



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A. Gibbins

**Respondent:** British Council

**Heard at:** London Central

**On:** 4,5,6,7,10 July 2017  
11 July in chambers.

**Before:** Employment Judge Goodman  
Mrs J. Cameron  
Ms. L.Jones

## Representation

Claimant: Bruce Carr Q.C.

Respondent: Jacques Algazy Q.C.

## RESERVED JUDGMENT

- 1 The respondent did not discriminate against the claimant because of philosophical belief, directly or indirectly.
- 2 The claim of unfair dismissal fails.
- 3 The wrongful dismissal claim fails.

## REASONS

1. These claims of unfair dismissal, wrongful dismissal and discrimination because of philosophical belief were brought after the claimant was summarily dismissed by the respondent on 8 August 2016 for gross misconduct. The claimant had posted remarks on Facebook which had led to widespread media criticism and adverse public comment on both her and the respondent.
2. A list of issues had been agreed. The discrimination claim is argued both as direct, and by amendment, in the alternative, as indirect discrimination for religion or belief. The belief in question is that the UK should not be a

monarchy but a republic. The respondent pleads justification for any indirect discrimination.

### **Evidence**

3. In order to decide the issues the tribunal heard evidence from the following:

**Angela Gibbins**, the claimant

**Katherine Heather**, Head of Corporate HR, who prepared the investigation report on her conduct

**Rebecca Walton**, EU Regional Director, who made the decision to dismiss the claimant

**Jo Beall**, Director, Education and Society, who heard the claimant's appeal against dismissal

**Helen Murley**, Global HR Director, who managed the disciplinary process for the respondent.

4. Although written statements had been exchanged for each, we did not hear from **Beverley Gallagher** or **Casia Zajac**. Ms Gallaher, the respondent's head of employee relations, is still employed, but off sick with stress. Ms Zajac, a press officer, has retired from the respondent after 30 years' service, and a letter from her doctor recorded that she felt the stress of attendance here would make her ill. Their statements are contentious, and as they were not present to answer questions we paid no heed to this evidence.
5. Nor did we admit a statement from an expert on social media use. The reasons for this decision were that he was not a joint expert, and although the issues have been pertinent from the very start of the story, it was disclosed so late, only days before the hearing was to start, that the claimant had no opportunity to seek advice on whether its content could be agreed.
6. There were bundles of documents of around 1,500 pages counting insertions and additions. We read those to which we were directed.
7. We declined to read textbook material on republicanism not adduced by the claimant until closing submissions for the same reasons as we declined to admit the respondent's expert evidence.
8. After reading written submissions, and hearing oral submissions from the parties, judgment was reserved.
9. This hearing was restricted to liability issues and a contingent remedy hearing was arranged for November.

### **Findings of fact**

### **Background**

10. The respondent is a non-departmental public body, which is operationally independent of the Foreign & Commonwealth Office, though 16% of its

budget comes from there, the rest being self-generated. It is also a registered charity.

11. The respondent employs 12,225 staff across over 100 countries. There is a Board of Trustees; overall management is conducted by an executive board. The scope of its work is set out in a Royal Charter as promoting cultural relationships between the people of the UK and other countries, promoting wider knowledge of the UK, developing wider knowledge of the English language, encouraging cultural and scientific technological and other educational cooperation between the UK and other countries, and otherwise promoting the advancement of education.
12. The respondent's Patron is Her Majesty the Queen, and the Vice-Patron is H.R.H. the Prince of Wales.
13. The claimant was employed from 2008 as Head of Facilities Management, and in March 2016 was confirmed as Head of Global Estates. Her pay was £77,800 per annum, with an annual bonus of 6% salary. She reported to the Chief Financial Officer.
14. Until the events of the end of July 2016 which led to her dismissal the claimant was well regarded and had an unblemished record. In addition to her work overseeing the respondent's property worldwide, she occasionally lectured on an MSc course on Facilities Management at UCL.

