EMPLOYMENT TRIBUNALS

Claimant: Miss P Walters

Respondent: Department for Work and Pensions

Heard at: Liverpool **On:** 2 - 6 December 2019

Before: Employment Judge Aspinall,
Mr Gelling and Mr Bannon

REPRESENTATION:

Claimant: Mr J Chiffers, Counsel
Respondent: Mr J Hurd, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is

1. The claimant was fairly dismissed.

2. Her claims for direct discrimination and harassment on the protected characteristic of her philosophical beliefs are not well founded and fail.

3. The reason for her dismissal was gross misconduct in that she breached the Civil Service Code and Standards of Behaviour.

4. The claimant's beliefs did not amount to philosophical beliefs within the meaning in section 10(2) of the Equality Act 2010.

5. The Tribunal had no jurisdiction to hear the discrimination claims for treatment prior to 12 November 2018 as they were brought out of time.

6. The disciplinary process which began following a report on 16 May 2018 against the claimant and resulted in her dismissal on 14 November 2018 was conduct extending over a period of time and fell within time.

7. In respect of those aspects of the claimant's claim that were out of time it was not just and equitable to extend time.

Background

8. By a claim form presented on 14 February 2019, having achieved an Early Conciliation Certificate number R116931/19/71 on 11 February 2019, the claimant raised a complaint of unfair dismissal and of direct discrimination and harassment based on her philosophical beliefs. The respondent defended the claims. The matter came to a case management hearing on 23 May 2019 before Employment Judge T V Ryan at which the claims were clarified and the case was listed for this final hearing.

9. The claimant was employed by the respondent as an administrative officer from 17 July 2006 until her dismissal for gross misconduct on 14 November 2018. The claimant was dismissed for breaches of the Civil Service Code and Departmental Standards of Behaviour. Those breaches related to numerous tweets that the claimant posted between June 2015 and January 2017 and to a press release that she sent to a newspaper in April 2018. The breaches came to light in response to an anonymous call made to the respondent's whistleblowing hotline following publication of a newspaper article.

10. The claimant had previously been dismissed on 26 May 2017 for standing for election without permission in breach of the Civil Service Code but was reinstated on appeal on 3 August 2017 with a final written warning.

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

11. The claimant's belief in nationalism is set out in her Claim Form as:

> "(i) the claimant is a nationalist, which is a philosophical belief/protected characteristic as per section 10(2) of the Equality Act 2010. Nationalism is a political philosophy premised on the concept of a nation being not merely a landmass or civic structure, but a population that is bound by a shared culture, heritage, language (in the state of the United Kingdom this would include the established languages within the separate nations), history and sense of posterity: such nation should become a nation state with sovereignty over its territory and internal affairs. According to the nationalist, preserving the nation and the nation state as defined is a moral imperative. It is integral to such belief that the interests of citizens of the relevant nation state are prioritised by such state, over the interests of the world at large. It is also integral to such belief that the nation state does not belong to any supra-national structure that would in any way undermine the nation state's sovereignty.

12. The claimant's belief in anti-political correctness is set out in her Claim Form as:

> "(ii) the claimant is opposed to political correctness which defines certain groups as permanent victims or oppressors and means that the former "should be immune or at least partly shielded from criticism".

Issues for determination

13. A list of issues was agreed. The issues were:

13.1 Are the claimant's philosophical beliefs/lack of beliefs protected characteristics within Section 10(2) of the Equality Act 2010?

13.2 Did the respondent discriminate against the claimant because of her protected characteristics by treating her less favourably than the respondent treats or would treat others (the hypothetical comparator being a public facing employee of the respondent who did not hold her philosophical beliefs) in relation to:

A the claimant's request for permission to stand in the Mayoral Election for the Liverpool City Region Mayor on or around 13 April 2017:

B The respondent's subsequent disciplinary investigation and procedures subsequent to the Mayoral Election;

C The claimant's dismissal on 26 May 2017 following which she was reinstated;

D The manner in which the respondent handled the claimant's grievance against AG which was lodged on 1 June 2017;

E The disciplinary investigation and procedures which culminated in the claimant's dismissal (which commenced on 3 May 2018 and the decision made that there was a case to answer on 16 May 2018;

F The decision to dismiss the claimant on 14 November 2018;

G The failure to reinstate the claimant on appeal, subsequent to her dismissal on 14 November 2018?

13.3 Did the respondent harass the claimant by engaging in unwanted conduct related to her protected characteristic, and did the conduct have the purpose or effect of violating the claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, in relation to the matters set out above?

13.4 Does the Tribunal have jurisdiction to hear the claimant's complaints of discrimination in relation to matters which occurred outside the requisite three month period (as extended by ACAS Early Conciliation) prior to commencement of these proceedings on 14 February 2019 on the basis that the respondent's actions amount to conduct extending over a period and / or it would be just and equitable to extend time?

13.5 Was there a potentially fair reason for the claimant's dismissal?

13.6 At the point of dismissal did the respondent believe that the claimant had committed an act of gross misconduct? Did the respondent have reasonable grounds on which to sustain that belief and had the respondent carried out as much investigation as was reasonable in all the circumstances of the case?

13.7 Did the respondent act reasonably?

13.8 If the dismissal was unfair, should any compensation be reduced on the basis of the claimant's contributory fault, and if so, by what proportion would it be just and equitable to do so?

13.9 What remedy if any should be awarded to the claimant?

Evidence

14. The Tribunal heard oral evidence. All the witness were sworn in to give evidence and they all confirmed the truth of written statements they had made and answered questions.

15. The claimant gave evidence. She readily admitted not having read an extract from the Browne and Conway book on political correctness which her Counsel had included and she did not pretend to be familiar with its content. The claimant sometimes avoided answering questions by talking instead about her beliefs and opinions. In this way she avoided answering questions which would require her to apply the Civil Service Code to her tweets. Her position generally, in response to questions seeking to apply the Civil Service Code, was that if she believed something then it was a fact and if it was a fact then she could express it whether or not it was politically controversial or had the potential to cause offence.

16. The respondent's witnesses, at the claimant's suggestion, volunteered to stay out of the hearing room during each other's evidence.

17. The respondent called Nicki Cooper, a Team Leader and the claimant's line manager from July 2017 until dismissal. Nicki Cooper accepted that in her handling of the grievance she (mistakenly) focused on whether or not remarks had been made by MC when the claimant had said they were made by AG. She admitted that focus had been incorrect and the Tribunal noted that she turned her mind to what harm her mistake might have caused in that she immediately pointed out that the claimant could have appealed. Nicki Cooper was someone who took advice and tried to act fairly.

18. The respondent called Lisa Macdonald, a Senior Leader and the person who conducted the disciplinary investigation. Lisa Macdonald, in her disciplinary investigation, looked at potential breaches of the Civil Service Code and Standards of Behaviour in relation to both the tweets and the press release. She described things as being "not her role". This was credible as the Tribunal had heard this from Nicki Cooper who described working in tunnels of activity, whilst Lisa Macdonald had not been present in the hearing room. She said "this is how things were done at that time, they were looked at very separately". The Tribunal found this to be reliable and credible evidence in the light of the evidence of other witnesses and documents in the bundle which showed staff taking advice from HR and dealing only with their part of the process.

19. The respondent called Judi Blacow, the person who made the decision to dismiss the claimant. Ms Blacow was convincing (because her position was corroborated by documents) about the efforts she made to engage the claimant in the disciplinary hearing before dismissing her in her absence. When challenged about using the phrase "concur with media" in her disciplinary outcome letter she readily

admitted that it was a poor choice of words. When criticised that her dismissal letter did not itemise the tweets for which the claimant was dismissed she accepted that criticism but said that she was confident the claimant knew what it referred to as they had been part of the investigation and were set out from the outset in the Counter Fraud and Investigation report.

20. The respondent called Nicki O Connor, a Senior Operations Leader and the person who heard the claimant's appeal against dismissal. Nicki O Connor gave evidence for the respondent in a straightforward and helpful way. Nicki O Connor dealt with the claimant's appeal against her dismissal. Nicki O Connor was believable when she said that if she had found any bias in the appeal she would have referred the case for further investigation. This was believable because the Tribunal saw within the documentation that there existed a regular practice of referring matters to colleagues for advice and the Tribunal saw that the respondent had reinvestigated a grievance and had reinstated the claimant previously on appeal.

Documents

21. The documentary evidence was presented in a large agreed navy bundle of 541 pages. There was also a black agreed bundle which contained a cast list and the witness statements. The Tribunal also considered evidence and a skeleton argument of closing submissions in a blue file submitted by the claimant. That file included an extract from Browne, A and Conway, D [2006] *The Retreat of Reason: political correctness and the corruption of public debate in modern Britain.* The Institute for the Study of Civil Society, London.

Facts

22. The claimant worked for the respondent as an administrative officer in Child Benefit. Her role was telephone based. She took calls through a random allocation telephone system from service users all around the country. In practice she rarely if ever dealt with anyone from Merseyside region. Her role was public facing in the sense that she spoke directly to members of the public but did not meet them face to face. She gave advice and assistance and worked with parties to reach negotiated settlements for payments for the welfare of children. She could also be involved in enforcing payment under agreements that had been reached. If asked her name the claimant would give her first name or, after this was agreed with her as an appropriate measure, she would use a pseudonym. Pseudonyms were commonly used to protect staff as child benefit can be a sensitive area in which to work. The claimant's own line manager Nicki Cooper uses a pseudonym.

