Case Number: 2300911/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms. K Sunderland
Respondent: (1) The Hut.Com Limited
(2) Ms. P Cohen

Heard at: London South Hearing Centre. In person

On 28-31 March 2023 (and in chambers 24 May 2023)

Before Employment Judge McLaren
Members: Mr. H Smith
Ms. C Oldfield

Representation
Claimant: Mr. F Hoar, Counsel
Respondent: Ms. A Stroud, Counsel

JUDGMENT

1. The claim for harassment is dismissed on withdrawal by the Claimant

2. The unanimous decision of the tribunal is that:
   i. The Claimant did not hold a philosophical belief which falls within section 10 of the Equality Act 2010.
   ii. Neither of the Respondents contravened any or all of sections 13, 19 or 26 of the Equality Act 2010. The claims of discrimination do not succeed.
   iii. The reason or principal reason for the claimant's dismissal was not the claimant's political opinions or affiliation with the Conservative Party in accordance with section 108(4) Employment Rights Act 1996. The claim for unfair dismissal does not succeed

REASONS

Background

1. The first respondent trades as an e commerce business, primarily in the retail sale of consumer beauty, health and fitness nutrition products. The claimant was employed by the first respondent as a Senior Business

Development Manager from 6 September 2021 until her dismissal on 10 November 2021. She reported to the second respondent.

2. We heard evidence from the claimant on her own account. The second respondent, Ms Cohen, gave evidence on behalf of both respondents. In timetabling this hearing, we agreed that we would address liability only.

3. We were provided with a bundle of 240 pages. The claimant then added pages 241- 268 by agreement and the respondent added two press articles relating to a Twitter rant, together with an email exchange of 9 November 2021. In addition to the two written witness statements, we were also provided with written opening submissions by the claimant amounting to some 49 pages, together with a bundle of authorities of 590 pages. We were asked to consider 2 authorities from this, Forstater v CGD Europe and Others (1) [2022] ICR 1 and Billy Graham Evangelistic Society v Scottish Event Campus Ltd [2022] SC GLW 33, paras 22-50 and 174 to 222.We were provided with written closing submissions by the respondent.

4. In reaching our decision we took account of all the pages in the bundle to which we were referred, the witness evidence, the claimant's written opening submissions, the respondent's written closing submissions and additional oral submissions from both Counsel.

Preliminary application

5. The claimant made an application under rule 31 that the respondent be ordered to disclose and provide for inspection all relevant documents, emails and work product generated by them about the dismissal of the claimant. Specifically, they requested the correspondence in which management were informed of the issue, correspondence and other documents generated by HR when they were informed of the issue, any calendar data produced relating to meetings between management and HR.

6. This had been requested in writing prior to the hearing and the respondent had stated that no such documents existed. In discussion with the parties, Mr Hoar, on behalf of the claimant, accepted that he could properly put his questions about this to Ms Cohen and therefore no order was made.

7. During the hearing however, it became clear that Ms Cohen was unable to answer such questions. Overnight, a further additional document was produced which had been sent by HR to Ms Cohen. At our request, the respondent agreed to carry out a further search and produced a statement from the Chief People Officer of the respondent that a search had been carried out for notes taken by Mr Mahoney in respect of the meeting on 9 November 2021.

8. Having considered this, we concluded that this did not answer the point fully enough. Ms Cohen had suggested that inboxes of past employees could not be searched. The Chief People Officer had clearly been able to do that. We therefore ordered the respondent to carry out a further search of any relevant documents or correspondence relating to the claimant on

the 9th and 10th of November, that is the day before and the day of her dismissal. No additional documents were found.

Issues

9. In the claim form the claimant asserts that she holds the following philosophical beliefs: a) conservatism; b) gender equality; c) secular atheism; and d) freedom of expression;

10. The claimant claims that her dismissal was unfair and discriminatory and that she was harassed on the grounds of conservative philosophical beliefs. She brings the following claims against the respondents:

    a) Indirect philosophical belief discrimination, on the basis of a belief in conservatism, contrary to section 19 of the Equality Act 2010 ('the EA 2010');

    b) Indirect philosophical belief discrimination, on the basis of gender equality, contrary to s.19 of EA 2010;

    c) Indirect philosophical belief discrimination, on the basis of secular atheism, contrary to s.19 of EA 2010;

    d) Indirect philosophical belief discrimination, on the basis of a belief in freedom of expression, contrary to s.19 of EA 2010;

    e) Direct philosophical belief discrimination, on the basis of conservatism, contrary to s.13 of EA 2010;

    f) Harassment related to a protected belief in conservatism, contrary to s.19 of EA 2010; (this was withdrawn during the hearing)

    g) Unfair dismissal contrary to s.98 of the Employment Rights Act 1996 (ERA 1996) (relying on the exception to the qualifying period of two years because her dismissal was, it is alleged, due to her political opinions and/or affiliations)

11. The issues had not been addressed at the preliminary hearings. The respondent had recently produced a draft list of issues on which the claimant commented, but this had not been agreed between the parties at the start of the hearing.

12. In particular, reference was made to the respondent's legitimate belief in relation to the indirect discrimination claims, but this was not set out. Counsel for the respondent stated that there were three legitimate aims on which the respondent intended to rely, and she outlined these. Counsel for the claimant objected on the basis that these matters had not been pleaded. While there was reference in the Reply to one aim in respect of unfair dismissal, in relation to the indirect discrimination reference is made in general terms to legitimate aims with no specificity.

13. Having heard submissions from both Counsel on this point we concluded that we would allow two of the legitimate aims as articulated by

Counsel for the respondent to be included in the issues list. On balance we concluded that these were referenced in the pleadings, albeit not specifically pleaded against this point. We did not accept that the third proposed legitimate aim had been pleaded at all.

14. The issues in this matter were therefore agreed as follows.

"Equality Act 2010 – Section 10

1 Did the Claimant, during the course of her employment with the Respondent , hold the alleged philosophical beliefs of:

1.1 Conservatism;

1.2 Gender equality;

1.3 Secular atheism; and/or

1.4 Freedom of expression

(the Beliefs)?

2 Did the Beliefs fall within section 10, Equality Act 2010?

Indirect Discrimination

3 Did the Respondents apply any of the following provisions, criteria or practices ('PCPs'):

3.1 a practice of using subjective standards of political or religious propriety by decision-makers in disciplinary cases where the inculpated conduct is social media expression outside the scope of employment (PCP1); and/or

3.2 a policy of punishing manifestations of conservatism, secular atheism and gender equality where those expressions are deemed by some to be controversial or simply personally offensive (PCP2)?

3.3 In relation to PCP1:

(a) was the alleged practice so vague as to allow individual decision-makers to enforce it in a way that appeals to their own prejudices and political beliefs;

(b) did or would the alleged practice apply to persons that did not have the Claimant's belief in freedom of expression;

(c) did or would the alleged practice put persons with the Claimant's belief in freedom of expression at a particular disadvantage (i.e. its application allegedly resulted in the Claimant's dismissal) when compared with persons that do not share the Claimant's belief;

(d) did the Claimant's practice put her to the disadvantage; and

(e) can the Respondents show that the alleged practice was a proportionate means of achieving a legitimate aim, namely:

(i) Managing R1's reputation; and/or

(ii) Ensuring that R1s' employees act in a manner consistent with its values and/or those of its clients?

3.4 In relation to PCP2:

(a) did or would the alleged policy apply to persons that did not have the Claimant's beliefs in conservatism, secular atheism and gender equality;

(b) did or would the alleged policy put persons with the Claimant's beliefs in conservatism, secular atheism and gender equality at a particular disadvantage (i.e. its application allegedly resulted in the Claimant's dismissal) when compared with persons that do not share the Claimant's beliefs;

(c) did the policy put her to the disadvantage; and

(d) can the Respondents show that the alleged policy was a proportionate means of achieving a legitimate aim, namely:

(i) Managing R1's reputation; and/or

(ii) Ensuring that R1s' employees act in a manner consistent with its values and/or those of its clients.?

Direct Discrimination

4 Did the Respondents treat the Claimant less favourably than a hypothetical employee who was the same in all material aspects but for not holding a belief in conservatism because of the Claimant's belief in conservatism by disciplining and dismissing the Claimant?

Harassment

5 Did the Respondents engage in unwanted conduct related to the Claimant's belief in conservatism that had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant when the Claimant's colleagues discussed her political affiliation in the group chat?

Unfair Dismissal

6 Was the reason or principal reason for the Claimant's dismissal the Claimant's political opinions or affiliation with the Conservative Party in accordance with section 108(4), Employment Rights Act 1996 (ERA)?

7 If so, does the First Respondent have a potentially fair reason for dismissal? The First Respondent contends that its reason for dismissal was misconduct or in the alternative some other substantial reason, pursuant to sections 98(2)(b) or 98(1)(b) ERA?

8 Was the Claimant's dismissal fair and reasonable in all the circumstances of the case, both substantively and procedurally in accordance with section 98(4) ERA? In particular:

8.1 Was there a fair reason to dismiss the Claimant.

8.2 Did the Respondent carry out a reasonable investigation.

8.3 Does the Tribunal need to apply Sections 2, 3 and/or 6 of the Human Rights Act 1998 so as to give effect to the Claimant's rights under the European Convention on Human Rights? and

8.3 Did the Respondent act reasonably in all the circumstances.

9 If the Tribunal finds that the First Respondent has failed to follow a procedure in relation to the Claimant's dismissal and the dismissal is unfair, would the application of a fair procedure:

9.1 have made no difference to the decision to dismiss the Claimant; and/or

9.2 have led to the Claimant being dismissed but at a later date?