### **Republican views**

15. The philosophical belief asserted in this claim is a belief in republicanism. The claimant believes: "that the United Kingdom should not be ruled by a hereditary monarch, but should be a democratic and secular republic".
16. The claimant described how she developed this belief over time, from involvement in antiracism demonstrations in Southall in the context of the Grunwick dispute and the death of Blair Peach while she was still at school, to the influence of the late Tony Benn, a well-known advocate of republicanism, both from reading his work and later through personal contact when working on environmental campaigns for Friends of the Earth. She also described her membership of the Labour Party and trade unions, and keen interests in social welfare, environmental issues and international human rights. She was not explicit on the link between republican belief and these memberships and interests, but they are evidently associated in her own mind, and we understand her to mean these are a cluster of beliefs often held together by like-minded people. She explained that she was employed by Amnesty International for 8 years, and in the context of campaigns to abolish the death penalty became concerned in part about the role of the monarch as commander-in-chief of the British Armed Forces, and in part about the role of the Judicial Committee of the Privy Council deciding appeals against the death penalty in Commonwealth jurisdictions. She added that travel to countries where there were human rights violations "further confirmed my belief in the need for strong democratic republican government systems, founded in international law".
17. Her republican belief was well known among colleagues in the British Council "alongside my atheist and socialist beliefs", and she was sometimes called

“the red under the bed”, and “the quiet Corbynista”. She was known not to have joined colleagues paying their respects in Trafalgar Square on the day of Margaret Thatcher’s funeral in April 2013. She had turned down an opportunity to be presented to the Prince of Wales when he visited the British Council on its 80<sup>th</sup> anniversary in 2014, though she had taken a key role in the preparation of the event, and she proposed more junior colleagues to be presented instead. She emphasised that she had discharged her professional duties conscientiously, including making nominations for honours even though she did not agree with the honours system, in which honours are conferred by the monarch even if in practice most nominations are submitted to her by elected ministers.

### **The Facebook Posts**

18. On the afternoon of Sunday 24 July the claimant was logged onto Facebook at home, and could see from her Facebook newsfeed that that some of her Facebook friends were in conversation about a meme (a photograph with a comment) posted on the Facebook page of a band called the Dub Pistols.
19. The Dub Pistols had posted a photograph of Prince George, the Queen’s great-grandson, and fourth in line the throne after his father and grandfather, who had celebrated his third birthday two days earlier. They commented on the picture: “I know he’s only 2 years old, but Prince George already looks like a Fucking Dickhead”. Then they added: “too much?”
20. This meme was visible to the claimant, as was a sub- thread of discussion of it among her Facebook friends. She said she could not see other comments. A couple of friends had raised the concept of “white privilege”. They asked if this was only known to those of black ethnic minority, or whether white people recognised it too. They wanted to know if this would be understood by white people if they mentioned it, concerned that in the past they had been adversely criticized for commenting on the Royal family at all.
21. The full thread is no longer available, but the claimant made the following contribution to the conversation:

“ White privilege. That cheeky grin is the (already locked-in) innate knowledge that he is Royal, rich, advantaged and will never know \*any\* difficulties or hardships in life. Let’s find photos of 3yo Syrian refugee children and see if they look alike, eh?”
22. The claimant has explained how she and friends in the conversation were considering whether the well-known 2015 photographs of a Syrian refugee child, Alan Kurdi, aged three, who drowned off a beach in Turkey when his mother was trying to make the crossing to Greece in a rubber dinghy, carried the same associations of privilege.
23. In answer to a further post by a friend (text no longer available, but it must have made some reference to hate), the claimant commented she had:

“a multifaceted political opinion. That’s not hate, and I hate no human being on this planet as an individual. But I do disagree with the system that creates privilege of any sort. And I have a dedication to calling that out for what it is”.

24. A friend, Alex Browne, wrote:

“you look at a smiling child and this is the kind of stuff you think? You need some time off the Internet”,

to which the claimant responded:

“Not at all Alex. I’m sound in my socialist, atheist and Republican opinions. I don’t believe the Royal family have any place in a modern democracy, least of all when they live on public money. That’s privilege, and it needs to end”.

25. Finally the claimant later added (presumably to someone who commented that the young Prince would have to grow up with the burdens of his position):

“but are you happy that he will grow up to inherit that burden/privilege? I understand that a 3-year-old will know no different than his circumstances. All I wish to suggest is that most children in the world don’t have as many reasons to smile. That’s sad for kids in UK, just as it is elsewhere. Not everyone has a good life and opportunity”.

26. The Claimant has explained that at the time she had 150 Facebook friends, all people already known to her. She had set her privacy settings at their highest. Facebook friends could access a tab which showed that she worked with the British Council, but no one who was not a friend. Her bio page stated: “Personal use and friends only here. Work-related elsewhere”. In her understanding, her posts were only visible to her Facebook friends.