23. It was agreed that the claimant was a long serving, hard working and capable employee and that there were no issues with her performance.

24. In 2017 the claimant was investigated and dismissed for breach of the Civil Service Code and Standards of Behaviour. She appealed against her dismissal. The appeal manager found that the claimant had ignored management instructions and had appeared on television, in relation to political activity, without permission. It was his view "you were clearly prioritising your involvement in political activity over your contractual obligation as a civil servant". He stated "should you wish to partake in any

further political activity, for the avoidance of doubt, you seek permission in advance". The appeal manager accepted that there may have been some confusion around the application of the Civil Service Code. The claimant was reinstated subject to a final written warning.

25. Angela Marsh Davies, a senior manager, wrote to the claimant on 3 August 2017 confirming that the final written warning would be back dated and run for twelve months from 26 May 2017.

Reinstatement August 2017

26. Nicki Cooper was the claimant's team manager following her reinstatement. They met on the 10 August and Nicki Cooper asked that the claimant set out her political activity in writing for approval. The claimant wrote to Nicki Cooper on 15 August 2017 setting out her political activity under two headings; My role as local branch chairman for a political party and my role on the National Executive Committee.

27. The respondent set out its limited permission for the claimant to engage in political activity in a document headed Political Activtiy Criteria, dated 13 September 2017 and signed by the claimant. There were three core requirements (1) that the claimant immediately remove any reference on social media or the internet to her being a civil servant (2) that she adopt a pseudonym at work and (3) that "you do not involve yourself in any political activity that publicly challenges ministerial or government policies". The third requirement went on to create an ongoing obligation "Paula to inform Team leader in good time in writing if her role changes or if anything occurs in her political activity that could impact on your impartiality at work".

28. The document included links to the Civil Service Code and Standards of Behaviour. It reiterated "if you complete any actions not listed in your job roles copied to myself on 15 August 2017 that you seek permission to undertake that activity".

The grievance against AG from 1 June 2017

29. The claimant had brought a grievance against a colleague AG on 1 June 2017. That grievance had been heard and dismissed by Andrew Dunbar on 13 September 2017. The claimant had met with the investigating officer of the grievance but AG had not. There was some ambiguity about the outcome of that grievance. The decision letter recited that the main allegations in the claimant's grievance were that (i) AG had incited inflammatory rumour and hatred when she had referred to UKIP as a racist party in a social media post, and (ii) AG had triggered the dismissal process that led to the claimant's dismissal (prior to her reinstatement). The outcome report said *both* that these reasons were not upheld *and* that the grievance was partially upheld as AG's comments had been ill-judged.

30. AG complained that she appeared to have been charged with and cleared of a potential disciplinary offence but had not been involved in the process. It was decided to reinvestigate so as to allow AG to participate. AG was facing two separate disciplinary misconduct issues in the autumn of 2017.

31. In January 2018 the grievance was reinvestigated. Mark Smith, Cluster Manager wrote to the claimant on 24 January 2018 using her work pseudonym email

address, to invite her response and set a meeting date for 2 February 2018. AG was notified of the grievance and invited to attend a meeting herself with Mark Smith on 7 February 2018. Mark Smith was unable to meet the claimant on 2 February 2018. On 13 February 2018 HR advised Mark Smith that the claimant ought not to be allowed "a second bite at the cherry" and so ought not to be interviewed again in the grievance investigation. Following HR advice the case was to be resumed at the point where AG was given the evidence and invited to a meeting. Mark Smith advised the claimant that she did not need to be interviewed again on 21 February 2018.

The 14th March 2018 investigatory interview with AG and MC

32. Mark Smith interviewed AG, with her union representative MC present on 14 March 2018. Notes were made of the meeting.

33. Mark Smith concluded his reinvestigation and wrote to the claimant on 26 March 2018 with an outcome. His decision was not to uphold the grievance. He enclosed a copy of his investigation report which showed what had been said by AG and MC on 14 March 2018, and informed the claimant of her right to appeal. Within those notes was a record of a statement allegedly made by AG (a thte 14 March 2018 meeting with Mark Smith) alleging that the claimant had said that all Poles should be shot.

34. The claimant saw those notes, too offence at the alleged remark of AG and appealed. The appeal was heard on 21 May 2018 by Julie Savage. The decision was not overturned on appeal.

35. The claimant referred to this appeal and her dissatisfaction at the outcome of her first grievance in a second grievance in June 2018.

29 March 2018 -the claimant wishes to stand for local council

36. On 29 March 2018 the claimant informed her line manager Nicki Cooper by email that she wished to stand in local council elections in May 2018.

37. Nicki Cooper took advice from HR and asked the claimant on 4 April 2018 by email "provide me with the attached guidance that you feel supports your new political activity, as agreed as part of your political activity document" Nicki Cooper attached the 13 September 2017 document and the link to the Civil Service Management Code Guidelines and Principles on participation in political activity.

38. Debbie Dorman from HR replied directing Nicki Cooper to the Civil Service Code and the Standards of Behaviour on political activity.

39. The Tribunal saw the respondent's Standards of Behaviour document, paragraph 30, as at 12 March 2018. This document was amended on 3 December 2018 after the claimant's dismissal.

> "We must take care about commenting on government policies and practices or any other information relating to the government and should not do so without the proper authorisation. We should avoid commenting altogether on politically controversial issues and avoid making any kind of personal attack or tasteless or offensive remarks to individuals or groups i.e. anything that would cause

> offence to a reasonable person. This applies irrespective of whether you can or cannot be identified as an employee of the Department. In these circumstances if posts/comments are considered inappropriate, disciplinary action will be taken and could lead to dismissal."

40. On 13 April 2018 the Child Maintenance Group newsletter, Child Maintenance News reminded all staff " Please follow the pre election guidance" It contained a link to specific guidance and reminded staff that they were in the three week period before the elections and should all be aware of the restrictions that apply to civil servants in a pre election period.

41. On 22 April 2018 Liverpool Echo online published an article which said that UKIP's only council candidate in Wirral (the claimant) has been urged to step aside after a series of hate filled tweets comparing migrants to terrorists were unearthed. The article referred to tweets by the claimant in 2015 and 2016 which had come to the Liverpool Echo's attention. The article said that it had chosen not to repeat the tweets and that they compared migrants to terrorists, attacked immigrants for receiving benefits and getting preferential treatment. The article reported that the claimant had responded to the Echo in terms that any statement that she makes is her own and may or may not be UKIP.

<u>The claimant's response to the Liverpool Echo article</u>

42. On 23 April 2018 at 18.55 the claimant sent an email to her line manager Nicki Cooper. The subject line reads "private – draft press response". The claimant was wanting to respond to an article in the press about her views. The response was almost two pages long and contained, amongst others, the following expressions of the claimant's views:

> "Halal is barbaric practice from the dark ages and has no place in modern Britain". There is no necessity for Muslims to eat Halal"
>
> "sensitivity only runs one way, people are given a choice to eat halal but no choice to avoid it"
>
> "British people can't get cancer treatment but plenty of dosh for hotels for illegal immigrants"
>
> "what would you choose a hotel room for a guest that has turned up uninvited or life saving treatment for a loved one"
>
> "migrants complaining about wrist bands that allow them three meals a day. I wear a wristband on all inclusive holidays"
>
> "half a million immigrants are on their way. How many are ISIS I can't tell can you?"
>
> "I can't tell the difference between a migrant and a terrorist"
>
> "a Muslim gets benefits for each wife. If wives are children do they also get child benefit?"

43. Nicki Cooper saw the email and took advice from HR the next day. She received advice at 11.30 on 24 April 2018 to the effect that "comments can fall short of Standards of Behaviour" and "better practice to put it as their parties stance… as it is

not expressing their own view but that of their party" and "it would be safer to send their response to you before submitting it as you can look at it and see that it does not have any conflicts of interest around political activity policy but you should not be definite in saying that it is OK to send".

44. At this time Nicki Cooper thought that the claimant was consulting her and seeking permission. Nicki Cooper had a conversation with the claimant in which she shared the advice and restated the links to the Standards of Behaviour with the claimant. It was for the claimant to consider whether or not her proposed response was appropriate in the light of her obligations as a civil servant.

45. Nicki Cooper followed up on the conversation and emailed the claimant at 17.47 on 24 April 2018. She attached the guidance from HR and arranged for time and a private room in which the claimant could take time out to make her decision on "current political activity and specifically your decision to respond to the article published in the local press on 23 April 2018".

46. The claimant replied to Nicki Cooper at 15.05 on 25 April 2018 saying "I can confirm that at this stage it is too late to withdraw my response". The claimant also said "nothing I have done or written has in any way brought the Civil Service into disrepute". The claimant had sent the response first to the journalist and then to Nicki Cooper. Nicki Cooper told the Tribunal in evidence "I should be made aware "but not after the event", "she was required to advise me first". The claimant had been disingenuous in seeking permission and typing "draft response" in the subject line of her email and in her discussion with Nicki Cooper because she had already sent the response to the press.