9.3 In consequence, should any compensatory award be reduced to nil or, alternatively, to a lesser sum?

Finding of facts

<u>The Claimant's Role</u>

15. The claimant was employed as Business Development Manager. A summary of the role was set out at pages 117 – 118. This was a maternity cover and was responsible for managing a subscription-based beauty box service trading in the UK, Nordic, France, US Germany and Austria known as "Glossybox". It was explained that subscribers are sent a box once a month which includes a range of products, some full-size, some travel size. They can be from a variety of beauty brands and allows customers to try out a range of products.

16. Ms Cohen in her written witness statement gave evidence that a key strategy of Glossybox was to create a strong and identifiable brand and that its brand strength, and therefore its reputation, were key. Damage to reputation could severely impact the delivery of the marketing strategy and it was for this reason it was important the respondent aligned with the values of their partners. She also gave evidence that understanding the importance of representing a global brand culturally with its brand partners was a key responsibility of the claimant's role.

17. The job description contains a summary of the role. The successful candidate would be able to appraise and improve sourcing strategy, analyse budgets, build relationships and launch new limited sampling solutions. It was agreed that building relationships was therefore one of four parts of the role, and this included building relationships internally.

18. The description, under “Responsibilities” set out four bullet points. It included having a strong understanding of the UK beauty market to identify key partners for the business, having good political, cultural and economic awareness to identify opportunities and potential issues which they would need to navigate as a business. It required strong experience in developing campaigns with major beauty brands at a senior level. It also included understanding the importance of representing a global brand culturally both with brand partners and ensuring high quality product for customers. This did not specifically set out any requirement to sell directly, although we accept that there was an expectation that the role would liaise with brand partners.

19. Under “key behaviours” the document specified that the individual must be a highly presentable brand ambassador. The claimant accepted in a general sense that all staff of the respondent are ambassadors of the company and the brands that they represent. The claimant explained that this cultural awareness was of beauty trends and things that might appeal to certain sectors of the community. Ms Cohen agreed this definition of brand ambassador.

20. The claimant was also clear that there was no discussion about values, nor was she ever told that it was a key responsibility to represent the global brand culturally at the time. We find that the job description was not discussed in any level of detail and that the importance of individual staff conduct aligning with the value of customers was not raised with the claimant.

21. The most significant dispute between the claimant and the respondent in relation to the job description is the amount of brand contact she was to have. The role description under “Requirements” does specify that outstanding sales and relationship building skills are required and that means “that you must not be afraid of cold calling and be able to charm people off their feet”. The “Behaviours” include being a highly presentable brand ambassador and having effective communication presenting skills, both face-to-face and written.

22. In her evidence, the claimant stated that she had all the skills, but the description was not one of a customer facing role. She certainly did have to interact with brands on occasions and was able to charm people, but this was an internal role. In her witness statement the claimant described external client contact as about 10% of her role. She accepted that she needed to have strong sales experience but was adamant that her role was not a direct sales role. The role was to oversee her team who were doing the selling. Her experience and skills in sales allowed her to coach her staff and to assist them in growing their skills as a salesforce.

23. The claimant said that if her role had been sales one, it would have included key performance indicators on the amount of sales she had to make within a certain time period. It did not do so because this was a customer facing role.

24. The claimant also told us that she had herself sought clarification on this point at the outset from Ms Cohen. She had asked her if she was

actively supposed to get the brands into the box herself, or simply to oversee the team doing this. She was told that her role was to oversee the team.

25. Ms Cohen was unable to identify how much time the claimant spent on liaising externally with brands. Her evidence was that the role was client facing and that she had been in brand meetings with the claimant who had secured some deals herself.

26. On the balance of probabilities, we prefer the claimant's evidence as to what the job required. We find that it was not a specific sales role that was focused on personally building external relationships. It was a role overseeing a team. We accept that there would have been a requirement for some contact with brands, but this was not the primary function of the role and accept the claimant's description that this contact was for about 10% of the time. Nonetheless, we accept the respondent's position that there was some contact and find that the claimant's actions could therefore have an impact on her job role and on the respondent's brand if they were in the public domain and this was a legitimate concern.

Employment contract and policies

27. A copy of the statement of particulars of the main terms of her employment contract were issued to the claimant on 9 September 2021, with the claimant starting work on 6 September 2021. Her initial employment was subject to a three-month probationary period. The notice required to end the contract was one week during the probationary period.

28. These terms made reference to the company disciplinary procedure and specified that it was the claimant's responsibility to familiarise herself with the procedure. It was specified not to form part of the contract of employment.

29. The terms of employment specified that in addition to conduct which could result in summary dismissal as set out in the disciplinary procedure, the company could terminate employment immediately by summary notice in writing if any one of a number of specified acts occurred. We were taken to clause 12.2.3 which specifies that doing anything which is seriously prejudicial to the interest of the company can result in termination by summary notice in writing. This was qualified to be an act which occurred in the performance of duties under the agreement. Clause 12.2.4 included if an employee adversely prejudiced or acted in such a way as was likely to prejudice and adversely impact the reputation of the company. It was agreed that the act for which the claimant was dismissed occurred years before she was employed by the company and before these contract terms applied.

30. The staff handbook contained a number of policies. We were taken to the bullying and harassment policy which included a definition of harassment (page 80). The diversity and inclusion policy, which the claimant did not have, includes prohibitions on direct and indirect discrimination and harassment (page 85).

31. The social media policy (page 87 – 89) specified it is intended to help staff make appropriate decisions on their use of social media and it outlines the standard staff are required to observe when using social media. It also set out that action would be taken for breaches of the policy. Under the heading "personal use of social media sites" the policy specified that the respondent permitted incidental use of social media websites and personal use subject to certain conditions, but this was a privilege and not a right.

32. The policy set out that staff were not to upload or post a link to any abusive, obscene, discriminatory, harassing, derogatory or defamatory content. It specified that uploading or posting material which is offensive, obscene, criminal, derogatory or may cause embarrassment to the respondent, clients or staff would amount to gross misconduct.

33. It was agreed that the employment contract did not reference this policy which was described as non contractual. Ms Cohen confirmed that she was unaware of whether the claimant was directed to this policy or not. It was not her role as line manager to do this, this was HR's role, but she could not say whether it happened or not.

34. The claimant was clear that while she was sent a staff handbook, it did not include either the Harassment policy or the Social Media policy in the bundle and neither was ever drawn to her attention. She produced a copy of the document that had been sent to her at the time she was hired. This was headed Communications Policy and referred to indirect communications chat rooms and other electronic communications methods. It concluded that any use of such chat rooms et cetera must be in compliance with this policy and the social media guidelines.

35. The claimant confirmed that she was aware the respondent had an intranet. She used this for various purposes but was not able to say whether it contained any policies. There were a number of mandatory training modules she was required to undertake as part of her employment. She did these, but that did not include any reference to the social media policy. The claimant also commented that reference to material which is offensive is open to interpretation and is highly subjective. There was no specific list of such matters.

36. We accept the claimant's uncontested evidence that, other than the reference to it in the communications policy, the claimant did not have her attention directed to the social media policy and that she was not aware of its contents. We find that the terms of the policy nonetheless reflect the respondent's concerns about any impact of staff actions on the reputation of the business

37. The disciplinary policy (page 90 – 101) sets out the steps that would be taken to investigate and notify of a disciplinary hearing and the procedure at the disciplinary hearing. It included an appeals process. Examples of gross misconduct included bringing the organisation into serious disrepute.

Political career

38. The claimant explained that in mid-2017 she became involved in the Brexit debate and realised that her views were conservative. In a written witness statement, she specified that she felt as if all her beliefs in individual liberty dovetailed with what appeared to be a conservative belief. She felt that she could make a difference, and that it was important to participate in democracy in order to make society better. She therefore became involved in her local Conservative party in June or July 2017. She attended party events and engaged with the local branch. She also used her Twitter account to promote conservatism.

39. In late 2017 the claimant was asked if she would like to become a candidate and on around 24 October 2017 she confirmed that she would stand as a Conservative candidate in the Lewisham and Deptford area.

Use of Twitter/the 3 tweets

40. The claimant explained that Twitter was central to her work as a political activist and candidate and she used it as a tool to promote her candidacy, conservatism and the Conservative party. She explained that she would comment on the Twitter posts of LBC radio which attracted robust debate.

41. On 19 October 2017 she tweeted in response to an LBC post stating *"such a lame attempt you need to justify hijabs. Self-indulgent to think anyone gives a toot that you showed your hair".* On 19 November 2017 the claimant published a further tweet which she said was concerning a news story about school children wearing the hijab. She accepted this was not clear from the tweet itself. It said *"parents will simply bang on about Islam and their rights blah blah blah. It confuses me so much by people with these views live in the West.*

42. In answer to cross examination questions the claimant believed that the reason that the second post was a month after the first was it was likely she was responding to somebody else's comment on her first post. She believed the posts were related, but accepted that also was not clear from the tweets themselves.