27. She also had a Linked-In account, which she used for work, so linked her name with the respondent. Her Twitter handle showed that she worked for the British Council, though she only used it for personal content. She now agrees that anyone who googled her name could without difficulty discover that she worked for the respondent in a senior position.

28. Unfortunately for the claimant, the sub-thread of discussion came into the public domain. It was not clear to the claimant, or the respondent, or the Tribunal, exactly how this came about. It is possible that one of the claimant’s 150 friends passed her comments on to others. It is also possible that as the claimant was posting on a sub- thread of conversation about the Dub Pistols meme, they were being posted onto the Dub Pistols page, below the line, and so visible to all, even though the claimant’s Facebook newsfeed was only alerting her to comments made by her friends. The claimant herself suggested that friends of friends may have been able to access the sub-thread, or that others may have looked at her friends’ Facebook pages, over their shoulders, as it were.

29. A woman called Lisa George, believed to be a former employee of the respondent, but not one the claimant’s Facebook friends, claimed online that it was she who directed the Sun newspaper to the claimant’s comments. In a post on the respondent’s website she said:

“Her vile views were not posted on a private account. They came from her personal account, but she posted them on a public Facebook page”.

### **The Respondent’s Social Media Guidance**

30. The respondent has a Code of Conduct for its staff. Section 8, entitled “Upholding Public Trust” says:

“trust is at the heart of everything we do and every one of us has a duty to behave in ways that actively uphold public trust in us and give people confidence in the integrity of the British Council as an organisation... We should also never behave, at work or in public, in a manner which may damage the British Council’s reputation”.

This is a general message, not specific to social media.

31. Paragraph 10 is entitled “Looking After Our Reputation”, and says that the Council’s reputation is vitally important,

“so when we make statements to the media or other British Council contacts we should also always aim to maintain and enhance our reputation. We must never make statements, on or off the record, about politics or on a subject which may damage our reputation or cause a loss of confidence in the British Council.”

It goes on:

“Being sensible online. Many of us make personal use of the Internet, email, websites and social media, such as blogs, microdots, Facebook, YouTube and Twitter. However, when you have clearly identified your association with the British Council, such as by discussing our work or using your British Council email address you should always behave appropriately and in line with our values”.

Finally:

“when using personal social media accounts that are publicly visible you should be mindful of the possibility that you could be identified as having an association with the British Council, which in turn could have an impact on the reputation of British Council”.

Thus staff are alerted to their responsibility for the Respondent’s reputation, but the advice concerns overtly public use.

32. Less than a month before the claimant’s posts, in the context of the controversial and unexpected EU referendum result, the respondent had issued a policy briefing and social media guidance to all staff. The covering message explained it was guidance on social media use at work and in a personal capacity as a British Council employee, and noted that in social media lines between using social media in a personal and public capacity are blurred. In case it was thought the advice applied only to the referendum outcome, it went on:

“this guidance should be referred to as a continual useful reminder. The main thing is common sense. It goes without saying that we are all entitled to express and share personal views on and off social media”,

but

“as is the nature of social media, social media communities may not always view what you say as entirely separate from the organisation you work for. If you are in any doubt, don’t post it... If your personal social media account is private and does not identify you as a British Council employee, you can still never predict where your comment or content might end up! A restricted private post can easily find its way to a much wider, more public audience”.

After a brief reference to the referendum it went on:

“Please consider carefully the comments and content you post on your personal social media page or account, including replies or responses to other social media users. Whatever you do or say on social media at any time (even personal capacity) may have an impact on how people perceive the British Council”.

In other words, staff should be careful what they said even if they believed their comment was private.

33. The claimant read this, and was careful what she said about the referendum result. Her evidence to the Tribunal was that she did not consider it applied in other contexts.

### **George and the Dragon: the Media Story**

34. On the afternoon of Monday 25 July 2016, Gary O’Shea, a reporter on the Sun newspaper, emailed the respondent’s press office saying the paper had been contacted on Sunday night by a reader who had seen:

“that one of your senior staff Angela Gibbin was making unkind comments about Prince George and the Royal family on Facebook. Keeping in mind the close relationship between the British Council and the Royals, and that your organisation holds the Royal Warrant, we thought we should contact you for your views. Your employee chose to add comments for a thread – begun on Facebook by a rock music band declaring that the young Prince “looked like a fucking dickhead”,

and he then quoted the “white privilege” comment, and the comment about the family having no “place in a modern democracy, least of all when they live on public money.”