47. On 30 April 2018 Michael Foulkes advised Nicki Cooper that based on information provided by the claimant she was to be given permission to stand in the local election. Nicki Cooper shared this with the claimant. She said "this is on the proviso that you do not undertake any additional duties not listed or noted in this email trail". The claimant was to stand in the local council election on 3 May 2018.

<u>Whistle-blower tells respondent about the tweets</u>

48. On 3 May 2018 an anonymous caller rang the respondent's whistle-blower hotline and reported the claimant's tweets from 2015 to 2017 (which had been unearthed in the 23 April 2018 newspaper report) to the respondent.

49. The Government Internal Audit Agency Counter Fraud and Investigation department (CF&I) conducted an investigation. The CF&I report dated 16 May 2018 set out the following tweets

"32 tweets between 9 April 2015 and 21 May 2016 which contain comments posted to David Cameron and Boris Johnson and include "Dave says steel is not vital to the economy. It's about people not money, you still don't get it, you plonker, time to resign. "Do the right thing Boris, but your country before yourself and join the out brigade, "Cameron, he came, he saw, he conceded" "well done David you just sold

your country out" "10 billion pledged to Syria while British people are refused cancer treatment. It's obscene David." "6000 service men and women homeless, illegal immigrants pampered in hotels. Shame on you Cameron" "so Boris thinks it's okay to fly the Isis flag" "you are a traitor to your country Boris" "hate preacher Hani al-Sibai lives in a £1 million house on £50,000 benefits why Dave?" "Half 1 million immigrants on their way how many are Isis? I can't tell, can you?" "

and concluded that there was a case to answer in relation to breaches of the DWP Standards of Behaviour Procedures and the Civil Service Code. It said that the tweets posted by the claimant breached the following paragraphs of the DWP Standards of Behaviour procedures.

> Paragraph 1 - the expectations for employees are …does not bring DWP into disrepute…..and conduct both inside and outside the workplace does not bring the DWP, its ministers or the government into disrepute.
>
> Paragraph 7 - you must take care to avoid putting yourself in a position where you work and private life in in conflict.
>
> Paragraph 95 Civil Servants are expected to take care to express political comment with moderation, avoiding comment on matters of controversy for which their own Ministers are responsible.
>
> Paragraph 97 - employee must also ensure that they do not comment on matters of controversy which fall within Ministers' responsibility."

50. The CF&I report also addressed the issue of the claimant posting political opinions on an open public Twitter feed and in tweets and in the press when the public were aware she was a civil servant. It found that she had breached the following paragraphs of the Code.

> "Paragraph 28 - in social media the boundaries between professional and personal are often more blurred because although you might regard your comments as personal to you people who know who you work for could also associate them with DWP – so it's important to be particularly careful.
>
> Paragraph 29 - as civil servants …you should bear in mind the unique position you occupy as a civil servant and should not take part in any political or other public activity or discussion which compromises or might be seen to compromise or may potentially compromise our impartial service to the government of the day or any future government.
>
> Paragraph 30 - we must take care about commenting on government policies and practices……and should not do so without the proper authorisation. We should avoid commenting altogether on politically controversial issues and

avoid making any kind of personal attack or tasteless or offensive remarks to individuals or groups.

Paragraph 35 - If you are using a personal social media account, you are responsible for the content that you post.

51. The Standards of Behaviour also prohibited:

Paragraph 36 - personal opinions posted online that are embarrassing or disrespectful to the Department / Government; offensive or could bring the department into disrepute."

The report also found there was a case to answer in relation to breaches of the Civil Service Code and its values of integrity, impartiality and political impartiality.

"Integrity – you must act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings.

Impartiality – you must not act in a way that unjustifiably favours or discriminates against particular individuals or interests.

Political Impartiality - you must not act in a way that is determined by party political considerations; and allow your personal political views to determine any of your actions".

52. Following the CF&I report's recommendation that there was a case to answer Lisa Macdonald was appointed to investigate the allegations that the claimant had posted inappropriate tweets on social media and comments in the local press in breach of the Civil Service Management Code and DWP Standards of Behaviour policy.

<u>Claimant's second grievance 19 June 2018</u>

53. In the face of disciplinary proceedings on 19 June 2018 the claimant lodged a second grievance.

54. Nicki Cooper met with the claimant on 17 June 2018 and clarified the content of the grievance. The letter records that there were three issues the claimant raised.

Issue 1: that the DWP had not followed its own procedures in the management of a previous grievance, which was ultimately not upheld.

This related to the claimant's grievance 1 against AG and it being reopened.

Issue 2: that Vicki Norman had failed to act as required under department procedures when inappropriate comments had been made about the claimant;

This related to an allegation made by the claimant that AG had posted on social media a remark that a colleague was standing for a racist party. The claimant took this to be a reference to her, to her standing for UKIP and she found it offensive. Her grievance was that the DWP had not acted against AG for that remark.

> Issue 3: that MC had made defamatory comments about the claimant in a meeting whilst acting as a trade union representative for a colleague.

55. That colleague at Issue 3 was AG . The comment (wrongly) attributed to MC was that he had said that the claimant had said all Poles should be shot. The claimant had not said this but AG, on 14 March 2018 alleged in her grievance meeting that she (the claimant) had.

56. The claimant also complained in her grievance that it was AL, a friend of AG , who had revealed her status as a civil servant on social media and not the claimant. The claimant admits that her status was on display as a civil servant on her own website (but she had not put it on social media) throughout the period from May 2017 to her dismissal.

57. The claimant at this time continued to work as usual. The claimant kept the disciplinary process and grievance process that was underway confidential. The managers involved in the processes kept those processes separate and confidential so far as was possible. The environment at work continued as usual. There was nothing done by the respondent that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

58. Nicki Cooper wrote to acknowledge receipt of the grievance on 17 July 2018. The claimant and Nicki Cooper had spoken on 9 July 2018 and the claimant was no longer supported by her union but was now representing herself. Nicki Cooper invited the claimant to meet to discuss the grievance off site at Woodside Café on 25 July 2018.

<u>Disciplinary investigatory interview invitation letter 17 July 2018</u>

59. Lisa Macdonald wrote to the claimant on 17 July 2018 inviting her to an investigatory interview to take place on 24 July 2018. The letter set out the allegations. The allegation was that the claimant posted inappropriate tweets on social media and made comments to the local press. This related to the 2015 to 2017 tweets and the claimant's response by press release to the newspaper article on 23 April 2018. She was advised of her right to be accompanied at that meeting.

<u>25 July 2018 2nd grievance meeting at Woodside Café</u>

60. The claimant met Nicki Cooper on 25 July 2018 at Woodside Café. Rebecca Smith was also there taking minutes of the meeting. They discussed the three issues set out above and agreed that the claimant would send any supporting documentation in her grievance to Nicki Cooper by 6 August 2018 and then Nicki Cooper would make her decision. On 6 August 2018 Nicki Cooper wrote to the claimant to say she would make her decision as soon as possible.

<u>Disciplinary investigatory interview</u>

61. On 13 August 2018 the claimant met with Lisa Macdonald for the investigatory interview in the disciplinary process from the CF&I report. The interview had been delayed as initially another manager had been appointed but at the claimant's request Lisa Macdonald was appointed to handle the disciplinary investigation. At the meeting the claimant argued that she had honoured all the terms of her reinstatement agreement from 13 September 2017. She rejected the suggestion that she had breached any Standards of Behaviour or Civil Service Code and she said that she would go quietly if she could have a pay off. The claimant gave Lisa Macdonald a letter requesting a settlement.

62. Lisa Macdonald then took the claimant through some of the tweets. In particular they looked at tweets as set out in the CF&I report that made comment on Mr David Cameron's policies and Mr Boris Johnson's position on Europe. The claimant argued that she was entitled to express her opinions and that her posts were legitimate posts and were not political. The claimant made statements of her broader and further beliefs. The claimant wanted it recording in the minutes and it was duly recorded that she said "I will not shut up. I will not be lied about. I am not a racist".

63. Lisa Macdonald's investigation focused on the tweets and the press response. It did not investigate account holders for other tweets. The claimant had argued that a colleague called AL ought to have been investigated. Lisa Macdonald remained focused on the claimant's conduct. She said in evidence "my role, was to consider the CF&I report".

64. Lisa Macdonald decided that there was a disciplinary case to answer in relation to the claimant's posting of tweets and the claimant's press release response to the press article.

Invitation to disciplinary hearing

65. On 10 October 2018 Judi Blacow wrote to invite the claimant to a disciplinary hearing. The letter set out the allegation (again) that the claimant had posted inappropriate political tweets and comments in the local press whilst employed by DWP. The letter enclosed Lisa Macdonald's investigatory report and the CF&I investigatory report both of which concluded there was a case to answer. The letter advised the claimant of her right to be accompanied and warned her that the case could lead to dismissal.

66. The claimant did not attend a disciplinary hearing. She reported that she was too ill to attend. Judi Blacow adjourned the hearing and took advice from HR. She wrote to the claimant asking her when she might be able to attend and offering her the opportunity to submit written comments. Judi Blacow said "I already have your testimony from the meeting with Lisa so you may not want to comment further but I need to be able to conclude matters". The claimant replied on 16 October 2018 saying "Judi, I'm saying that due to the bullying that I have received at work which has not been addressed by DWP my physical and mental health has deteriorated to such an extent that I have been advised by my doctor to avoid any stressful situations that will increase my blood pressure as it is already a serious issue".