43. The claimant explained in her written evidence that the first tweet manifested her belief that any religious practices must be subjected to rational scrutiny and sacredness should not prevent this from occurring. It was also suggested that this tweet was partly about gender equality. The claimant explained that the second tweet manifested her belief that women should not be prescribed certain roles and identities as a group. Identification of women as temptations who must be hidden is offensive and false. We find this reference to women is not apparent on the face of the tweet. It references parents and Islam.

44. In oral testimony the claimant was asked about these tweets in some detail. She repeated that she rejected modesty culture as a concept and in her tweet was responding to a particular thing, which to the best of her recollection was about hijabs for schoolchildren. She recalls that she was responding directly to a published interview by a radio station in which the

guest speaker had suggested that schoolchildren should wear the hijab so that they could get used to this in readiness for adulthood. That was the context of her response.

45. The claimant explained that she was engaging in a debate by LBC on a contentious subject. It involved a broad range of opinions but that we lived in a free society and it was very important that a wide range of opinions should be heard. She considered that the language she used, referring to the justification as "lame" was mild. She did not accept that it was a "brutal" tweet, rather that it was offensive to require children to wear the hijab to make them feel self-conscious and at fault if they attracted more attention because they have not covered up.

46. The claimant was asked about her comment that she was confused why people with these views live in the West. She explained that this reflected her genuine confusion as to why someone would choose to live in a western society where their values were at odds with western values. She repeated that telling a schoolgirl to cover because it was immodest and you would burn in hell as a penalty was an extreme view from her perspective. She confirmed that she was not saying that individuals could not or should not live in the West, but that she was confused as to why they would wish to. She would not want to live where her values were at odds with society. She was not saying that Muslims should not live in the West.

47. She accepted that her tweet did not give context or show her entire view but explained that it was a post she put out in response to a specific thing, and it was part of a bigger debate. This was a debate about schoolchildren and not about adults who choose to wear the hijab. The claimant accepted that adults or children wearing the hijab is not a Conservative policy and does not relate to Conservative or conservatism. She confirmed that it was not a political opinion.

48. On 3 December 2017 the claimant published a further tweet in response to 3 other Twitter users' comments, two of whom are very well known and would have a wide following. Her tweet read "*love your optimism. The thing is, religion undermines the hard fought for values and tolerances of progressed countries… Suppresses free-speech and is autoimmune from criticism. This is toxic and where the hostility comes from. Religion is totalitarian. Islam has become the new Nazism*"

49. In her written witness statement, the claimant gave evidence that the third tweet was made in the context of her belief in freedom of speech and secular atheism. The claimant explained that she felt that the comparison with Nazism that she had made could be harmful and undercut the other parts of the tweet which she stood behind. She therefore released a recorded apology message on 2 May 2018. She understood why the Nazi comparison was wrong and regretted this, but stood behind everything else as it expressed her consistently held view that no religion should get a "free pass".

50. Again, the claimant gave further evidence on this in answer to cross examination questions. It is her opinion that religion does undermine

values and tolerances and it suppresses free speech and that is toxic. She did not say that religion is toxic, but the suppression of free speech is toxic. While there is a specific reference to Islam in the last sentence, she was talking about religion as a broad subject and not about specific religions. Her point is that one cannot criticise religions as we now find ourselves in a "cancel culture". She was adamant that she was referring to the text and teachings of religions and not to human perception. She stated clearly that she has the right to an opinion about religious ideology and that she did not mean, for example, Christians or Muslims in her comment; she was criticising the ideology and she defends that.

51. The claimant did not believe that this tweet incited hate. It was not about Muslims but ideology. With hindsight she believes that someone looking at that post would say that it was a bit strong and possibly a reasonable person could have found it offensive, but we are all offended by different things. It adds an extra layer of offence if it is about religion and that is partly her point.

52. The claimant agreed that she was not expressing a political opinion in this tweet. As it was anti-religion she said it was not implausible any reader might think that she was not a religious person and might be an atheist. We find that may be the case but the tweet in itself is not atheist or secular. We also find that on its face it is not about gender equality. The claimant has agreed it was not political and not conservative. Of the 4 "beliefs" relied upon it potentially references only 1, free speech.

53. The claimant understood why she was suspended from the Conservative party and in hindsight agreed it had not been sensible to post these tweets during the candidacy process, but she was not thinking about that. She accepted the final sentence in tweet 3 was unwise. She could have framed it better and she understood why it posed a problem to the Conservative party and agreed she should not have done it. She accepted that could be seen as poor judgement. She also stated it would be reasonable to ask about this in any investigation. We find that the claimant accepts this tweet is objectively offensive.

54. On 1 May 2018 the iNews online newspaper published a story about these tweets which included the tweets themselves. Its headline was that a Tory council candidate had been suspended for "Islamophobic" tweets. The article identified the account from which these tweets had been made and stated that it appeared to be have been deleted or moved. It noted that the claimant now appeared to be tweeting from a private account.

55. This story was also reported by BBC News online with the headline "Lewisham Tory candidate suspended over Islamophobic tweets". It was also reported in the Mirror. The claimant was suspended by the Conservative party pending investigation because of the news stories.

56. The claimant explained that she was advised by Tory headquarters not to engage with journalists but as she was still standing as an independent candidate she wished to apologise and that is why she made her apology which is still on YouTube. She was asked why she did not apologise any earlier as it was four months after the tweet. She explained that if

someone had come back in the debate and she had been challenged she could have apologised then. She did not pause for reflection at the time she tweeted but moved on. She remains of the view that Islam is a supremacist ideology and her apology related to the use of the word Nazism.

57. The claimant was not successful in the election. The investigation announced by the Conservative party did not proceed and the claimant left the party of her own accord. She has not changed her beliefs but no longer believes that conservatism is found within the Conservative party.

Meeting in Manchester

58. The claimant explained that she worked at a serviced office in London but that the main business was based in Manchester. Staff communicated with each other using "Teams" as they were not provided with landlines or mobile telephones.

59. In October 2021 the claimant organised a meeting with the operations team who were based in Manchester and therefore travelled up to do that. At this meeting the claimant was asked by a colleague whereabouts in Manchester she was staying, and she explained that she was staying at a hotel with her boyfriend. He was attending the Conservative party conference. At the time there was no reaction to this.

60. The claimant subsequently discovered that a colleague who had not attended the meeting, a Ms Stanley, then searched for her name on Google after learning that her boyfriend was attending the Conservative party conference. Pages 126 – 128 contains an exchange of Teams messages which took place on 6 October between three of the claimant's colleagues, Ms Stanley, Mr Greenwood and Mr Hughes.

61. Ms Stanley suggests that her colleagues google the claimant. Mr Hughes does this and then sends his colleagues a headline from one of the newspaper articles relating to the claimant's tweets which identified that she was suspended as a Tory council candidate for homophobic tweets comparing Islam to Nazism.

62. There was a further exchange on 1 November in which Ms Stanley made the e-commerce manager for Glossybox, Kit Savatherajan, aware of the newspaper articles. She is also advised to google "Karen Sunderland Tory". The two discuss what is shown and describe it as alarmingly bad, that they are concerned that she has been hired with that history. The text exchange confirms that the claimant referred to this in the operation sourcing meeting, one colleague was told that and then googled her out of curiosity. It is pointed out that she is in a client facing role which is described as "insane". Ms Cohen was unaware of this exchange of texts prior to the claimant's dismissal.

Background to the meeting of the 10 November

63. Having seen the articles herself, Kit Savatherajan then sent Ms Cohen a Team's message saying that she needed to speak to her about the claimant and it seemed to be quite serious. The two then spoke in person

in the office when Kit explained that she was aware from a Manchester team member of some tweets and news articles relating to the claimant. Kit Savatherajan then showed Ms Cohen one article on her mobile, Ms Cohen then used her own mobile to Google the claimant. She had not done this before. She came across the tweets and the national press coverage that the claimant had received. Ms Cohen believes that it was the article in the i newspaper which sets out three tweets that she found.

64. It was Ms Cohen's written evidence that she initially thought the media posts were offensive and derogatory in respect of the faith and beliefs of others. They were inconsistent with the respondent's values and the key requirements of the role the claimant carried out.

65. Ms Cohen was taken to each of the tweets and asked detailed questions on these. She agreed that the first tweet was a reply to an individual and it shows the claimant disagrees with the requirement to wear the hijab which Ms. Cohen considered to be a representation of the belief and therefore indirectly about religion. She accepted that it was indirectly also against women because wearing the hijab was to hide a woman's hair.

66. The second tweet she considered to be "brutal" with very aggressive wording about Islam which had been published and so was in the public domain. She was not aware that the context was part of a debate about children wearing hijab and accepted that it could be helpful to find out the context but felt was not her responsibility to do this research. She did understand the second tweet was to do with children because of the reference to parents. She was unaware that LBC was a radio station believing it was a Twitter account. She looked at both tweet one and tweet two at the same time and felt that both were about the same community. She considered "people with these views" were the parents who had views on Islam and therefore it was about Islam.

