, for which he considers the death penalty an appropriate sanction was referenced. Counsel for the claimant submitted that in re-examination the claimant had confirmed that this was theoretical only and would only occur if a proper trial took place and he did not express any intention to act on such views.

130. Counsel for the respondent submitted that the claimant gave clear and confident answers in cross examination but rowed back in re-examination but even then, was equivocal.

131. As Grainger identified, membership of a particular political party cannot amount to a protected belief, although belief in the underlying philosophy of the party may. We were directed to a number of cases relating to political beliefs. Counsel for the claimant referred us to Henderson v The General Municipal and Boilermakers Union [2017] IRLR 340 where left-wing democratic socialism was found to be a philosophical belief. Mx Davies also referred us to Olivier v Department of Work and Pensions ET/1701407/13 in which democratic socialism amounted to a philosophical belief. Counsel for the respondent referred us to the decision of the tribunal declining to recognise loyalty to flag or country as a belief, Williams v South-Central Ltd [2004] 6 WLUK 473.

Burden of proof in discrimination

132. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e., on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

133. The Supreme Court in Royal Mail Group v Efobi, considering s136(2) of the Equality Act confirmed that at the first stage of the two-stage test, all the evidence should be considered, not only evidence from the claimant.

134. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA.

Conclusion

135. We have then considered the findings of fact as we have made them and the applicable law as we have set out above. Our conclusions are set out below, adopting the issues list as a framework.

Direct discrimination on the grounds of race

136. It was accepted that the claimant identifies as English and that this is a nationality which is in the scope of the Equality Act protection. The claims of race discrimination were brought as direct discrimination i.e. Has the Respondent treated the Claimant less favourably than it treated or would treat others? The Claimant alleges that the following acts or omissions of the Respondent constitute discrimination on the grounds of race:

1.1.1 Failing to have a box labelled “English” for employees to select on its recruitment monitoring form.

We conclude that this complaint is substantially out of time. This is not a continuing act. It is a one off event Its impact, if any, was at the time of the declaration only. We are satisfied that it is not a policy, rule, scheme, regime or practice’. In looking at the substance of the complaint it cannot be said to be part of one continuing act by the employer.

We conclude that it would not be just and equitable to extend time in the circumstances. There is no evidence to support the claimant’s assertion that he would not have been employed had he raised it at the time. We find that he was confident enough to raise it at the first formal meeting with his employer at a point when an outcome could have been the ending of his employment. He raised this point at a time when there was clear jeopardy to his employment, and we are satisfied that he could have done so earlier.

This complaint fails as there is no jurisdiction to hear it.

1.1.2 Adrian Lewis told the Claimant that a complaint had been made against him.

We have found that no complaint was made against the claimant. We have found that Mr Lewis did not tell the claimant this. The issue therefore fails on factual grounds.

Leaving that to one side, this issue is not that the matter should have been investigated and was not. The issue is not that the claimant has been told about a complaint when no such exists, but that he has been told about a complaint where a complaint has been made against him.

We cannot see how, if there had been a complaint made as the claimant thought, a line manager informing an employee of that could amount to less favourable treatment.

1.1.3 Adrian Lewis only reacted in a negative way after he had look at the English Democrats' website.

It was accepted that Mr Lewis had a negative reaction to the English Democrats' website. It was submitted by the claimant's representative that when Mr Lewis found out about the claimant's political stance regarding Englishness it is likely to have fed into his treatment of him on 11 December 2019 and his feelings about the claimant. This was not put to Mr Lewis. The claim is brought as race discrimination, not belief. We have found that that Mr Lewis knew nothing of the claimant's nationality as English, or his beliefs . The claimant's nationality had never been expressed to him. At most he knew of his candidacy for a particular party and had formed a brief impression that it was not a party to which he would subscribe.

There was no evidence of Mr Lewis treating the claimant less favourably because of any reaction to the website and concluding that the claimant was English, or because of his beliefs. We have found that in making the telephone call on 11 December Mr Lewis was acting on the instructions of Mr Dewey, not on his own initiative, and that his doing so was reasonable and had nothing to do with the political party the claimant was associated with or his nationality, but his failure to declare his candidacy. Mr Lewis asked the questions he had been instructed to ask. There was therefore no negative reaction by Mr Lewis which led to any treatment of the claimant at all, let alone any unfavourable treatment on the grounds of nationality.

1.1.4 Adrian Lewis lied about knowing that the Claimant was standing in the General Election.

We have found this was not the case. We have found that the first time that Mr Lewis knew that the claimant was standing in the general election was 11 December.

1.1.5 Evidence was ignored at the probation review meeting.

We have found that this is not the case. The evidence relating to the absence documentation was taken into account at the probation review meeting and properly considered.