67. Judi Blacow replied "I am aware you have raised a bullying complaint, however this is separate to the allegations detailed in the matter I am looking at……..whilst I appreciate you are in poor health I am trying to give you the opportunity to provide any

further information before I make my decision. Unless advised otherwise by Monday 22/10 I will take it that you do not intend making any further comments or providing any further evidence in relation to the allegations detailed in my letter….I will make my decision based on the evidence already provided after this deadline and advise you of my decision in the writing as soon as I can after Monday".

68. The claimant had been diagnosed with stomach ulcers and had high blood pressure. She was engaging with the respondent's occupational health service.

69. Judi Blacow took advice from HR about the claimant's health. She was advised that OH ought to be asked whether or not they considered the claimant to be capable of understanding the process being undertaken. If the claimant was capable of understanding then the disciplinary decision could be made, though if there was an outstanding grievance that ought to be concluded first.

70. On 26 October 2018 Judi Blacow informed the claimant that there had been a delay whilst she had taken HR advice.

71. Nicki Cooper on 7 November 2018 informed Judi Blacow that there had been a further occupational health report on the claimant. The OH case conference conducted by nurse Lynda Sinclair advised "undue delay in dealing with stressors can result in an exacerbation of symptoms and so our advice is to conclude matters with normal care, concern and sensitivity and in a timely manner by scheduling a meeting. ….. you told me today that (the claimant) has been invited to interview and refused. I would again invite her and if she does not attend on this occasion that the meeting is held in her absence".

72. The claimant was well enough in October, November and December 2018 to participate in the disciplinary and grievance processes.

Second grievance outcome – grievance dismissed

73. On 7 November 2018 Nicki Cooper wrote to the claimant setting out the outcome of her second grievance. The grievance was not upheld. The letter advised the claimant of her right to appeal. Nicki Cooper did not share her findings with her line manager, Lisa Macdonald. Nicki Cooper and Lisa Macdonald worked in their own "tunnels of activity". Nicki Cooper dealt with the grievance confidentially.

74. Nicki Cooper had considered the three issues but there was a flaw in her findings. She had misunderstood an allegation. The claimant had alleged that AG had said that the claimant wanted all Poles shot. Nicki Cooper investigated whether or not *MC* had said this and found that he had not. The claimant, understandably, found this unsatisfactory. She had been clear in her allegations that it was AG who had said it, both in her grievance letter of 19 June 2018 and at the Woodside Café meeting. Nicki Cooper readily admitted this error when giving evidence. It was a genuine mistake. She had advised the claimant of her right to appeal and she could have appealed on this point but did not. The mistake made in this grievance had no bearing on the outcome of the disciplinary process which was conducted separately and related to separate content.

Decision to dismiss

75. Judi Blacow emailed the claimant on 12 November 2018 to say that she was aware that the grievance had now been concluded and that she was ready to send out her decision in the post. She also said that the settlement offer the claimant had made to Lisa Macdonald at the investigatory interview meeting was not something the department would support. Judi Blacow, following HR advice, said "I wanted to give you one last opportunity to meet with me" before she sent out her decision. The claimant did not take this opportunity.

76. Judi Blacow decided to dismiss the claimant. Her letter of dismissal dated 12 November 2018 attaches a Record of Decision document setting out the reason for the dismissal. The letter informs the claimant of her right to appeal.

The rationale for dismissal

77. Judi Blacow did not take into account the claimant's previous final written warning. She thought that she was entitled to do so as the tweets had come to light on 3 May 2018 and the final written warning ran for twelve months until 25 May 2018 but she felt that the seriousness of the twitter posts and the press response was such that she did not need to accumulate misconduct to justify dismissal.

78. It was her decision that the tweets or the press response, either of them, standing alone was sufficiently serious a breach of the Standards of Behaviour and Civil Service Code as to warrant a gross misconduct dismissal.

79. Her Record of Decision related the allegations of misconduct to the relevant paragraphs of the Standards of Behaviour and of the Civil Service Code. It did not set out each of the tweets relied on. With hindsight she could see that she might have done that but the claimant was in no doubt about the content of the tweets and press response and the content of the Standards of Behaviour and Civil Service Code. They had been sent to the claimant and she had commented on the tweets and the press response to Lisa Macdonald and Judi Blacow had the notes of the investigatory interview response with Lisa Macdonald in front of her. The claimant had also prepared a document entitled "Paula Walters – outline response to case to answer document" which she had shared with Lisa Macdonald at the investigatory interview on 13 August 2018.

80. Judi Blacow took no formal action in relation to the claimant's role as UKIP chairwoman. She was satisfied that following the 13 September 2017 agreement the claimant had disclosed her roles as local UKIP chair and as a member of the National Executive Committee. She was also satisfied that the claimant had been open about her intention to stand for local elections in May 2018 and had asked for and been granted permission to stand.

81. Judi Blacow found that the tweets were controversial and did express the claimant's own political views and were therefore in breach of Standards of Behaviour. Judi Blacow used language from the press article when she described the tweets as "highly offensive" and she said that in finding them to have controversial content she did "concur with the media". That did not mean that she had been influenced by the media in her decision. It meant that she found the content of the tweets to be controversial. She applied the Standards of Behaviour to the content of the tweets and the press response and found there were clear breaches.

The grounds of appeal

82. The claimant appealed against her dismissal on the following grounds:

(1) That Judi Blacow was biased when she said “I concur with the media”.

(2) That Judi Blacow failed to identify which specific tweets she was basing her decision on;

(3) That the tweets pre dated the 13 September 2017 agreement that had been made following the claimant’s reinstatement;

(4) That the claimant had implicit permission to express political views if given permission to stand;

(5) That she did not identify herself as a civil servant;

(6) That there was no evidence that her political views affected the way she did her job;

(7) That the press article was malicious.

Appeal hearing

83. The claimant was invited to attend an appeal meeting on Thursday 20 December 2018. The appeal was to be heard by Nicki O Connor. The claimant was notified of her right to representation. The claimant attended the appeal meeting. She was well enough to have put her appeal letter together and to attend the appeal hearing. She was well informed about her legal rights, having had previous representation from her union and advice from a lawyer she had instructed. She chose to pursue internal processes rather than bring a claim at this time. At the meeting she said “I stand by all my tweets”. She also said that she had spoken to the media in response to their article (in addition to having sent the press release). The claimant asked for the appeal outcome decision on the spot but Nicki O Connor said she wanted to take time to consider all the information and seek advice. Nicki O Connor did not speak to Judi Blacow, the dismissing officer about the appeal. She did not discuss the claimant’s case generally with any of the other witnesses in this case. She made her decision independently having spoken to the claimant.

84. Nicki Connor sent the minutes to the claimant for approval – amendment was made to those minutes by the claimant and they were otherwise agreed.

Appeal Outcome 9 January 2019

85. Nicki O Connor sent the appeal outcome letter to the claimant on 9 January 2019. The letter deals in detail with each of the claimant’s points of appeal. Nicki O Connor upheld the decision to dismiss for breaches of the Standards of Behaviour and Civil Service Code. The letter attached an extract from the Standards of Behaviour document. An update in the Standards of Behaviour had taken place on 3 December 2018 between the claimant’s dismissal and appeal. The only difference is that the updated version includes a warning about disciplinary action. The final sentence in the paragraph attached to Nicki O Connor’s appeal outcome letter is different from the

previous version of the Standards. It is marked in bold here for the purpose of comparison.

> "We must take care about commenting on government policies and practices or any other information relating to the government and should not do so without the proper authorisation. We should avoid commenting altogether on politically controversial issues and avoid making any kind of personal attack or tasteless or offensive remarks to individuals or groups i.e. anything that would cause offence to a reasonable person. This applies irrespective of whether you can or cannot be identified as an employee of the Department. **In these circumstances if posts/comments are considered inappropriate, disciplinary action will be taken and could lead to dismissal."**

86. The claimant had been dismissed on 14 November 2018 and the appeal confirmed that dismissal. Nicki O Connor felt her role was limited to considering the fairness of the dismissal process and to see if the claimant had breached the Code and if so was dismissal justified. Nicki O Connor's role is for Job Centre plus and was entirely separate from the roles of the other managers in this process.

Factual findings as to the claimant's beliefs

The claimant's beliefs – anti-political correctness

87. The claimant is opposed to what she describes as political correctness. She believes that political correctness is not being able to say or reflect your own views in the public or on social media. Her belief in political correctness involves permanent victim groups and permanent oppressor groups for example she claimant says that an influx of people from Africa marrying British women lead to the spread of AIDS in the UK but when doctors published this opinion as to the spread of AIDS they were told it was not politically correct. The claimant believes that it is wrong to tell the doctors that they can't express that opinion. To do so casts the people from Africa as permanent victims and the doctors as oppressors. The claimant believes that this is political correctness and she is opposed to it.

88. She believes there are lots of people who are victims and not one particular group. The permanent victims of political correctness could be anyone. The claimant used the content of some of her tweets to give a further example of her belief. She says that people turn up in Britain illegally and they are given hotel rooms, clothing and pocket money. They are considered to be victims. The claimant believes anyone seeking asylum is in a permanent victim group. For the claimant political correctness means being unable to speak out against immigrant groups without being classed as an oppressor. It is the claimant's belief that political correctness has gone too far and people are being gagged and not allowed to express opinions without being perceived as racist, homophobic or sexist.