67. Ms Cohen's evidence was that without the context you could not know what the claimant was referring to, but she understood that she pointed out a community publicly and was discriminating against these people who should not live in the West. As this is a news article and was therefore in the press, she considered it was serious enough to touch on public opinion. It also said that the claimant was suspended by her party and was being investigated so she understood this was something serious. While she accepted that she did not know what the views were being discussed, she considered that it was an Islamic view that the claimant was criticising.

68. On the third tweet she did accept that this shows the claimant believes in free speech and does not like religion. When it was put to her in cross-examination, she agreed that the tweet does refer to a number of views and beliefs. We find, however, that this reflection was only when each word of the tweet was broken down and put to her separately. We find that at the time she read the tweet and discussed this internally she did not carry out such a detailed analysis. She took it at face value and believed all 3 tweets were about Islam.

69. Ms Cohen explained that she was aware that Islam is a religion and Muslims practice that religion and she thought all the tweets were about religion. The first one is about the hijab, that is Islam, the second one is about parents who are Islamic living in the West. At the time she read these Ms Cohen was not aware of the timing of the articles and the local election. Ms Cohen was asked what she understood by race discrimination, and she believed that it included race, ethnicity and religion.

70. As her source of information was the newspaper articles, she was asked whether or not she had been influenced by the comments reported from another local councillor that these were xenophobic comments. She said she had not. She herself was very uncomfortable about what she was reading. She confirmed that she felt that the wording was inappropriate and the manner in which the beliefs had been expressed was of a racist nature because three posts were against Islam.

71. Ms Cohen was unaware of the claimant's YouTube apology and did not feel the need to ask about this as in her view the damage was done. The article was visible and accessible, and it could damage the respondent and relationship with brands. The respondent could not control this as they could not erase social media.

72. We accept Ms Cohen's evidence that at the time she first saw the tweets she believed that they were publicly available, and that they were of a racist nature as, while they are linked to Islam this is likely to relate to a particular ethnicity. We find that she did not connect this in any way to the claimant's candidacy as a Conservative councillor. She did not view these as free speech, or about gender equality but saw them as anti Islam and expressed in an offensive and racist manner

73. Having seen the news articles and the tweets set out in those, she therefore contacted Mr.O' Mahony, Senior People Adviser via Teams and spoke over the phone. She explained to Mr. O Mahoney that Kit had come to her and showed her some tweets about the claimant. She explained that she had then found the tweets herself and found them inappropriate. She had also heard from Kit that other members of the Manchester team were aware of the tweets and she asked him what should she do, what is the best process here?

74. Mr. O Mahoney asked Ms Cohen for more information about how Kit had come across these and she explained that she'd been told about them by Ms. Stanley who was based in Manchester. She recalls that they briefly discussed the tweets, Mr. O Mahoney having googled them and found them himself they shared their surprise at the tone of voice used. Ms Cohen could not recall what was said between them. She does recall that they both agreed on the need to speak to her line manager, Mr. Adamson, the Managing Director of Glossybox, and she phoned Mr. Adamson to join them.

75. When he came on the line Ms Cohen again explained the situation to him. Mr. O Mahoney either shared his screen or Mr. Adamson googled himself and she believes that they all had the "i" report in front of them.

Ms Cohen recalls that she told Mr. Adamson she was concerned about the wording used and that it was very visible and in the press. She recalls that Mr. Adamson understood the point quickly and said that he needed to speak to his line manager, Mr. Bonner, the Commercial Director, to seek guidance. At this point Ms Cohen recollects that they all agreed that this was something serious.

76. Ms Cohen believes that Mr. Bonner was contacted, and he went into a meeting room. She thinks that she spoke to Mr. Bonner to explain the position again and that Mr. Adamson may already have shown him the newspaper article as he was also in the meeting room. She believes that Mr. O Mahoney explained that they were all concerned about some of the tweets and she thinks Mr. Bonner used his mobile to look at them. She did remember that they were all aligned with their thinking. She does not recall what Mr. Bonner said, but that he was shocked. She believes they discussed the overall content which they all found to be quite extreme, and they agreed the need to address this as quickly as possible. We find that the shock was about the manner in which the negative views of Islam were expressed.

77. Ms Cohen could not remember exactly what they discussed or what specific points that were made, just that they all agreed it was serious. She told us on a number of occasions that everybody's views aligned, and we find that this means that all those in the room shared her view of the nature of the tweets, that the way in which they were expressed was objectively offensive. We find that no one carried out a detailed analysis of the tweets but looking at the three together believed that they were all negative towards Islam and the views were expressed in an offensive way.

78. While Ms Cohen could not remember whether the word racism was used in the meeting.. She does not think that she would use that word but could not recall if anyone else at the meeting used it .Despite the word not being used explicitly, we find that they did not consider these to be examples of free speech or relating to gender equality but were views expressed in such a way as to amount to racism. She recalls that she asked what we should do, and it was decided that they should have a disciplinary meeting and that Mr. O Mahoney would email her advice on how to conduct it. He said that the claimant should be asked to explain what had happened and in general terms he went through the points which are set out in the follow up email, although the email is more detailed.

79. She remembers that either Mr. Bonner or Mr. Adamson first mentioned terminating the claimant's employment. She can't recall exactly what was said, she does not have a clear memory of it. She believes that termination was mentioned before they discussed the details of how to have the meeting.

80. While Ms Cohen said the decision to dismiss was not taken at that meeting, she also agreed that she knew that her senior director and his senior felt that it was worthy of dismissal. She also told us that whatever

decision she was taking she would consult her manager; she was not the decision-maker.

81. Following this meeting Mr. O Mahoney sent a follow up email suggesting how the meeting should be structured. It suggests that Ms Cohen should open the meeting to say that it had come to her attention that a news article was available online which alleged the claimant had posted comments of an inappropriate racial nature onto a social media platform. On the balance of probabilities, we find that all of those in the meeting considered that the tweets were negative towards Islam and had expressed this view in a way that was racist in nature. This was certainly Ms Cohen's view, and we find that it was this consensus which led Mr. O Mahoney to advise Ms Cohen to frame the meeting as being about allegations of posting of comments of an inappropriate racial nature. In the absence of hearing evidence from any of the attendees at this meeting other than Ms Cohen, we find that the advice he gave reflected the views of all those in the meeting, including Mr Adamson.

82. We also find that all those in the meeting reflected Ms Cohen's view that the ease with which these articles could be found meant that they could be seen by the brands with which they were hoping to deal and, given the claimants role was to interact with brands, this was potentially damaging to the respondent's reputation. We conclude that going into the process, Ms Cohen shared a view with HR, her line manager and Mr Adamson, that the tweets were expressed as anti-Islamic which amounted to race discrimination and were potentially damaging to the respondent brand.

The Process

83. As line manager, Ms Cohen was tasked with holding an investigation meeting. She confirmed that she had seen the disciplinary policy as an employee but had not read it prior to the meeting with the claimant. She had no training on the policy or how to conduct investigation or disciplinary hearings. This was her first, and to date, only such meeting. She had no training on diversity or inclusion policies.

84. Ms Cohen agreed that, while it was her job as line manager to hold the meeting, it was unfair both on her and on the claimant to be asked to do so without training on either investigation and disciplinary meetings or diversity and inclusion.

85. Ms Cohen was taken through the disciplinary policy and accepted that she did not follow it. She accepted that the policy was to provide guidance within which managers could work to ensure high standards of conduct are achieved and to encourage improvement when a colleague breaches the respondent's rules, standards or terms and conditions.

86. She accepted that the policy specified it was crucial to establish the facts of the case and therefore for more serious matters investigation would be conducted as soon as possible. The purpose of such an investigation was to establish a fair and balanced view of the facts before deciding whether there was a preliminary case to answer. She accepted

the policy specified no decision on any disciplinary action will be taken until after a separate disciplinary hearing had been held.

87. Ms Cohen acknowledged that she took no steps to investigate the context in which the tweets were made but relied entirely on the view she formed of them based on the tweets presented in the news articles.

88. When she was asked about these tweets, she confirmed that she did not search these tweets and was not sure if they were even accessible. She also noted that the newspaper article that she saw indicated that the account was now private, and she did not dispute this.

89. Ms Cohen accepted that the claimant was not invited to a separate disciplinary meeting, was not given any relevant information gathered during an investigation, was not given a copy of any relevant documents such as a copy of the tweets and was not given 24 hours notice of any hearing. She also accepted that the claimant was not given the right to bring a companion. She also accepted that the claimant was not given the right, having heard the allegations against her, to respond and present any evidence of her own.

90. Ms Cohen accepted that the claimant was entirely unprepared for the meeting to which she was invited and with hindsight agreed that things should have been done differently. The process fell very far short in every respect of a fair process that is required where an individual has qualifying service to bring a claim for unfair dismissal.

The meeting

91. The claimant was invited to attend a meeting on 10 November 2021. She was not informed of the nature of the meeting other than it was a catch up with HR. The notes of the meeting were at page 137 – 138. This shows that it was explained that the meeting was to discuss something that had come to Ms Cohen's attention and that she had been made aware of news articles in relation to material published on social media. This was not precisely the opening of the meeting that Mr. O Mahoney had suggested Ms Cohen used. It did not mention posting comments of an inappropriate racial nature on a social media platform. Ms Cohen confirmed that she did not have a printed out copy of this advice with her nor did she have it on screen at the time. She was recalling the advice given and summarising it in her own words.