35. The respondent’s press officer, Casia Zajac, straight away showed this to the claimant, who opened Facebook, demonstrated the privacy settings, still at their highest, and found that the entire comment thread had been taken down. Casia Zajac suggested she “keep her head down and it will all blow over”. She might want to stay at home next day.

36. Late that night, at 11. 30 p.m. the respondent saw the front page of the Sun’s online edition, with the headline:

“George and the Dragon. 3-year-old Prince George hit by vile rant from British Council boss paid thousands by taxpayers to promote UK....Irate Giddens attacked future monarch saying he was “privileged, rich” and “looks like a f\*\*\*\*\*d\*\*\*head” .”

37. This was misquotation, as she had not herself used the swear words. The print edition was more accurate when it said:

“Prince hit by vile rant of boss paid to promote Britain – GEORGE AND THE DRAGON. A boss at a taxpayer funded culture group sparked fury with an astonishing Facebook attack on Prince George. Angela Gibbins, 52, said the 3-year-old was an example of “white privilege living off public money”. The British Council manager made her remarks on a snap of him which had the vile caption: Prince George already looks like a f\*\*\*\*\*d\*\*\*head.”

38. The respondent’s press team contacted the Sun to point out the misquotation, but no correction was printed at the time. In fact, there was no public correction until after an IPSO adjudication nearly a year later.

39. The impression that the claimant had called the Prince a fucking dickhead became widespread. It was quoted in that morning’s Metro, a free newspaper widely distributed on public transport. It generated enormous comment on social media, and on the respondent’s website. Both the accurate and inaccurate versions of what she had said were widely circulated and syndicated.

40. So it was that on Tuesday 27 July the claimant and her husband found themselves besieged by the press, unable to leave the house, or to answer either landline or mobile phones as reporters seeking comment from her had the numbers. The claimant was only able to communicate with the respondent by text.

### **British Council Responses**

41. As the story broke, the respondent’s press team called a gold crisis meeting for 08:30 to discuss it. In anticipation of that meeting, at 06:49 Helen Murley, executive board member, emailed the Head of Employee Relations:

“I think the question will be how far we take the disciplinary action”.

The response was:

“will be potential gross misconduct and therefore dismissal but we will need to hold the meeting and follow due process in case of any mitigation”.

42. The claimant argues this shows a corporate mind set on dismissal before her story had been heard, and when senior officers thought she had posted the obscene remark (though the word Ms Murley used at the time was not obscene but “blasphemous”).

43. At the crisis meeting, the respondent’s objectives were identified as:

1. Protect the reputation of British Council
2. to adopt /maintain British Council distance from what is a personal social media issue
3. Maintain British Council position on values and the need to follow disciplinary process



4. provide necessary support and duty of care.

The minute reads: “British Council reputation at risk by association with the employment of director GE (the claimant). Social media feeds are coming in thick and fast tagging director GE, many being very aggressive, calling for resignation et cetera”. Also: “The CEO and director of human resources will follow disciplinary procedure”. The false attribution of the obscene remarks is not minuted.

44. The respondent asked the claimant to apologise to Kensington Palace, London home of the Prince and his parents. With some resistance, she did so. Although she amended the draft provided by the respondent, she did not mention that she had been misquoted.

45. The respondent posted a press statement on their website:  
“this comment was made on a private social media account. It has absolutely no connection to the British Council and does not represent the views of the British Council. That said we expect high standards of our staff and we will be investigating the matter further”.

After the crisis meeting, the statement was updated to read:

“in accordance with our code of conduct we have started disciplinary procedures with the individual concerned”,

and added that “this comment” did not represent the respondent’s views and values. The claimant is concerned that saying “this comment” continued to associate her with the Dub Pistols’ obscenity, and that an opportunity was lost to limit the damage.

46. The claimant alleges the respondent posted the press statement on Linked-In, the professional networking website, and so damaged her reputation. In our finding, she is mistaken about this. It was from a Linked-In news feed about this update to the press statement that the claimant learned that disciplinary procedures were in train.

47. Arrangements were made for the claimant to speak by telephone to Helen Murley, and her acting line manager Adrian Greer, next day. An email confirming the arrangement said that the respondent wanted to understand “what has happened from your perspective”. The claimant complains that she did not understand that this was to be an investigatory meeting, because the word investigation was not used, nor was she told she could be accompanied. (On this, the Tribunal notes that the respondent’s disciplinary procedure, in common with the ACAS Code of Practice on Discipline and Grievance, does not give employees a right to be accompanied at an investigatory meeting; respondent’s witnesses did however say that it was regarded as best practice).