89. The claimant accepted that she wasn't really sure beyond her examples above of what was meant by political correctness or anti-political correctness or how to explain it. The claimant said she was getting confused and wasn't clear but that she stood for equality. The claimant said that in essence her belief is that people are not allowed to say what they think anymore, anti-political correctness is about being able to say what you think. When pressed on what kinds of things people should be allowed

to say and how political correctness is defined the claimant said she had totally lost the thread.

90. The claimant did not discuss her anti political correctness beliefs at work other than in response to allegations made against her or in her grievances when she made complaints about others. She complained that AG should not be allowed to say that UKIP was racist and she complained that AG had falsely accused her of saying that all Poles should be shot.

91. The claimant was told as part of the respondent's disciplinary and grievance procedures to keep matters confidential and she did. The claimant does not know how her employer could know, simply from her membership of UKIP, that she had a belief in anti-political correctness. Judi Blacow knew that the claimant had stood for UKIP but did not know what UKIP's beliefs were apart from wanting to leave the European Union. She did not know that the claimant had a belief in anti-political correctness.

The claimant's beliefs – nationalism

92. The Tribunal heard very little of the claimant's nationalist beliefs. The respondent had conceded that nationalism was capable of being protected under the Equality Act 2010.

93. The claimant's belief in nationalism included a belief that equates migrants with terrorists. In one of her tweets the claimant said "can you tell the difference between a migrant and a terrorist?" Obviously Dave can because this week he's putting the welcome mat out" and that David Cameron "puts the welcome mat out to ISIS". The claimant's belief in nationalism extended to equating Muslim males with paedophiles. She tweeted "so Muslims get benefits for each wife, if the wives are children do they also get child benefits?" The claimant's equating migrants with terrorists and equating Muslim males with paedophiles is part of her belief in English nationalism.

94. Whilst the claimant did not share her views at work the staff were aware that she was standing for UKIP. Judi Blacow knew that the claimant had stood for UKIP. Judi Blacow did not know what the claimant's beliefs on nationalism were.

Relevant law

Unfair dismissal

95. Section 98 of ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
>
> (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it…(b) relates to the conduct of the employee…

(4) Where the employer has fulfilled the requirements of subsection (1), 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.

96. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

97. Where the reason for dismissal is the employee's misconduct, the Tribunal considers whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out such investigation was reasonable in the circumstances and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

98. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

99. The ACAS *Code of Practice 1 – Disciplinary and Grievance Procedures* provides, at paragraphs 4, 9 and 10:

4. …whenever a disciplinary … process is being followed it is important to deal with issues fairly. There are a number of elements to this:

...

- Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.

…

9.If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

10.The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.

Direct Discrimination

100. The definition of direct discrimination appears in section 13 of the Equality Act 2010 and provides as follows:

> **"(1) 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".**

101. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

102. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible: see the decision of the Employment Appeal Tribunal ("EAT") in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

Harassment

103. The definition of harassment appears in section 26 of the Equality Act 2010 which so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**

Burden of Proof

104. The burden of proof provision appears in section 136 of the Equality Act 2010 and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

Protected characteristic: philosophical belief

105. The Equality Act 2010 defines the protected characteristic of a religious or philosophical belief. The material part at section 10 (2) provides as follows:

> **(2) belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief".**
>
> **(3) In relation to the protected characteristic of religion or belief –**
>
> **(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief**.

106. The leading authority on the application of what will amount to a philosophical belief remains **Grainger plc and others v Nicholson [2010] ICR 360** a decision of Burton J in the Employment Appeal Tribunal (EAT). The claimant asserted that a belief in man-made climate change was a protected characteristic. The EAT agreed that such a belief was capable of being protected under what is now section 10 of the Equality Act 2010. After considering the European Convention on Human Rights (ECHR) and authorities on the scope of article 9 (see below) the EAT identified in paragraph 24 five limitations or criteria which must be satisfied if a belief is to be protected.

> **(i) The belief must be genuinely held;**
>
> **(ii) it must be a belief and not…. an opinion or viewpoint based on the present state of information available'**
>
> **(iii) it must be a belief as to a weighty and substantial aspect of human life and behaviour;**
>
> **(iv) it must attain a certain level of cogency, seriousness, cohesion and importance;**
>
> **(v) it must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others"**

Harassment

107. The definition of harassment appears in section 26 of the Equality Act 2010 which so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

European Convention on Human Rights

108. The ECHR is partially incorporated into English law by the Human Rights Act 1998. The right to freedom of thought conscience and religion is protected by article 9 in the following terms:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others

109. Article 10 provides for freedom of expression.

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

110. The time limit for bringing a claim under the Equality Act 2010 appears in section 123 as follows:-

> **"(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable**.
>
> **(2) …**
>
> **(3) for the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

Early conciliation provisions

111. Section 207B of the Employment Rights Act 1996 provides for the extension of time limits to facilitate conciliation before institution of proceedings.

Authorities referred to by the parties

112. The claimant referred the Tribunal, amongst other cases, to a first instance decision of the Manchester Employment Tribunal Patel v Secretary of State for Work and Pensions, heard on 21 August 2018 before Employment Judge Porter. That was an unfair dismissal case and as a first instance decision was not binding authority on this Tribunal. The claimant relied on two points in this case, the first was an argument that the claimant in that case had not known that his tweets were a breach of the Civil Service Code at the time he posted them and the second was that the Tribunal found that the respondent had failed to identify which particular tweets it relied on in dismissing the claimant and that rendered the procedure adopted unfair.

113. The claimant included the following authorities in its bundle of documents: Grainger plc v Nicholson [2010] IRLR 4, Redfearn v UK [2013] IRLR 51, R (Williamson and others) v Secretary of State for Education and Employment [2005] HL15.

114. The respondent referred to Gray v Mulberry Company (Design) Limited [2019] EWCA Civ 1720 on the issue of cogency within the Grainger test and to Henderson v GMB [2016] EWCA Civ 1049 on philosophical belief discrimination.

115. On the out of time issues the respondent referred the Tribunal to Hendricks v Commissioner of Police of the Metropolis [2002] EWCA Civ 1686 as to conduct extending over a period of time and to Apelogun-Gabriels v London Borough of

Lambeth Council [2001]EWCA Civ 1853 regarding the just and equitable extention of time and a claimant's decision to pursue an internal appeal.

Submissions made by the parties

116. Both Counsel spoke to written submissions.

Submissions on philosophical belief

117. The claimant's submission was that nationalism was clearly a philosophical belief and that the only issue for determination was in relation to anti-political correctness. Claimant's counsel submitted that if political correctness is a belief capable of protection under the Act then anti-political correctness must be too. The claimant submitted that anti-political correctness clearly met the tests of being a belief, being genuinely held by this claimant and of attaining a certain level of cogency, seriousness, cohesion and importance and is compatible with human dignity.

118. Further the claimant submitted that the compatible with human dignity element of the test in Grainger should not be interpreted too widely as that would put the tribunal in the invidious position of making value judgments.

119. The respondent conceded that nationalism is capable of protection as a philosophical belief.

120. The respondent took no issue with anti political correctness beliefs being *genuinely held* by the claimant but said that on her evidence the beliefs lacked cogency, seriousness and importance. On *cogency* the respondent submitted that the claimant's evidence as to her belief was a series of anecdotes as to who should be allowed to say what against whom. On the issue of *worthy of respect* the respondent submitted that some of the claimant's opinions expressed in evidence did not appear to be worthy of respect in a democratic society as they strayed into clashing with protection given to protected characteristics under the Equality Act 2010.

121. The respondent submitted that in order to discriminate against the claimant for her beliefs the respondent has to know what they are and in this case the claimant must fail as she (i) could not express her beliefs coherently in tribunal and she (ii) admitted that she did not talk about her beliefs at work and (iii) the respondent's witnesses, the respondent submitted, showed in their evidence, a sense of bewilderment as to what a nationalist was, what anti-political correctness was and what the claimant's beliefs were. The respondent submitted that it is a step too far to equate membership of UKIP with the claimant holding nationalist and anti politically correct beliefs and further with the respondent's knowledge of the claimant's beliefs.

122. The respondent submitted that none of its witnesses knew what the claimant's beliefs were and so it could not have had a discriminatory motive in its decisions to investigate, discipline, dismiss and uphold the dismissal on appeal.

Submissions on burden of proof

123. The respondent submitted that the burden of proof does not shift in this case. In the alternative, it submitted that the claimant's allegation of a discriminatory motive in this case, given the numbers of independent parties involved in different stages, would require there to have been a conspiracy to dismiss. It submitted that the facts here show that the decision makers did not know one another well, did not discuss the case, took advice from HR and or Cabinet Office such that there was not and could not have been a conspiracy against the claimant.

124. Further, the respondent submitted that the conspiracy theory would require all of the people involved to know and have communicated with one another and to have political beliefs opposed to those of the claimant. The respondent submitted that not attempt had been made in cross examination to expose the beliefs of the respondent's witnesses and that they may share the claimant's beliefs. The respondent submits there is no evidence whatsoever of bias against the claimant before the tribunal.