92. The claimant was asked to elaborate further, and she explained that she regretted what she posted about comparing an ideology, it was a misstep, not her finest hour, and she had since apologised for it. She commented that the articles had been out there for some time.

93. Ms Cohen responded that she was concerned because her role required the claimant to be the front face for the developing brand relationships, and she was concerned about the impact it could have if an individual were to come across the articles. The claimant gave more context about her views and said they were not racist views. While the notes of the meeting do not contain the allegation that the views are racist, we find that the way in which the claimant responded was because

this is how she believed the respondents were viewing it from the way in which they were talking to her. The claimant understood the tweets were viewed as racist.

94. The claimant was asked about what else she said in the meeting, and told us that she did make reference to being a political candidate at the time of the post, she talked about an ideology, she talked about being in politics and about free speech. While the notes do not reflect this, the claimant was adamant that she had also mentioned the fact that she was atheist. She did not say in evidence that she referred to secular atheism.

95. The meeting having started at 9.30 was adjourned at 9.49. In the break, Ms Cohen explained that she and Mr. O Mahoney had a brief discussion which covered the fact that they both agreed they needed to call Mr. Adamson as her manager. He was expecting a call, answered immediately and then went into a meeting with them straightaway. He was aware that the purpose of the call was to discuss whether to terminate the claimant's employment.

96. Ms Cohen's best recollection of the meeting was that she summarised the meeting by effectively going through the questions that she asked the claimant. She did not have any notes of the meeting with her nor were Mr. O Mahoney's notes shared, nor did he make any reference to what he had captured as the claimant's responses with one exception. Ms Cohen referred to the fact that the claimant was apologetic. It was also brought up that the tweets were some time ago. Ms Cohen referred to the claimant's role having a brand relationship.

97. The three discussed what they should do and Ms Cohen recalls saying that she was not comfortable with the position, which we find to be an expression of her distaste for the manner in which the claimant had expressed her views. She was asked what Mr Adamson said and could not remember, but when pressed in cross-examination said that she thought that Mr Adamson said something like "we can't take the risk to have someone with her values in the company". Mr Adamson therefore decided to dismiss the claimant. We accept that he was the sole decision-maker.

98. The meeting reconvened at 10.05 when the claimant was told that having taken into consideration what had been discussed and considered how it would impact her front facing role with brands and clients, despite the fact this occurred a number of years ago, the respondent considered there was a significant risk this could impact stakeholder relationships. Ms Cohen terminated her employment. We find that this conversation reflected Mr Adamson's opinion and that Ms Cohen was effectively relaying what she had been told and agreed with to the claimant. The claimant was therefore told that she was dismissed because of her racist tweets and the impact on stakeholder relationships.

99. The claimant asked for further clarification about direct relationships with suppliers/customers, and she was told that the respondent needed to consider that it might damage the relationship if the stakeholder were to become aware. The image of Glossybox could be impacted by this, given

the claimant's role. They could have colleagues who took serious offence to the content posted. It had the ability to impact on a business level. We find that the dismissal was therefore about the way in which the claimant had expressed her views and the impact on the respondent's reputation.

100. Following this meeting Mr. O Mahoney prepared a draft outcome letter which was sent to Ms Cohen for her comments. She had no comments and therefore the letter confirming this decision was sent to the claimant on 11 November 2021.

101. This set out more detail and explained that it had come to Ms Cohen's attention that the claimant had posted comments of an inappropriate and racial nature onto social media platforms. It recorded the fact that the content was published a number of years prior to commencing employment with the respondent, the claimant had apologised and that she did not believe it would impact her role at the respondent. The letter set out the respondent's perspective, that it was a fundamental aspect of the claimant's role that she built a relationship with brands and stakeholders and if an external client or a colleague saw these articles they could take offence.

102. The letter concluded that taking into consideration the risk such content posed to stakeholder relationships, both internal and external, Ms Cohen had lost confidence in the claimant's ability to meet expectations and the requirements of the job role.

103. In answer to cross examination questions the claimant says that she believed she had been sacked partly because the respondent believed that she was racist, but also because they believed the comments were derogatory and did not represent the values of the respondent. She confirmed that these were the reasons she believes they dismissed her.

104. We accept the respondent's undisputed evidence that Ms Cohen was not the decision-maker and that the decision to terminate was taken by Mr. Adamson. Mr Adamson did not give evidence to this tribunal. We have to consider what was the reason for the dismissal.

105. No one had carried out any research or investigation into the context of these tweets and therefore they were relying on them at face value only. On the balance of probabilities, we find that the decision-maker believed the claimant had expressed racist views in these tweets which by association could damage the respondent's brand. We reach this conclusion because we have found that that was Ms Cohen's belief when she first saw the articles. We accept her evidence that her views, those of Mr. O Mahoney, Mr. Adamson and Mr. Bonner all aligned with each other, which we understand to mean that they all considered the posts in the same light. We have also found that this view was reflected in the advice Mr. O Mahoney gave to Ms Cohen as to how to frame the meeting.

106. As it is not disputed that the decision-maker was not present at the meeting and was not given any information about what the claimant had said in her defence, he can only have made his decision based on the view he had already formulated on the nature of the tweets. Whether the

claimant did or did not refer to her atheism in the meeting, refer to free speech or political beliefs, these points were not passed on to the decision-maker. He cannot have taken these into account when making a decision.

107. We find that Mr Adamson had formed a shared view that the comments as they were expressed amounted to racism, that this impacted the brand, and that the only option was to end the claimant's role. We find that the points made in the outcome letter, although drafted by Mr. O Mahoney and signed by Ms Cohen reflect a shared view which was also that of the decision-maker.

108. We have considered Ms Cohen's recollection that Mr Adamson referred to the risk because of the claimant's values. On the balance of probabilities, we find that this is a reference to the way in which she made the comments being perceived to be anti-Islamic. There is no reason to suppose that Mr Adamson alone carried out a more detailed analysis than either Ms Cohen, Mr. O Mahoney or Mr. Bonner.

109. We find that on the balance of probabilities, Mr Adamson took the articles to express anti-Islamic views in an inappropriate way and did not consider them to be evidence of views of free speech, gender equality or conservatism. We find that if he did make a reference to the claimant's values, this related to the objectionable way in which she had expressed her views on Islam only. We also find that, because of the link to reputation, it was the objectionable manifestation of her views on Islam that led to the termination.

110. The claimant's contract was ended on the 10 November 2021 and she was paid one week's pay in lieu of notice. The claimant sent in a letter of appeal on 18 November 2021 setting out in great detail why she believed the dismissal was inappropriate and that it was discrimination on grounds of philosophical beliefs as well as unfair dismissal.

111. On advice the claimant later withdrew her appeal and instead pursued the matter via ACAS and then subsequently through this litigation.

The claimant's beliefs

112. The Claimant gave evidence as to how she formulated the philosophical beliefs on which she relied. She confirmed that she had never expressed any of her philosophical views within the workplace.

Conservatism

113. In her written witness statement, the Claimant's belief in conservatism was expressed as a belief in a small state, low tax, freedom of expression and as few controls on an individual's freedom as are consistent with law, order and human rights. This is a view that is fundamentally democratic and individualist in its orientation and opposes attempts to constrain individuals and families or apply economic or other coercion to stop something that might be unpopular but not criminal.

114. In oral evidence she explained that liberty was the key thing that attracted her to conservatism. It was fighting for the liberty of the individual which is why she identified with conservatism. Prior to the Brexit debate the claimant had not been particularly interested in politics. She was certain of her position on lots of things, but had not assigned them to any particular party prior to 2017.

115. At that time, she then did some research into Thatcherite themes and realised that her views were closely aligned with Thatcherism. She was clear that she had not changed her views, nor were these new, it was simply that her perspective changed and that she appreciated, having done this research, that conservatism brought together her long-held views.

116. Following this research triggered by the Brexit issue, which in the claimant's mind was the biggest democratic vote ever held, she asked to be a member of the Conservative party and began campaigning and engaging locally in her local party. She thinks this was around June 2017.

117. The claimant was then approached by Conservative headquarters and invited to be the local Conservative candidate in the election. The claimant explained that she lived in a Labour stronghold where getting candidates to stand is not easy. She thought that she had been invited to stand because she had become very passionate about conservatism and had supported campaigning locally so that it was likely that Conservative headquarters had noticed this. Standing as a candidate was not something she had sought out. The claimant agreed that she was not a political expert but considered that one does not have to be; different things compel individuals to become engaged in politics.

118. The claimant explained that she attended a lot of Conservative headquarter courses, although she also accepted that there was no evidence of this in her written witness statement or in terms of documentary evidence within the bundle. The claimant also attended the Conservative conference in 2018 although not in 2019 or 2020. She had been very upset by the Twitter storm and did not feel the need to go to the conference.

119. The bundle did contain examples of tweets made by the claimant in support of her various beliefs and one was said to evidence her Conservative belief. That was from 7 August 2022 (page 221 of the bundle). This identifies that conservatives need to conserve the value of a free society, reject cancel culture, champion free speech and confront totalitarian forces. The claimant was asked why there was only one tweet evidencing her conservatism and she explained that she could not access tweets that she had posted before 2020.