48. Also that Tuesday, the Charity Commission contacted the respondent to remind them of the duty to report potential reputational damage caused by the story. The respondent replied that they had started disciplinary procedures, as well as posting a press statement. Much later, in September, the respondent informed the Charity Commission that they had decided the situation was not of the magnitude or significance to require a serious incident report.

49. Meanwhile, that afternoon Beverley Gallaher, Head of Employee Relations, contacted the claimant to provide moral support, including a link to the IPSO website on how to handle media siege, and the claimant explained what she and her husband were going through.

50. Finally that day, there was a second crisis meeting at 5.15 p.m. to review media coverage. By now there was a Facebook account called “Sack Angela Gibbins”, and the respondent’s customer services had received about 500 calls. A suggestion that the claimant place an apology on her Facebook page was discussed, but rejected because this would give the story a second wind. The respondent’s staff were noted to be taking sides.

### **Initial Investigation and Suspension**

51. On Wednesday 27 July 2016 was the first investigation interview. Katherine Heather, of HR, had prepared an agenda for Helen Burley and Adrian Greer to follow. This included a statement to the claimant that Katherine Heather would be investigating, and she would have a chance to comment on the report, which was likely to be completed by 7 August. In the meantime the claimant would be suspended on full pay, and later invited to a disciplinary meeting, probably in the week commencing 8 August.

52. In the telephone meeting at midday, the claimant, still under siege at home, and accompanied only by her husband, explained that she was not responsible for the original remark, that was the Dub Pistols. She had not seen all the press stories, the Facebook comments had been taken down, she had been quoted out of context. She explained that she was posting about white privilege, not about the original meme, and was expressing personal beliefs. The respondent already accepted that she had her privacy settings at their highest. There was discussion of how the story got out, and she conceded it could from friends of friends. She confirmed she did not mention her work on Facebook, and that Lisa George was not a friend; the respondent speculated that the press knew had got hold of the claimant’s salary through Lisa George as a former employee. The claimant explained it was a personal account, she only used Linked-In for work matters, and her Facebook page said “friends only – no work here”. As planned she was told that she was being suspended on full pay for breach of the Code of Conduct. There was also discussion about how she should handle social media comment, and about going to the police if threatened.

53. A suspension letter was sent to her at 3 p.m. The letter said there was potential breach of sections 8 and 10 of the Code of Conduct, specifically in relation to use of social media and upholding public trust.

54. Meanwhile, the chief executive, Ciaran Devane, had emailed Helen Murley asking: “is it possible to have a without prejudice conversation today pointing out that if the investigation went a particular way then summary dismissal might be likely, but if she were to resign then holidays and pay in lieu could be in play?”

55. A further crisis team meeting that day, monitoring media comment, noted 2,000 emails from followers of the Facebook page of Britain First (a right-wing nationalist group), and 150 comments on the respondent’s press statement.

### **The Investigation Report**

56. On Thursday, 28 July Katherine Heather prepared an investigation report. As signed off and sent to the claimant on Friday morning, the report summarised the position, based on interviews with the claimant, with Casia Zajac, and with the respondent's Chief Information Officer, plus a review of press and social media coverage of the story. It included extracts from the respondent's social media policy, disciplinary policy, and code of conduct. She reported the circumstances of the posts, and the actions to date. She reviewed the coverage and its impact.

57. There were quotes from the Sun, to the effect that as the claimant was a department head, it was not a private matter as claimed, as the respondent was receiving "£154.9 million of public cash a year to promote UK culture".

58. She also quoted from a story in the Daily Mail, a spiteful hatchet job, including:

"perhaps she will attribute her lapse to stress, the pressures of work, or perhaps one too many glasses of champagne at one of the BC's lavish taxpayer funded receptions."

In this context, several press stories were accompanied by a picture of the Claimant with a glass in her hand which had been taken at her wedding reception, probably obtained from her husband's Facebook page.