125. The claimant submits that the burden of proof shifted in this case and that the respondent had not established a non discriminatory reason for its treatment of the claimant.

Submission on harassment

126. The respondent submits that the harassment claim requires a "hostile environment" and that the Tribunal should not trivialise the nature of harassment under the Equality Act 2010. The respondent submitted that the allegations in this case fall a long way short of there being a hostile environment for this claimant.

Submission on human rights

127. The claimant submitted that there must be proportionality in the application of the Civil Service Code and Standards of Behaviour to the claimant.

Submissions on unfair dismissal

128. The claimant submitted that the Patel case was relevant in that the claimant had not known that posting the tweets was a breach or potential breach of the Civil Service Code and Standards of Behaviour.

129. The respondent distinguishes this case from the Patel case. It argues that in this case the claimant does not say she did not know what she was doing. Even at appeal she says she stands by the tweets. The respondent says on any objective analysis the tweets are in significant breach of the Code. The respondent submitted that it was very telling that the claimant avoided answering the questions on whether or not the tweets breached the code by deflecting to talk only about her beliefs and facts.

130. The respondent submits that the decision making officer performed an objective analysis. The respondent accepts the letter would have been better written if it had set out the tweets but the claimant knew what they were from the outset from the CF&I

report. The respondent says there is no allegation of procedural unfairness and points to the claimant's witness statement where she says that although she didn't attend her disciplinary hearing she says "I felt I had made all the points I could make". The respondent submits there was an appeal and a fair appeal hearing.

Application of the Law to the Facts

The Time Issue

131. The claimant brings claims for unfair dismissal, harassment and direct discrimination. The claimant was dismissed on 14 November 2018, entered early conciliation on 11 February 2018 achieving a certificate that same day. The claimant commenced proceedings on 14 February 2019.

132. It was agreed that the claimant's unfair dismissal claim is brought in time.

133. The claimant's direct discrimination and harassment claims relate to the following events:

A The claimant's request for permission to stand in the Mayoral Election for the Liverpool City Region Mayor on or around 13 April 2017.

B The respondent's subsequent disciplinary investigation and procedures subsequent to the Mayoral Election.

C The claimant's dismissal on 26 May 2017 following which she was reinstated.

D The manner in which the respondent handled the Claimant's grievance against AG which was lodged on 1 June 2017.

E The disciplinary investigation and procedures which culminated in the claimant's dismissal (which commenced on 3 May 2018 and the decision made that there was a case to answer on 16 May 2018.

F The decision to dismiss the claimant on 14 November 2018.

G The failure to reinstate the claimant on appeal, subsequent to her dismissal on 14 November 2018.

134. The claimant's representative made submissions on the out of time and just and equitable issue. It was submitted that all of the acts complained of were, taken together, continuing acts. In the alternative it was submitted that it would be just and equitable for the Tribunal to extend time because the claimant had previously been dismissed and reinstated and so it was reasonable for her to attempt to reconcile with the respondent.

135. The Respondent submitted that the claimant is out of time on everything but the decision to dismiss and the appeal.

Applying the law on time

136. The claimant brought proceedings on 14 February 2019 meaning that any acts prior to 12 November 2018 are out of time.

137. The acts complained of at A, B and C are out of time. The acts at A, B and C are, taken together, acts that could amount to conduct extending over a period of time because they all arise out of the same set of facts related to the claimant's decision to stand in the Mayoral election in potential breach of the Civil Service Code and Standards of Behaviour, but in applying Section 123 (3) (a) the last act complained of at C on 26 May 2017 was itself out of time and could not bring the previous conduct within time.

138. Would it be just and equitable to extend time in relation to the acts complained of at A, B and or C ?

139. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 Leggat LJ said that the employment tribunal has the widest possible discretion to consider what is just and equitable and that it would be wrong to put a gloss on the words of section 123. There are factors that will almost always be relevant to the application of the just and equitable test and that they include *the length of and reason for delay and the prejudice to the respondent* in allowing an extention of time.

140. On the *length of delay* point, in this case the acts complained of at A, B and C above took place between 13 April 2017 and the claimant's reinstatement by letter on 3 August 2017. Counting from 13 April 2017 the claimant brings her claims 637 days late. The delay is considerable.

141. As to the *reason for delay* the Tribunal, applying Apelogun-Gabriels v Lambeth, finds that the claimant did not bring proceedings within time on the issues at A, B and C above because she made a conscious decision to pursue internal procedures.

142. The claimant's decision not to bring proceedings at that time was a well informed choice. The claimant had instructed a lawyer in April 2017 who wrote to the respondent on her behalf and threatened proceedings. The claimant had said in a meeting with Paul Atherton in April 2017 that she was being discriminated against. On 1 June 2017 the claimant lodged a grievance. She knew her rights, the relevant time limits and processes and she made an informed choice not to bring a claim at that time.

143. The claimant was not suffering any incapacity. She said that she was ill at this time. She brought no medical evidence to substantiate an argument that she was too ill to bring proceedings. Whilst these might have been distressing times for her she was not so ill from April 2017 through to September 2017 as to be unable to work, engage in political activity, stand for a mayoral role, instruct a lawyer, pursue a grievance and defend herself in disciplinary proceedings. Any suggestion that incapacity prevented the claimant from bringing proceedings in time is rejected.

144. As to the *prejudice to the respondent* in allowing an extension of time, the witnesses called by the respondent were the investigating officer, dismissing officer and appeal officer for the dismissal in November 2018 and the person who heard the grievance in November 2018. No witnesses were called solely as to events in 2017. The documents stood as a record of the respondent's position at that time. If the Tribunal were to extend time the respondent would face the prejudice of answering

more allegations of direct discrimination and harassment and having to answer them at a time when the relevant witnesses' recollections may have faded.

145. For the following reasons: the length of the delay, choice of the claimant not to pursue external proceedings but to seek internal redress and weighing the prejudice to the respondent, the Tribunal finds that it is not just and equitable to extend time to allow the claimant to proceed with her complaints that the events at A, B and C above amounted to direct discrimination and or harassment.

146. Turning now to the allegation relating to the grievance(s) at D above.

147. The handling of the grievance against AG at D above relates to a grievance that was lodged by the claimant on 1 June 2017 (grievance 1) and determined on 13 September 2017. Again, the tribunal must consider the length of the delay, the reason for the delay and the potential prejudice to the respondent. Counting from the date of the outcome of that grievance the claimant's claims in respect of the handling of the grievance are brought 520 days later.

148. Grievance 1 was subsequently reinvestigated following AG 's complaint that she had not been interviewed in the process. The claimant brought a second grievance made on 17 June 2018 (grievance 2). The outcome of that grievance decision was confirmed on 7 November 2018. The claimant entered early conciliation on 11 February 2019 and so is out of time on the second grievance.

149. Were the grievances conduct extending over a period of time ? On a proper reading of section 123 the conduct extending over a period argument will not assist the claimant. Conduct is to be treated as done s123(3) (a) at the *end of the period*. The period ends with determination of the second grievance on 7 November 2018. Any events prior to 12 November 2018 are out of time. In relation to the grievances there is no final act after 12 November 2018 such that it could bring the earlier acts into time. It is not therefore necessary to consider whether grievance 1 and 2 taken together amount to conduct extending over a period of time.

150. Is it just and equitable to extend time for grievance 1? Taking into account the length of the delay, the reason for the delay the fact that the claimant was pursuing internal processes and taking into account the prejudice to the respondent, time is not extended.

151. Is it just and equitable to extend time for grievance 2 from 7 November 2018 to the date of presentation ? The reason for delay is a relevant factor. The claimant could have but did not commence proceedings within time. The length of delay here was short, the claimant was just a matter of days out of time. The claimant had no reason for delay on this occasion. She was a union member and had had previous legal advice on discrimination. The claimant was capable and well informed. It was her position at tribunal that she was ill. She was off sick and had seen occupational health but she was able to participate in the appeal process and attend the appeal hearing. In December 2018 the claimant would still have been in time to bring a claim for discrimination arising out of the respondent's handling of grievance 2 but did not do so. Having regard to the prejudice to the respondent in having to address further claims, time is not extended for the events at D above.

152. Turning now to the events at E above. This relates to the start of the disciplinary process that led to the claimant's dismissal. In Hale v Brighton and Sussex University Hospitals NHS Trust [2017] UKEAT 342 The Honourable Mr Justice Choudhury considered whether or not the decision to instigate disciplinary proceedings was a one off decision or created a state of affairs that amounted to conduct extending over a period for the purposes of s 123(3)(a). At paragraph 42 of his judgment he states:

> "By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time."

153. And at paragraph 44:

> "If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts - including the medical profession - can take many months, if not years, to complete. In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they could rely upon the act extending over a period provision. It seems to me that that provision can encompass situations such as the one in question."

154. In applying Hale, once the respondent's CF&I report dated 16 May 2018 found there was a case to answer against the claimant, it was inevitable that steps would be taken in the disciplinary process. The disciplinary process complaints at E and the decision to dismiss at F are part of the same course of conduct extending over that time period.

155. The appeal outcome at G is in time.

156. The claimant submitted that all of the events taken together at A – F are part of one course of conduct extending over a period. That submission is rejected. The disciplinary process in 2017 is unrelated to the disciplinary process in 2018.