120. The claimant also explained that after what happened with the Conservative party, she was no longer promoting them, but she had expressed her disappointment with the party and its abandonment of Conservative principles and its betrayal of conservative values on a lot of occasions. She did not see why she needed to evidence this in the bundle.

121. The claimant also explained that she was no longer a party member but that you do not have to be a member to be a conservative. She is a conservative although the party is not. She explained that the political parties do not live up to their name. She believes in conservatism, but the party no longer represents that to her. She became a member of the Brexit party and more recently became a member of "Reclaim".

122. She is centre-right and gravitates to groups who have similar views but does not attend forums or events. Twitter is the platform that she uses to learn about things and to comment on tweets. Her passion remains liberty as evidenced by her Twitter bio which states "born free and plan to stay that way if we are not free to speak then we are not free at all challenge puritanical views wherever you find them".

123. The claimant accepted that she did not tell her employer that she was a Conservative party member and did not express any conservative views within the workplace.

124. While there is ample evidence of the claimant's original affiliation to the Conservative party, there is little evidence of her belief in conservatism beyond that. Further, the claimant says that the Conservative party does not represent her conservative views. We cannot therefore rely on her political affiliation as evidence of this belief. There is no evidence of a belief in a small state or low tax or as few controls on an individual's freedom as are consistent with law, order and human rights. There is evidence from one post only that the claimant believes in freedom of expression as something that is linked to conservatism.

Gender equality

125. The Claimant's witness statement set out that her belief in gender equality is the belief that men and women are entitled to political, social and economic equality; that an enlightened and liberal society should strive towards the empowerment of women; and that misogyny must be resisted.

126. The claimant had provided some evidence of her belief in gender equality in one of the Twitter posts (reference to the hijab in the first tweet), attendance at a Conservative party conference discussing the domestic abuse bill and a transcript of the speech that she had given on the unveiling of the statue of Millicent Fawcett, a suffragette. This took place over three years. The claimant explained that she had simply given examples and not an exhaustive list of everything she had said or done.

127. The claimant explained that she was not an activist about gender equality, and she was not a feminist. If an issue came up in the news, she might comment on it. She did not attend groups on this subject, nor had she read any books about it as she was not really a reader. However, she did not need to attend events or to read books in order to give credit to her opinions. Twitter is a platform which allowed her to see a wide range of views and contains pod casts and news articles one could click onto. She explained that she held religion responsible for hardwiring gender inequality in society and that was the case for all religion.

128. We find that the majority of her evidence as to her views on gender inequality were in relation to religious practices. As she herself identified she was not an activist or a feminist. We find that her belief in gender equality is no more than an opinion or viewpoint shared by many. There is no evidence of belief.

Secular Atheism

129. The Claimant's witness statement described her belief in secular atheism as a belief that religion as a belief system tends to inhibit the development and well-being of society on the grounds that it limits independence of thought and diminishes tolerance of others.

130. In answer to cross examination questions the claimant defined secularism as the separation of the state from religious institutions. She believes in this. For her democracy asks for tolerance not agreement. Secularism gives everyone space to think what they think.

131. She defined atheism as not believing in God. She challenges the concept of religion. However, she accepts that other people have religious beliefs and respects their freedom to do so.

132. The claimant produced a screenshot of an email petition asking for sanctions to be imposed on China over its treatment of the Uighur Muslims. She explained that that had been included in order to show that she was not against those who have belief. She believes that secular atheism is tolerance of others. She agreed, however, that this was not evidence of atheism.

133. The claimant produced evidence that she was planning to go to a rally to show solidarity with Israel because of the way she considered British Jews were being treated. This is included as it shows that she could be an atheist but still care about people of faith. The claimant also produced a tweet reacting to a report in the Times that businesses could sack Muslim women wearing the hijab headscarf in some circumstances. This she said did not sit right on the grounds of neutrality in customer facing roles. She also produced a tweet that she had made disagreeing with banning the burka.

134. The claimant explained that she opposes religion in general. Page 219 of the bundle contains a tweet in which set out that she resented the existence and teachings of Islam and that in her view, by modern standards, it qualified as incitement and hate speech, but banning it was not the solution. She would not take faith away from others but considered it was okay to be against Islam because as a religion it has fear as an agenda in its ideology, although she stated that she was not Islamophobic. She accepted there was no evidence of a general opposition to religion in the bundle, but said that she had also challenged Christianity.

135. We find that the claimant has produced some evidence that she challenges the concept of religion, and we accept that she is atheist.

Freedom of expression

136. The Claimant's belief in freedom of expression were set out in her witness statement as the belief that people should be free to express themselves as much as is consistent with the law, that freedom of expression will inevitably involve the expression of unpopular opinions and that a free exchange of ideas being characterized by robust disagreement and argument is not a bad thing, as long as they do not amount to incitement.

137. To evidence her beliefs the claimant produced five tweets and evidence of her activity in a funding campaign. She was taken to one in particular at page 209 which was a response made to comments by a grime rapper and producer, Wiley. The bundle included copies of two newspaper articles about Wiley's posts which headlined that he was accused of being anti-Semitic and likened Jews to the Ku Klux clan. The claimant was unclear whether she had seen these articles and if it was that to which she was reacting in her tweet. She believed that she had seen comments which compared Jewish people to snakes. She considers that incitement is about creating hatred around people and not about their faith.

138. The claimant agreed that the comparison to the Ku Klux Klan could be seen as incitement to hatred. She accepted that the Ku Klux Klan and Nazism were both abhorrent . However, she had reacted because she believed the rapper was attacking the Jews and was inciting racial hatred of an ethnic group rather than attacking religion.

139. We find the claimant's reactions to be inconsistent with each other. She believes that her Islamic comments are about freedom of expression whereas anti-Semitic ones were incitement to hatred.

Law/Submissions

Belief

140. The protected characteristics relied upon are philosophical beliefs in a) conservatism; b) gender equality; c) secular atheism; and d) freedom of expression;

141. 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."

142. 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.

143. 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).

144. We were reminded by Counsel for the respondent that it is no longer necessary for a philosophical belief to be similar to a religious belief, but it is necessary for it to have a similar status and cogency as a religious belief: Cohesion is defined as "being understood in the sense of being intelligible and capable of being understood": Harron v Chief Constable of Dorset Police [2016] IRLR 481

145. 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.

146. 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 that case the EAT determined that the claimant took a view not as a matter of principle, but as a matter which the evidence available showed to him. It was not so much therefore a matter of belief as opinion based upon the facts available to him.

147. In Mackereth v Department for Work and Pensions.[2022] IRLR 721 it was acknowledged difficulties can arise in seeking to define in general terms the precise distinction between a philosophical belief, on the one hand, and an opinion or viewpoint based the present information available, on the other. As a minimum philosophical belief implies acceptance of the claim and it must be capable of being understood as a characteristic of the individual in question.

148. 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"*

149. The respondent's counsel challenged the claimant's views and submitted they did not meet the Grainger criteria. She submitted that none of them attained a level of cogency. Her beliefs in conservatism and gender equality were not a belief, but merely an opinion or viewpoint, and the manifestation of her freedom of expression in her tweets was not worthy of respect in a democratic society.

150. We were directed to Gray v Mulberry co (design) Ltd 2019 ICR 175, EAT as an example of lack of cogency. In that case the EAT commented that if a belief is expressed in relation to one act but inexplicably is not expressed in relation to another which is very similar, that it will be open to a tribunal to conclude the belief was unintelligible and lacking a certain level of cogency or coherence.

151. We were also directed to compare the scope and nature of the claimant's evidence and statement of belief with that provided in Maistry v the BBC ET 1313142/2010 –paragraphs 5-8,Hashman v Milton Park(Dorset) Ltd (t/a Orchard Park) ET 3105555/2009–paragraphs 9 to 24, Olivier v Department of Work and Pensions ET 1701407/2013

Direct Discrimination

152. The claim includes 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.".

153. 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.

154. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. Shamoon v the Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 identified that 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.

155. A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. We were addressed on the question of the degree of connection between the employer's action and the influence of the alleged discrimination and were directed to the Supreme Court decision in Royal Mail Group Limited v Efobi (2019) EWCA Civ 18 and to paragraph 28

> *"The aspect of section 136(2) which is the focus of this appeal is not the only respect in which the opportunity was taken to alter the wording of the old provisions so as more clearly to reflect the way in which they had been interpreted by the courts. The old provisions referred to "an adequate explanation" (or "a reasonable alternative explanation"). Those phrases were also apt to mislead in that they could have given the impression that the explanation had to be one which showed that the employer had acted for a reason which satisfied some objective standard of reasonableness or acceptability. It was, however, established that it did not matter if the employer had acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic: see eg Glasgow City Council v Zafar [1997] 1 WLR 1659, 1663; Bahl v The Law Society [2004] EWCA Civ 1070; [2004] IRLR 799; Laing v Manchester City Council, para 51".*

156. This decision confirmed the question is whether discrimination had nothing to do with the decision or the behaviour of an alleged wrongdoer responsible for the impugned conduct.

157. In the Supreme Court decision in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors *2010 IRLR 136, SC*. Lord Phillips's explained that direct discrimination can arise in one of two ways: where a decision is taken on a ground that is inherently discriminatory, or where it is taken for a reason that is subjectively discriminatory.