1.1.6 The probation review meeting outcome was premeditated.

We have found that this was not the case.

137. We have found that there is no jurisdiction for us to consider the issue at 1.1. We have found that the matters set out as issues at 1.1.2, 1.1.4, 1.1.5 and 1.1.6 did not occur. There can therefore be no question of less favourable treatment based on the protected characteristic of race.

138. While we have identified and agreed that Mr Lewis had a negative reaction to the political party's website, we have found as a matter of fact that there was no less favourable treatment based on the protected characteristic of race.

139. We have not had to consider the burden of proof in relation to these issues as we have found they did not occur.

Direct discrimination on the grounds of religion or belief

140. There are two matters that are said to amount to direct discrimination on the grounds of religion or belief.

2.1.1 Failing to have a box labelled "English" for employees to select on its recruitment monitoring form;

2.1.2 Terminating the Claimant's employment.

We have already determined that failing to have a box labelled English is a complaint the tribunal does not have jurisdiction to hear as it is out of time.

141. In relation to the termination of the claimant's employment, we must consider whether there has been less favourable treatment compared to an appropriate hypothetical comparator, and if so, was the reason for such treatment, was it the protected characteristic of religion or belief?

142. We have found that the reason that the claimant's employment was not confirmed, and therefore effectively ended, was because the respondent believed the terms of its Code of Conduct were clear and required regular updating of declarations of interest which the claimant failed to do and, more importantly, because it believed that he had spoken to a journalist and in so doing had potentially brought the respondent into disrepute. We have found that both the decision-maker and the appeal chair genuinely believed that this was the case. We have found that neither Mr Dewey nor Mr Chandler knew of the claimant's beliefs. We have found that neither had much knowledge of what the English Democrat party stood for and at most they were aware of the claimant's candidacy of this particular party.

143. As there is no evidence that the respondent was aware of the claimant's beliefs, and a membership of a political party is not sufficient to be a philosophical belief, the claimant has failed to discharge the burden of proof. Had he done so, in any event we have found that there is a non-discriminatory explanation for what occurred as we have set it out. That is the claimant had breached the Code of Conduct by not

declaring his candidacy and had breached confidentiality and brought the company into disrepute in what he told a journalist.

144. We do not therefore, need to consider whether the claimant's belief, as he described it, is a protected characteristic. For the sake of completeness, we have, however, addressed this. We have considered the five criteria set out in Grainger.

- is genuinely held
- is not simply an opinion or viewpoint based on the present state of information available
- concerns a weighty and substantial aspect of human life and behaviour
- attains a certain level of cogency, seriousness, cohesion and importance, and
- is worthy of respect in a democratic society, is not incompatible with human dignity and is not in conflict with the fundamental rights of others

145. The respondent accepted that the claimant met the first and third criteria. We have not therefore considered these points. The disputed areas were the second, fourth and fifth parts of Grainger. Counsel for the respondent submitted that the claimant's views was an opinion or viewpoint based on information available to him which he has studied. We acknowledge that the claimant referred to the antiquarian books he reads that set out things such as the constitution and English laws, and his particulars of claim give a detailed recitation of English history as he sees it, which is the basis on which he forms what is set out as his beliefs. Nonetheless, we conclude that there is something more to the claimant's views than just opinion based on his reading of English law. Further, as is pointed out in Grainger, evidence-based beliefs can be capable of amounting to a philosophical belief. We conclude that the claimant's belief in England as one nation under God, English self-determination and English independence, while based on his opinion of English history, amount to a philosophical belief that is more than a statement of opinion.

146. We have considered whether the claimant's beliefs lack cogency and coherence. We had difficulty in teasing out from the claimant exactly what it was he said his belief amounted to, but we concluded that it was a belief in England (English nation, under God), English culture (the English constitution and English common law), English independence and English self-determination. This is a cogent and cohesive belief.

147. Finally, we have considered Grainger five and considered whether the claimant's "beliefs" 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.

148. His views about socialism being unlawful, on what constitutes treason potentially infringe on others' rights within a democracy, but we conclude that his beliefs do not involve a very grave violation of the rights of others tantamount to the destruction of those rights. The claimant is not espousing violence or hatred in its gravest of forms. We conclude his beliefs fall into the category of beliefs that are offensive,

shocking or even disturbing to others but are within the less grave forms of hate speech which are not excluded from protection.

149. In summary, the claims for direct discrimination on grounds of race do not succeed because they did not occur and so there was no less favourable treatment. The claim for direct discrimination on grounds of philosophical belief does not succeed as the claimant's beliefs, which were not known to the respondent, had nothing whatsoever to do with the dismissal.

Employment Judge McLaren

Date 31 March 2022