157. The grievance process for grievance 1 is unrelated to the disciplinary process in 2018. The claimant submitted that AG got her dismissed but the Tribunal finds that the trigger for the disciplinary investigation is the CF&I report (itself triggered by an anonymous call to the respondent's whistleblowing hotline).

158. The grievance process for grievance 2 is also unrelated to the disciplinary process in 2018.

159. In conclusion, on the time points, the Tribunal has no jurisdiction to hear the complaints at A, B, C and D above.

Revisiting the issues

160. Following those findings on time it is appropriate to revisit the List of Issues.

161. The claimant's case for discrimination as put at Tribunal was as follows:

Did the respondent discriminate against the claimant because of her protected characteristics by treating her less favourably than the respondent treats or would treat others (the hypothetical comparator being a public facing employee of the respondent who did not hold her philosophical beliefs) in relation to:

E. The disciplinary investigation and procedures which culminated in the claimant's dismissal (flowing from the decision made that there was a case to answer on 16 May 2018)

and

F. the decision to dismiss the claimant on 14 November 2018 and

G**.** the failure to reinstate the claimant on appeal, subsequent to her dismissal on 14 November 2018

Applying the law on philosophical belief

162. The parties agreed that the relevant authority was Grainger. The Tribunal's task was to assess the belief of the claimant and not whether or not in principle nationalism and or anti political correctness could be capable of protection under the Equality Act.

Anti-political correctness

163. The claimant's belief in anti-political correctness amounted to a belief in her having an unqualified right to say what she wanted. Applying Grainger the Tribunal found that the claimant's beliefs were *genuinely held*.

164. The claimant was unable to define political correctness in a way that was *cohesive* in the sense of her beliefs being intelligible and capable of being understood. She argued on the one hand, that the permanent victim and oppressor groups could be anyone but, on the other hand, the examples she gave related to migrants as victims and those who spoke out against immigration as oppressors. Further, her belief was not cohesive because she argued it is a belief that anyone should be able to say anything they wanted without qualification and also argued that AG ought not to be allowed to say that UKIP was a racist party.

165. The claimant's belief in anti-political correctness was not *cogent* in the sense of it being clearly expressed. Tribunal found that in the lack of certainty the claimant expressed about who was a victim or oppressor, (that it would depend on the issue but could be anyone) her belief in what was politically correct and anti-politically correct was shifting and was not cogent.

166. The claimant's belief that she should be able to say anything about anyone is not *worthy of respect in a democratic society*. Her belief put her in inevitable conflict with the fundamental rights of others, rights protected under the Equality Act 2010.

167. The Tribunal concluded that the claimant's belief in anti-political correctness did not amount to a philosophical belief and was not therefore a protected characteristic under the Equality Act 2010 at the time of the acts complained of.

nationalism

168. In relation to the claimant's views on nationalism the Tribunal was concerned not in the abstract with whether or not nationalism is capable of protection under the Equality Act but with whether or not the beliefs of this claimant were capable of protection.

169. The Tribunal found that the claimant's belief in nationalism included a belief that equates migrants with terrorists. In one of her tweets the claimant said "can you tell the difference between a migrant and a terrorist?" Obviously Dave can because this week he's putting the welcome mat out". The claimant's belief in nationalism extended to equating Muslim males with paedophiles. She tweeted "so Muslims get benefits for each wife, if the wives are children do they also get child benefits?" The Tribunal found that the claimant's equating migrants with terrorists and equating Muslim males with paedophiles were part of her beliefs in English nationalism.

170. In applying the Grainger test the Tribunal must be satisfied that the claimant's belief *must be a belief and not an opinion or viewpoint based on the present state of information available.* The Tribunal found that the claimant's belief in nationalism was an intrinsic part of her political affiliation to UKIP and that as such, it amounted to a political opinion in favour of leaving the European union and limiting immigration.

171. The claimant's belief in nationalism must attain a certain level of *cogency, seriousness, cohesion and importance* in order to be a protected characteristic. The claimant's belief did not adhere to the belief in nationalism set out in the definition provided in her claim form. The definition said it is integral to such belief that the interests of citizens of the relevant nation state are prioritised by such state, over the interests of the world at large. The claimant's distinction was not between citizen and non citizen but between migrant and non migrant, Muslim and non Muslim. This was not a cogent nor cohesive position on nationalism.

172. The belief must be a belief as to a *weighty and substantial aspect of human life* and behaviour. The claimant's beliefs related to political opinion and challenging UK immigration policy. Her beliefs might change rapidly to remain aligned to the views of UKIP. Her beliefs have the potential to be sufficiently weighty or substantial to meet the requirements of the Grainger test but it was not necessary for the Tribunal to make a determination on this issue as the beliefs did not meet the requirements of a philosophical belief capable of protection for other reasons.

173. The Tribunal finds that the part of the claimant's belief in nationalism that equates migrants with terrorists and equates Muslim males with paedophiles is not *worthy of respect in a democratic society*. Those opinions are incompatible with human dignity and they conflict with the fundamental rights of others.

174. The Tribunal finds that the claimant did not establish her own belief in nationalism in this case.

175. The Tribunal unanimously concluded that the claimant's belief in nationalism did not amount to a philosophical belief and was not therefore a protected characteristic under the Equality Act 2010 at the time of the acts complained of.

Human Rights

176. The rights in Article 9 of the European Convention on Human Rights are qualified rights. The claimant, in her expression of her belief in anti-political correctness claims an unqualified right to say what she wants. If the claimant's article 9 rights were engaged in this case, then Article 9.2 is also engaged and in a democratic society it is necessary to have an impartial civil service. The Civil Service Code and Standards of Behaviour, in this case, limit the restraint on the exercise of the article 9 rights to any comment on "government policies and practices or any other information relating to the government" and they provide for consent to the expression of comment in those areas with "proper authorisation". The Civil Service Code and Standards of Behaviour also limit the restrain on the exercise of article 9 rights to "politically controversial issues" and to "personal attack or tasteless or offensive remarks to individuals or groups". The Civil Service Code and Standards of Behaviour which place restrictions on what civil servants can and cannot say or publish are, in this case, a proportionate means of achieving the aim of an impartial civil service.

177. The rights in Article 10 of the European Convention on Human Rights are qualified rights. The claimant in claiming freedom of expression is subject to article 10 (2) which provides that the exercise of these freedoms, may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputation or rights of others. The Civil Service Code and Standards of Behaviour, in this case, limit the restraint on the exercise of the article 10 rights to any comment on "government policies and practices or any other information relating to the government" and they provide for consent to the expression of comment in those areas with "proper authorisation". The Civil Service Code and Standards of Behaviour also limit the restrain on the exercise of article 10 rights to "politically controversial issues" and to "personal attack or tasteless or offensive remarks to individuals or groups". The Civil Service Code and Standards of Behaviour which place restrictions on what civil servants can and cannot say or publish are, in this case, necessary for the protection of the reputation of the civil service.

178. If the claimant's human rights are engaged, then, they would be engaged subject to the restraints above. The application of The Civil Service Code and Standards of Behaviour was a proportionate response to the actions of the claimant in posting tweets and sending a press release which potentially prejudiced the impartiality and the reputation of the civil service.

179. The Tribunal found that the claimant did not have a protected characteristic entitling her to bring her claims for direct discrimination and harassment. However, in the alternative the Tribunal went on to consider whether or not (if there had been a protected characteristic) there would have been any discrimination.

Direct Discrimination

180. The claimant submits that the disciplinary investigation and procedures which culminated in the claimant's dismissal (which commenced on 3 May 2018 and the decision made that there was a case to answer on 16 May 2018 and subsequent dismissal) were acts of direct discrimination by which she was treated less favourably than someone without her beliefs was or would be treated.

181. In particular, her argument for *less favourable treatment* was that she was singled out for disciplinary action and dismissal because of her political beliefs. The tribunal found that the claimant was not singled out for disciplinary action. That would have required there to have been a conspiracy against the claimant because of her beliefs by a number of people including the whistleblower, the CF&I report author and Ms Macdonald in her investigatory report. There was no evidence of any conspiracy. The decision makers in this case, on the investigation, grievance, disciplinary hearing and appeal did not know the claimant's beliefs (beyond her standing for UKIP) and did not know one another other than in the passing sense of working sometimes at the same location.

182. Judi Blacow in making her decision to dismiss was not motivated by any protected characteristic nor even by the claimant's political beliefs or affiliation. The Tribunal accepted her evidence that she was not aware, beyond knowledge of the claimant's having stood for UKIP, of the claimant's beliefs and she went on to say that even if she had been aware of the claimant's beliefs, the political beliefs would not have made any difference to her decision. Judi Blacow was motivated to dismiss by her application of the Civil Service Code and Standards of Behaviour to the content of the claimant's tweets and press release.

183. The Tribunal found that there was no less favourable treatment *because of a protected characteristic* in this case. The Tribunal accepted the evidence of the dismissing officer that anyone, irrespective of their philosophical belief, who had breached the Civil Service Code in the way the claimant had would have been treated in exactly the same way as the claimant.

184. The claimant pointed to someone whose views she assumed were opposed to hers and that was AG. The claimant argued that AG was an appropriate comparator because she had expressed the view on social media that UKIP was a racist party which the claimant argued was also a breach of the Civil Service Code and Standards of Behaviour.