158. The 'but for' test will apply principally in cases where some kind of criterion has been applied that is indissociably linked to a protected

characteristic and, in that sense, is inherently discriminatory. However, in the majority of cases, the best approach is to focus in factual terms on the reason why the employer acted as it did. This entails the tribunal considering the subjective motivations of the putative discriminator in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on.

159. As Lord Nicholls put it in Nagarajan v London Regional Transport 1999 ICR 877, HL:

> *'Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.'*

Freedom to hold a belief

160. We were reminded that there is a clear difference between the freedom to hold a belief and freedom to express or manifest a belief. The former is absolute whereas the latter is qualified.

161. We were referred to Wasteney v East London NHS Foundation Trust [2016] IRLR 388, EAT. That reiterated that Article 9 of the ECHR does not only protect the right to hold a particular belief, but also to manifest it because without the right to express in practice beliefs, freedom of religion will be rendered hollow. However, the right to manifest one's religion or belief is qualified and may be limited in accordance with Article 9.2. On the facts of this case the imposition of a warning was held to be because of inappropriate behaviour not for any legitimate manifestation of belief.

162. We were also referred to Page v NHS Trust Development Authority [2021] EWCA Civ 255, at paragraph 68. This identified that in the context of the protected characteristic of religion or belief, case law recognises distinctions between the case where the reason is the fact that the claimant holds and/or/manifests a protected belief and the case where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken.

163. We were referred to Mackereth v Department for Work and Pensions [2022] IRLR 721 paragraph 126 in which the ET concluded a tribunal could draw permissible distinction between the claimant's beliefs and the particular way in which she wished to manifest those beliefs.

164. We separately considered Pasab Ltd t/a Jhoots Pharmacy and another v Woods 2012 EWCA Civ 1578 in which the Court of Appeal considered whether a Muslim employee, who was dismissed following her remark that she worked at a 'little Sikh club' suffered unlawful discrimination. The Court of Appeal upheld the EAT which had allowed the employer's appeal against a finding of unlawful victimisation. The Court held that, in effect, the Tribunal found that Mrs Woods was dismissed because Mrs Jhooty

believed she had made a racist remark. In a strict causative sense, Mrs Woods was dismissed because she made a remark which the Tribunal considered objectively to be a complaint of discrimination. However, the protected act was not the reason why Mrs Jhooty acted as she did. Hallett LJ stated:

> *"I fail to see how it can be said that the reason why the appellant was dismissed was because she was claiming the respondents were themselves racist or discriminatory. It was the other way round. The appellant was dismissed because it was thought she was a racist. A "protected act" played no part, certainly no substantial part in the dismissal."*

Indirect Discrimination

165. S.19(1) of the EqA states that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's.

A PCP has this effect if the following four criteria are met:

•A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic (S.19(2)(a))

•the PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic (S.19(2)(b))

•the PCP puts, or would put, B at that disadvantage (S.19(2)(c)), and

•A cannot show that the PCP is a proportionate means of achieving a legitimate aim (S.19(2)(d)).

166. Counsel for the claimant confirmed that the group relied upon was those with outspoken views on the freedom of speech who believed in freedom of expression.

Burden of proof in discrimination

167. 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.

168. 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.

169. 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.

Unfair Dismissal s108(4) ERA

170. In 2013 a new subsection (4) was added to the ERA 1996 s 108, stating that the qualifying period does not apply if 'the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliation'.

171. This change was to comply with the decision of the ECtHR in Redfearn v UK [2013] IRLR 51 that an employee dismissed because of his membership of the BNP, but deprived of an unfair dismissal action because he lacked the qualifying employment, had had his Article 11 rights infringed. In such a case the qualifying period is now disapplied, but dismissal on this ground is not made automatically unfair.

172. In the first case at appellate level to consider this provision, Scottish Federation of Housing Associations v Jones [2022] IRLR 822, EAT, it was held that subsection (4) is not to be construed literally because it was intended to deal with the specific point in Redfearn and no more. It was designed to address the mischief of dismissals arising from the content of a person's political opinions or the identity of the party with which the person is affiliated. The correct interpretation, in line with normal rules, was that the exception from the qualifying period applies only where the political views or affiliations were the sole or principal reason for the dismissal. In cases where the employee's political opinions or affiliation are subsidiary considerations no protection is awarded.

173. It was submitted that domestic and Strasbourg caselaw about the application of Articles 8,9 and 10 in employment cases must apply to cases where the qualifying period for claims of unfair dismissal does not apply, because of the express and heightened protection of a person's conscience and expression of political opinions. It was also submitted that Articles 9 and 10 at least are engaged when the effect of the employer's conduct is to interfere with the right to hold and express political opinions.

174. We were referred to X v Y [2004] EWCA Civ 662, [2004] IRLR 625 in which the Court of Appeal had to consider the interrelationship between the Human Rights Act 1998 and ERA 1996. Mummery LJ provided the following guidance to employment tribunals:

> *"Whenever HRA points are raised in unfair dismissal cases, an employment tribunal should properly consider their relevance, dealing with them in a structured way, even if it is ultimately decided that they do not affect the outcome of the unfair dismissal claim. The following framework was suggested:*

(1) Do the circumstances of the dismissal fall within the ambit of one or more of the articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.

(2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.

(4) If it is not, was there a permissible reason for the dismissal under the ERA 1996, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

(5) If there was, is the dismissal fair, tested by the provisions of ERA 1996 s 98, reading and giving effect to them under HRA 1998 s 3 so as to be compatible with the Convention right?"

175. It was submitted that

> *"The state has a positive obligation to protect the rights guaranteed by Articles 9 and 10 by preventing private employers from dismissing or disciplining employees for expressing or manifesting their beliefs, which will be regarded as representing a 'very severe measure'. It will not, therefore, generally be justified by the mere expression or manifestation of beliefs on social media or elsewhere, but generally only be justified where the employee's beliefs lead him or her to act in a way that actually discriminates against the employer's customers or other employees, or that has some other clear impact on the actual performance, safety or effectiveness of his or her work (Vogt v Germany (1996) 21 EHRR 205, paras; Smith v Trafford Housing Trust [2013] IRLR 86, Ch,, paras 82-85; Eweida & others (2013) 57 EHRR 8, paras 94-95, 99, 102-106 & 107-109; Ngole, paras 129-130 & 134-136)"*

176. The claimant's counsel submitted that it was artificial to create a silo between religious views and political views. He referred us to Celtic and Rangers and other areas of life which are clearly both political and religious. All of the matters raised in the claimant's tweets were therefore "political". The term it is not itself defined in section 108 (4). It is to be applied broadly in line with Article 10.

177. The respondents counsel submitted the opposite. In her submissions the tweets were concerned with religion and therefore we had to be persuaded that religious opinions are perforce political ones. Alternatively, they were instances of the claimant exercising the right of freedom of expression and we would have to be persuaded that that makes them "political". It was submitted that either approach was equally flawed.

Unfair Dismissal s 98(1) ERA

178. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.

179. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

> *"... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and(b) shall be determined in accordance with equity and the substantial merits of the case.*

180. Where misconduct is said to be the reason for dismissal then, as set out in British Home Stores Ltd v Burchell 1980 ICR 303 EAT, the respondent must show that it believed the claimant guilty of misconduct, it had in mind reasonable grounds upon which to sustain that belief, and at the stage at which the belief was formed on those grounds, it carried out as much investigation into the matter was reasonable in the circumstances.

181. It is not enough that the employer has a reason that is capable of justifying dismissal. The tribunal must also be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason. It must consider whether in all the circumstances it was reasonable for the employer to treat that reason as sufficient reason to dismiss. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide.

182. When assessing whether the respondent adopted a reasonable procedure and was reasonable in treating the reason as sufficient to dismiss, the tribunal must use the range of reasonable responses test.

183. By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer.

184. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Conclusion

185. 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.

Equality Act 2010 – Section 10

Protected characteristic

186. Did the Claimant, during the course of her employment hold the alleged philosophical beliefs of conservatism; gender equality; secular atheism; and/or freedom of expression.

187. We have carefully considered the evidence that we have heard against the "Grainger" tests. The claimant's genuine belief in her views was not challenged. We also conclude that they all relate to weighty and substantial aspects of human life and behaviour. However, we have considered whether or not they are opinions or viewpoints, whether they attain a certain level of cogency and whether, for the belief of secular atheism, they are worthy of respect in a democratic society.

"Conservatism"

188. We found there was ample evidence of the claimant's original affiliation to the Conservative party but, on her own evidence, that did not represent the claimant's views of conservatism. While a political ideology is capable of constituting a belief and can sometimes be demonstrated by affiliation with a political party, on these facts the claimant has not done so. She has separated her beliefs from that of the political party. We conclude that the claimant's initial affiliation with the Conservative party does not evidence her conservative views which she said were not reflected by that party.

189. While there was one tweet linking the Conservative party to a need to champion free speech, we conclude that that is not sufficient for the claimant to demonstrate that she has a genuine belief in "a small state, low tax, freedom of expression and as few controls on an individual's freedom as are consistent with law, order and human rights".