The article continued with other sarcastic references to the respondent's educational aim when

"its global head of estates sounds oafishly uneducated",

and commented that while the respondent had a mission to increase the UK's international standing,

"while the BC is busy working in the Middle East, to protect cultural heritage, Ms. Gibbins happily spits on Britain's cultural heritage",

leading to a wider attack on the respondent, suggesting that the respondent

"like many of our cherished institutions, has been hijacked by highly paid, leftist quangocrats... The apparatchiks who run it are well looked after. The council's chief executive earns £185,000 year, with a handsome pension to follow. And many of its employees had their children's private school fees paid for".

59. Thirdly, from print media, the report quoted from Vogue:

"the Gibbins indeed has a point, this little tirade is problematic because the BC has a royal charter and is patronised by none other than that terribly rich, rotten, advantaged preschooler's great-grandmother: HRH the Queen of England!"

60. Mention was made of overseas press articles, and of customer services having had 700 emails and calls from members of the public. A staff member carrying a British Council bag had been abused on the Manchester Metro by another passenger, who said "your organisation is disgusting". The Britain First

website was mentioned.

61. There were some quotes from posts on the British Council's webpage and Twitter, one calling for a public apology to the Royal family, another complaining "the British Council is supposed to present Great Britain in a favourable light. It is supposed to show many of the good aspects of our country. This highly paid (taxpayer funded) woman verbally abused a 3-year-old which has reflected badly on the council around the world. In any other job that person would be dismissed instantly, and she should be". Another quoted was that this statement brought "the name and reputation of the BC down into the gutter. This disciplinary action needs to be swift and the outcome well-publicised. Any person needs to be accountable for their statements on social media".

62. There is reference to one letter from an MP calling for a public apology.

63. The Chief Information Officer was quoted as stating that every individual at management level must ensure they were aware of the risks for themselves and for the organisation of their activities online, and that social media is a public space. There had been training on social media. Parts 8 and 10 of the Code of Conduct are quoted in full, though without identifying precisely what the claimant had done in breach.

64 The conclusions reached included that the respondent had suffered "significant adverse publicity around world", and that, although there was no indication the claimant had intended it, "by posting comments on social media she has brought the British Council into disrepute". Although there was no indication that she did so deliberately, "she has acted without due care and attention in breach of the Code of Conduct". She had taken precautions to separate work from personal comment, but "by posting comments online she immediately lost control of them".

65. Appended to the report was a detailed file of posts and the text of media comment. Several expressed disgust at an attack on a 3-year-old child. Others said the claimant's comments were racist. There are references to the hypocrisy of living herself on taxpayers' money. Some are abusive - "your little Britain is a fascist and racist nation"; "this bitch is racist end of and to insult a 3-year-old is beyond words". Many express criticism in more measured, though still forceful terms - "posting racist comment", "rich spoiled idiot, spouting about socialism while living in the lap of luxury and leaching from the public purse". Many call for her sacking. Many make reference to the damage caused to respondent's work, or attack the respondent directly, for example: "why would anyone have confidence in your organisation with someone like that working for you", and "your public grant should be removed forthwith". There is one rare comment on the claimant's right to free speech and expression of Republican views, and another urging the respondent to stick up for her against the Mail and the Sun. Some of those who refer to the right to free speech still object to an attack on a child.

66. The claimant maintained in evidence that there was no evidence that her posts *had* caused damage to the respondent's reputation. Reading this material, the Tribunal does not agree. Both the Sun and the Mail are widely read and quoted by other media; the public comments were many, and only a few can be dismissed as mindless abuse. Whether less damage would have been caused if the public had been aware the claimant herself had not posted the *abusive* words

about the Prince is another question which must be separately considered.

### **Developments before the Disciplinary Meeting**

67. On the morning of Friday 29 July the claimant read the report and sent Ms Murley a written defence: she had not made the abusive remarks and had been misquoted, they were her own views on the institution of the monarchy, not about the Prince or specific members of the Royal family. To the best of her knowledge her comments “should only be visible to my friends”; they will know her personal views. She asked if the press statement about disciplinary procedures could be amended to “investigating the position”, as she had understood the Wednesday discussion was informal, and not part of disciplinary process. She was still being harassed by the press. She hoped that going forward they could set the record straight.

68. Ms Heather says she saw this reply, but did not consider it materially impacted on her findings.

69. The crisis team met again to consider the nature of the press threat. Comment on Facebook and Twitter seemed to be dying down. There was discussion on whether to correct any material that had been put out. The conclusion was that to do so would feed the story: “any statement on the outcome of disciplinary to correct inaccuracy would likely serve to reignite a further wave of abuse”.