185. The claimant said that she suffered less favourable treatment than AG who was not disciplined or dismissed for expressing that view. The Tribunal saw evidence to suggest that AG was referred for disciplinary investigation.

186. The conduct AG is accused of, saying UKIP is racist on social media is not comment on "government policies and practices or any other information relating to the government". AG is not an appropriate comparator with the claimant. AG 's alleged remark (the Tribunal made no finding of fact as to whether or not AG made any such

remark), whilst potentially offensive, did not by its content stray into comment on government policy on benefits which was part of the role of the respondent.

187. In this case the appropriate hypothetical comparator was someone else who does not have the beliefs (assuming they amounted to a protected characteristic, which they did not in this case) held by the claimant but who posts content that comments on government policy and practice in breach of the Civil Service Code and Standards. The Tribunal accepted the evidence of Judi Blacow and Nicki O Connor that anyone, irrespective of political affiliation or belief, who posted comment on government policy and practice in breach of the Civil Service Code and Standards of Behaviour would have been disciplined and dismissed.

Less favourable treatment: the decision to dismiss the claimant on 14 November 2018

188. The decision to dismiss is less favourable treatment but not *because of a protected characteristic.* The respondent established a non-discriminatory reason for dismissal on the grounds of the claimant's gross misconduct.

The failure to reinstate the claimant on appeal, subsequent to her dismissal on 14 November 2018

189. The claimant argued that the appeal was flawed in that it did not address the allegation of bias as a discrete investigation. The allegation of bias rested on Judi Blacow's use of the phrase "I concur with the media". It was a poor choice of words but it did not amount to evidence of bias. It was a short hand way of Judi Blacow saying that she found that the content of the tweets was politically controversial and had the potential to cause offense. The claimant attended and participated in the appeal. Nicki O Connor reviewed the decision to dismiss, heard from the claimant and decided to uphold the decision. There was no *less favourable treatment* in the appeal. The respondent would have dealt with an allegation of bias made by an appropriate comparator in the same way.

190. Putting aside any alleged bias, and none was found, the failure to reinstate was not because of a protected characteristic (none was found), but was because the claimant had committed acts of gross misconduct which, even when mitigation was taken into account, (and her existing final written warning for breach of the Civil Service Code and Standards of Behaviour was discounted) were so serious as to warrant dismissal. There was a non discriminatory reason for failure to reinstate.

Harassment

191. The claimant alleged that the respondent's conduct of the disciplinary process was unwanted conduct related to a relevant protected characteristic that created an intimidating, hostile, degrading, humiliating or offensive environment for her.

192. The Tribunal found that the disciplinary process was not *related to a relevant protected characteristic.* It was related to the CF&I report and the allegations of gross misconduct for breaches of the Civil Service Code and Standards of Behaviour.

193. Further, the Tribunal found that the disciplinary process did not create a hostile environment for this claimant. The claimant did not talk about her beliefs at work and she kept the process confidential. She alleged in her witness statement that colleagues referred to her as racist and fascist and that staff would "throw wild and insulting accusations" about her to her face and behind her back. The Tribunal saw no evidence other than the claimant's assertion to suggest that this happened. The assertion lacked specificity. It was not plausible that if this had happened this claimant, who had brought grievances and appeal before, would not have complained about it in writing through formal processes at the time, setting out exactly the remarks made, by whom they were made, when they were made and what effect they had on her.

194. The respondent's witnesses confirmed that they did not know the claimant's beliefs beyond her broad allegiance to UKIP. The respondent's witnesses were not cross examined as to their beliefs. The claimant was represented by her union and was engaging in meetings and correspondence with relevant managers in the disciplinary process. The Tribunal found that the process did not create a hostile, degrading, humiliating or offensive environment for this claimant but, in the alternative, if it had, taking into account the reasonableness of her reaction, it would not have been reasonable for the respondent's conduct to have had that effect.

195. The claimant was in significant breach of the Civil Service Code and Standards of Behaviour. The Tribunal noted the disingenuous sending of an email marked draft to her line manager of 23 April 2018 and the claimant's subsequent admission that the email, purporting to seek permission for draft press release text, had already been sent. It would not reasonable for this claimant, who was robust enough to send an email to her manager pretending to seek permission to send a press release when in fact she had already sent it to the press, to react to being investigated, interviewed and disciplined in such a way that she found it intimidating, hostile, degrading, humiliating or offensive.

The burden of proof

196. The claimant's beliefs were not protected beliefs under the Equality Act but even if they had been the claimant had not established facts from which, in the absence of any other explanation the Tribunal could decide that contravention of a provision of the Equality Act had occurred. The burden of proof did not shift in this case.

197. The respondent established a non-discriminatory reason for its treatment of the claimant and that was her breaches of the Civil Service Code and Standards of Behaviour.

The reason for dismissal

198. The factors operating on the mind of the dismissing officer Judi Blacow at the time of dismissal were the claimant's breaches of the Civil Service Code and Standards of Behaviour. The claimant was dismissed because she had posted content (the tweets) in breach of the Code and Standards and had responded to the newspaper article with her draft press release which she sent to the media again in

breach of the Code and Standards. Judi Blacow believed that this amounted to gross misconduct.

199. Gross misconduct is a potentially fair reason for dismissal. Applying Burchell the respondent's Judi Blacow had an honest and genuine belief in the claimant's guilt of that misconduct when she made the decision to dismiss. Ms Blacow's belief was honest and genuine because the claimant had admitted having posted the tweets and said that she stood by the content of the press release. The belief was held on reasonable grounds because, in addition to the claimant's admissions, there had been an independent investigation conducted by Counter Fraud and Intelligence and there had been a disciplinary investigation by an independent member of staff. Judi Blacow saw and applied the provisions of the Civil Service Code and Standards of Behaviour.

200. The respondent carried out such investigation as was reasonable in all the circumstances of the case. When the CF&I report was produced it set out the tweets complained of. On this point, this case is distinguished from the second point made by claimant's counsel in relation to the Patel case. The claimant knew the allegations against her from the outset. The CF&I report quoted some of the tweets and the claimant said throughout the processes that she stood by her tweets.

201. The respondent acted reasonably. It appointed an independent investigating officer and the claimant was interviewed. The claimant had been told of her right to be accompanied. The respondent relied on the content of the CF&I report in putting the allegations to the claimant and it set those allegations out in writing. The claimant admitted having posted the tweets. The respondent investigated, having told the claimant what the allegations were and it got an admission as to the content posted.

202. The claimant chose not to attend the disciplinary hearing. She had previously been represented by her union and had advice from a lawyer. She had been disciplined and dismissed before. She knew the case against her and the risks she faced in not attending and participating in her disciplinary hearing.

203. The claimant was given written reasons for her dismissal. Judi Blacow set out her reasoning in a document headed "Record of Decision" which gave, over its three and half pages, a detailed explanation of the application of the Civil Service Code and Standards of Behaviour to the claimant's conduct.

204. The letter of dismissal and Record of Decision, in so far as it said that Judi Blacow concurred with the media in finding the tweets offensive, was not determinative of anything. Judi Blacow's evidence was accepted that she had made her own decision as to the application of the Code and Standards to the conduct of the claimant

205. The decision to dismiss fell within the range of responses of the reasonable employer. The claimant's tweets and press release breached the Civil Service Code and Standards of Behaviour and amounted to gross misconduct under its Disciplinary Policy. Dismissal is an appropriate sanction for gross misconduct. Judi Blacow was aware that the claimant was already on a final written warning but she did not need to take that into account as she felt the gross misconduct finding on its own warranted dismissal.

206. Judi Blacow concluded that no mitigation would reduce the seriousness of the allegation and her decision to dismiss. Judi Blacow took advice from HR about the consistency of her decision to dismiss with other decisions by other officers for similar misconduct and was satisfied that dismissal was the appropriate sanction.

207. Responding here to the claimant's submissions on the Patel case; the claimant did not say in this case that she did not know what she was doing when she sent the tweets. She said throughout the internal process and this hearing that she stood by the content of the tweets and that as their content is, in her opinion, factual, it is not in breach of the Code or Standards.

208. The claimant participated in her appeal. She was given notice of the appeal hearing date and of her right to be accompanied. She attended the hearing on 21 December 2018. She was subsequently given notes of the hearing to approve. The claimant had the opportunity to amend those notes and did so. The appeal decision letter set out the reasoning for the decision. It considered the allegations of bias and the alleged failure of the dismissing officer to consider mitigation. It attached the relevant extract from the Standards of Behaviour and Civil Service Code. The claimant could have been in no doubt about the reason for her dismissal and why that dismissal was upheld at appeal.

209. The respondent acted reasonably and procedurally fairly throughout the process of investigation, hearing, dismissal and appeal. There was no breach of the provisions of the ACAS Code.

Conclusion

210. The claimant did not hold a philosophical belief capable of protection under the Equality Act 2010. Her discrimination claim is not well founded and FAILS.

211. This was an unfair dismissal case. The claimant was a civil servant. She was bound by the Civil Service Code and Standards of Behaviour. She posted content that breached the Code and Standards on both twitter and by her email to the media.

212. The claimant was FAIRLY DISMISSED for gross misconduct.

Employment Judge Aspinall

Date: 17 March 2020

REASONS SENT TO THE PARTIES ON

19 March 2020

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.