190. The claimant has demonstrated an original political affiliation, but has not provided evidence to show that she has the belief on which she is relying. On the limited evidence provided to us, we conclude that the claimant's belief in conservatism amounts to an opinion or viewpoint only. There is insufficient evidence to demonstrate a belief in conservatism or a belief that goes beyond a political viewpoint.

Gender equality

191. We have found that the claimant has not provided evidence to support her belief in gender equality. Rather, her evidence is that she believes some forms of religion oppress women but that is not evidence of a wider belief in gender equality as she has expressed it.

192. It is not enough to have an opinion. There must be a belief evidenced and we conclude that the very limited evidence provided about the claimant's opinions, does not raise the claimant's belief in gender equality above the level of an opinion or viewpoint.

Secular Atheism

193. The claimant was able to define atheism and secularism. In putting the two concepts together she describes this as a belief in democracy and tolerance and suspicion of religion. The evidence that she produced, showed her supporting some religious groups, and we accept that she demonstrated that, even as an atheist, she can still care about people of faith.

194. We also accept that the claimant has demonstrated that she opposes Islam. There was no evidence that she opposed any other religion or was generally suspicious of religion other than Islam.

195. We conclude that the claimant has not provided evidence of "secular atheism" as she defines it. What she has demonstrated is the denigration of one religion over another.

196. We conclude that the claimant has not provided evidence of a belief that is cogent or coherent. The concept of secular atheism is not intelligible and further, there is no evidence at all to support the claimant's belief in the concept as she has defined it.

Freedom Of Expression

197. Turning to freedom of expression, in the context of our findings we considered the case to which we are directed, Gray v Mulberry. We have found that the claimant was not consistent in her approach. She regarded her anti-Islamic tweets to be freedom of speech even while comparing Islam to Nazism and yet found comments made by others about Jews to be hate speech.

198. We found that in cross examination the claimant agreed that the comparison made between Jews and the Ku Klux Klan was abhorrent, but nonetheless she continued to state that there was a difference between her comments as free speech and those made by the rapper Wiley. We have found that both this statement and the claimant's Nazi comparison were equally abhorrent, and therefore find that this is a case where, on its facts, the belief the claimant expressed in relation to her own acts is not expressed in relation to another which is very similar. We therefore conclude that her belief lacks coherence.

Grainger V

199. We have found that none of the matters the claimant relies upon as beliefs meet the Grainger criteria 2 and /or 4 as more than an opinion or attaining a certain level of cogency. Nonetheless, we have gone on to consider whether her views, identified as part of her secular atheism, are worthy of respect in a democratic society. This was the sole belief that was challenged on this ground.

200. It was submitted that the claimant's stance on Islam should fail this aspect because it compared a religion to a genocidal regime. Such a comment is offensive and shocking. However, we are mindful of the fact that it is only those beliefs that are an affront to convention principles in a manner akin to that of pursuing totalitarianism or advocating Nazism, espousing violence and hatred in the gravest forms that should be capable of being not worthy of respect in a democratic society.

201. We conclude that despite the comparison to Nazism, this comment does not amount to a very grave violation of the rights of others tantamount to the destruction of those rights.

202. While the belief of secular atheism meets the Grainger V criterion, as set out above, none of the strands of the claimant's beliefs meet other parts of the Grainger test (2 and/or 4). We conclude that the claimant does not have a protected characteristic based on the philosophical beliefs on which she sought to rely. In case we are wrong on that, we have nonetheless gone on to consider the rest of the issues.

Indirect Discrimination

203. The PCPs on which the claimant relies were:

(a) a practice of using subjective standards of political or religious propriety by decision-makers in disciplinary cases where the inculpated conduct is social media expression outside the scope of employment (PCP1); and/or

(b) a policy of punishing manifestations of conservatism, secular atheism and gender equality where those expressions are deemed by some to be controversial or simply personally offensive (PCP2)?

204. For each we must consider whether

- A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic (S.19(2)(a))
- the PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic (S.19(2)(b))
- the PCP puts, or would put, B at that disadvantage (S.19(2)(c)), and
- A cannot show that the PCP is a proportionate means of achieving a legitimate aim (S.19(2)(d)).

PCP 1

205. Considering the first PCP, we conclude that there are number of difficulties with it. We accept the submissions made by the respondent's counsel that the PCP is unworkable. We agree that any disciplinary

decisions necessarily involve using subjective standards. We also note that as the claimant accepted that her tweets were objectively offensive therefore this PCP is also flawed because an objective standard would similarly have applied the same viewpoint.

206. The comparator group relied upon was those with outspoken views on the freedom of speech who believed in freedom of expression. Again we accept submissions made by the respondent's counsel and conclude that it is not possible to identify how that group would be formed. When the claimant believes in some qualification on freedom of expression it is not possible to identify who would be disadvantaged.

207. In any event, we have found that the claimant was brought to a disciplinary meeting, not because her tweets offended any subjective standards of political or religious propriety, but because the respondent considered the manifestation of those opinions to be offensive and to be expressed as racist. It was the manner of her expression of her views that led to her dismissal and not because of any subjective standard of political or religious propriety.

PCP 2

208. Considering the second PCP, based on our findings on the reasons for dismissal, namely that the respondent believed the claimant had posted content of a racial nature on social media, dismissal was not because of "manifestations of conservatism, secular atheism or gender equality". There was no such manifestation. We find no such policy as described in PCP 2 was imposed on the claimant.

209. For these reasons the claims of indirect discrimination would not succeed, even if the claimant had persuaded us that she had a relevant protected characteristic.

Direct Discrimination

210. Was the claimant treated 'less favourably' than a hypothetical comparator because of a protected characteristic, namely a belief in conservatism (this being the only belief relied on) ? To determine this we must focus in factual terms on the reason why the employer acted as it did. This entails the tribunal considering the subjective motivations of the putative discriminator in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on.

211. We have considered the reason for the claimant's dismissal before considering whether a hypothetical comparator would have been treated in the same way.

212. Without prejudice to our finding that there was no such protected belief, in any event we have found that the claimant was not disciplined or dismissed because of a belief in "conservatism". It was submitted that comments about religion are also by their nature political and that that is well understood. We do not accept that position. There is no evidence that an expression of views about religion is also linked to holding any

particular political view or any political view at all, and in this case the evidence was to the contrary. The claimant confirmed her tweets were not political but about religion . We conclude on her own evidence there was no link between politics and religion. These tweets were not political.

213. It has been submitted that the claimant's definition of conservatism includes free speech. We have found that the decision maker had two things in mind. The decision-maker considered the tweets to be an offensive manifestation of anti-Islamic views, and were in the respondent's mind racist, and this was damaging to the respondent's brand because stakeholders could be made aware of these articles. We conclude that these tweets were considered to be anti Islamic and racist, but the decision-maker did not have in mind that the claimant was evidencing a belief in free speech. He saw it simply as offensively racist

214. It appeared to the Tribunal that this case was on all fours with Jhoots. Even if the claimant's comments amounted to a manifestation of her political beliefs, it was not the reason why she was dismissed.

215. We conclude that the claimant's dismissal was not connected in any way at all, objectively or subjectively, to the claimant's conservatism. As we have found that the dismissal was not in any way to do with a belief in conservatism, we have not gone on to consider the position of a hypothetical comparator.

216. For all of these reasons this claim does not succeed.

Unfair Dismissal

217. We are asked to consider whether the reason or principal reason for the claimant's dismissal was the claimant's political opinions or affiliation with the Conservative Party in accordance with section 108(4), Employment Rights Act 1996 (ERA)

218. We have considered the reason for the claimant's dismissal, and we have found that it was because the decision-maker believed she had posted comments of an inappropriate racial nature on social media platforms and this could be seen by stakeholders and was a reputational risk.

219. We conclude that the claimant's political opinions or affiliation with the Conservative party played no part in her dismissal. While the relevant point is what was in the mind of the decision-maker, we note that the claimant in cross examination confirmed that from her point of view none of the three tweets for which she was dismissed were political in nature.

220. We have found that the decision-maker was unaware of any wider context in which the posts were made, was not made aware of the claimant's wider points that these views represented free speech or about gender equality or about any other matter that could fall within the claimant's definition of conservatism.

221. We have found that he took a decision solely on the basis of his reaction to the tweets themselves. We have found that he shared the

reaction of Ms Cohen that these posts were an objectionable manifestation of the claimant's negative views about Islam. Conservatism played no part whatsoever in the decision.

222. While it was submitted that the nature of the tweets were clearly about religion which is itself political, as set out above we do not accept there is an inherent link between religion and politics and the claimant has denied any such connection in this case

223. While it was argued that the claimant was manifesting her right to free speech, this was not in the mind of the decision-maker. If it was, and the claimant's tweets can be seen as an exercise of her right to free speech, we accept that Convention Rights would be engaged. However, we have also found that the dismissal was not because of the nature of the beliefs, but the way in which they were expressed, that is their manifestation. The decision-maker believed the comments to amount to racism. We conclude that the manifestation was itself discriminatory or harassing in the way comments were made about Islam. We therefore conclude that there was no unjustified interference with any Convention Right in any event.

224. The claimant does not therefore meet the threshold of section 108 (4) so the two-year qualifying threshold continues to apply. The claim for unfair dismissal does not succeed as the claimant did not have qualifying service and her dismissal did fall within this exception.

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Employment Judge McLaren
Date: 24 May 2023