70. Also that Friday morning the Mail on Sunday sent a list of questions to the British Council in connection with an article they proposed to publish that weekend. The questions asked indicate that the article would be critical of the British Council’s spending of public money, focusing on salaries and school fees.

71. At midday on Friday there was a further telephone discussion between the claimant, Beverley Gallaher and Helen Murley, which amounts to a protected conversation though neither party claims privilege. It was described as “an informal conversation to review where we are”. The claimant was told there was a lot of evidence to suggest there was a serious breach of the Code of Conduct, and it was a disciplinary issue. The respondent had also been told by the Mail on Sunday that they would be running a story about the lack of ethnic diversity in the respondent’s senior management, that £1.2 million was spent on school fees for executives, and this would have “big reputational impact” and “the damage from the article would be so great that we would have no option but to dismiss you for gross misconduct”. (There was a factual dispute as to how this was put - the account of the claimant and Beverley Gallaher that the respondent was blunt about the possibility of dismissal contrasts with Helen Murley’s more nuanced statement that dismissal could be “an option”. We prefer the former). The claimant was then told that she had an opportunity to take back control. If the claimant offered to resign that would be accepted.

72. She was asked to let them know by the end of the day, or by the end of the weekend.

73. In the event the claimant did not resign. Instead, she contacted a libel lawyer, who wrote on her behalf to the Mail on Sunday. As a result the planned story did not appear.

74. On 1 August the claimant was invited to a disciplinary hearing on 3 August (though it was then put off to 4 August). It is not known when or why the process was accelerated from the week beginning 8 August, the likely timescale indicated in the suspension letter. The stated purpose of the hearing was:

“to consider whether comments made on Facebook and subsequently published in various media had brought the respondent into disrepute, or” breached sections 8 or 12 of the British Council’s Code of Conduct specifically in relation to your use of social media and upholding public trust”.

She was warned that if either was upheld it would be considered gross misconduct and her employment might be summarily terminated.

### **The Dismissal**

75. The disciplinary hearing on 4 August was held off site. The claimant was represented by her trade union, the FDA. Rebecca Walton chaired. Katherine Heather, the investigator, provided HR support, but in our finding this was limited to notetaking. She made only one comment, and she did not take part in post-hearing discussion of what the finding should be.

76. The hearing lasted 2 hours. The findings of the investigation report were summarised. The claimant was then asked for her views, and she went over material already mentioned – that her Facebook page made it plain for her personal views, that the security settings were at their highest, she commented on the monarchy not on the Prince himself, that she had been misrepresented, that she had been attacked and was entitled to protection, her own reputation was damaged, moreover she had herself taken steps to stop the Mail on Sunday article, which suggested to her that the respondent could have done more themselves to limit the story’s damage.

77. There followed discussion of her knowledge of the social media advice issued at the time of the EU referendum result, and of how it was easy to find out online who she worked for. The claimant argued that she was not careless or reckless in the areas she could control. She pointed out that she had in the past commented on the welfare reform bill, and on the bombing of Syria, and that had not leaked or caused damage. When it was suggested she should have reflected about commenting on a 3-year-old, the claimant referred to an earlier comment on the picture of Alan Kurdi on the beach, which had not leaked. Her union representative added that even if it was misconduct, it was not gross misconduct because the claimant did not intend harm to the respondent’s reputation. Freedom of speech was asserted.

78. At the end of the meeting Rebecca Walton in this context said of freedom of speech that she would fight for people’s rights to express their views. She acknowledged that some of the media reporting had been misleading, and that the more unpleasant correspondence came from members of the public who had picked up the statement with obscene expletives, and said: “if not for that conflation none of this might have happened. That is the root cause of it”.

79. After the hearing Rebecca Walton sought legal advice by telephone. By 9 p.m. - five hours later - she had decided the claimant should be summarily dismissed, and she sought and obtained Helen Murley’s authority to do so.

Getting authority from HR Global Director is required to dismiss someone of the claimant's seniority.

80. It was suggested, for the claimant, that in reaching this decision Rebecca Walton, whose concluding remarks had acknowledged that much of the adverse comment and abuse was a consequence of misleading reporting, had been got at to change her mind, and to follow the corporate view that the claimant must be dismissed. The panel's assessment of Ms. Walton, having heard her give evidence, is that she is a tough, serious and independent-minded woman, who considered the arguments carefully and made her own decision. If that accorded with what was already the corporate view, it was nevertheless her own.

81. The dismissal letter is dated 8 August. The writer recites the background facts before moving on to the reasoning. It was noted that despite the privacy settings, the comments had reached the wider public online, "and an immediate connection was drawn between you and the British Council", and that "although you are not the author of the comment containing expletives, your comments were in the same thread containing these expletives directed at a 3-year-old". She did not accept the criticism of the press team not taking steps to contain the story. She recognised the claimant's right to freedom of expression, and that she had never intended that her comments should be widely reported. "Nevertheless it is my view that as soon as you posted comments on Facebook, whatever the privacy settings were which you used, you necessarily lost control of how comments were then used or reproduced". She concluded that her actions had brought the British Council into disrepute, and by her actions she had "acted recklessly", in serious breach of sections 8 and 10 of the Code. Though mindful of her unblemished disciplinary record and contributions, and her apology to Kensington Palace, it was "appropriate to terminate your employment without notice".

82. Amplifying her reasoning in evidence, Ms Walton said that discussion of privacy settings missed the point, as it was common knowledge that "things like this can happen". The claimant had lost control of her comment.

83. The damage to the British Council's reputation was of crucial importance to the decision, in her view, as the Council is:

"not a marketing or advertising body. Instead it operates through the development of the trusted engagement over a long period of time",

and was respected for its

"high level of integrity, honesty... also of respect".

The loss of reputation maimed the organisation.

84. Dismissal was because of her:

"reckless lack of judgement, inexcusable in someone in a senior position".

The claimant not make the worst comments about Prince George, but they were made on the same thread as comments that were negative about a 3-year-old child, and:

“in responding at all she allowed herself to be associated with the fucking dickhead comment”.

In the light of the guidance given, particularly in the recent post-referendum period, it was: “conscious risk-taking”.

85. It was clear to the Tribunal that it was particularly distasteful to her that the claimant did not disassociate herself from the attack on a child.

### **The Appeal**

86. The claimant exercised her right to appeal. In her letter of appeal she made a number of points in three areas: procedural irregularities, new evidence, and disproportionate penalty. This included material on the procedure adopted, suggesting the outcome was predetermined: the press statement could have clarified that she did not make the abusive remark; the suspension was not long enough for proper investigation, and the speed of the process removed the “critical distance” which would have led to a more considered decision; the invitation to resign was bullying at a time when she was trapped at home; the disciplinary meeting had initially been blocked out for one hour only, Rebecca Walton was restless at the start, and curt in her remarks. On the new evidence point, she said the comment was well below the line. The respondent’s former chairman (Helena Kennedy) was a well-known republican, so it could not be inconsistent with British Council values to be against the monarchy; inadequate steps had been taken to restrict reputational damage. On the penalty, she said she had not abused trust, but was the victim of a malicious third party (meaning whoever identified her as British Council staff and took the remarks to the Sun), the apology had been accepted by the Palace. Finally, the respondent was confusing the “noise” of public opinion with the “signal” of damage to its own reputation.

87. The appeal was heard by Dr. Jo Beall over four hours on 13 September 2016. She had obtained more evidence of social media comment, and expressed her horror at the violence threatened to the claimant in some tweets, especially as it came in the wake of M.P. Jo Cox’s murder the previous month. All the claimant’s points were discussed with her.

88. Dr. Beall did not uphold the appeal. She wrote a letter dealing with the claimant’s points on by one. The press statement (mentioning disciplinary procedures) was precipitate, but it was right to move quickly to retrieve the respondent’s reputation. By posting, the claimant had lost control of her statements. The actions of the press team were not relevant. Helena Kennedy’s republican position could be distinguished because she had not commented on a three year old child. “Reckless” was not an inappropriate description of the claimant’s actions.

89. In evidence, she was asked about a remark in her letter about the British Council’s work with children: she explained that the respondent taught all kinds of children across the world. Some of these children were white, and some were privileged. The respondent had a moral duty to be “supportive and kind”. She did not think it right to attack children.

90. Further, she did not think the claimant’s account to the respondent for her acts had been a “senior response”. What was private was a matter of interpretation, and if “private”, had been a:



“slip of judgment on a Sunday night on a public website page”.

As for whether a lesser penalty would have been appropriate, it was not, because the claimant had not “acknowledged any culpability for what was a mess”.

## Relevant Law and Discussion

### Philosophical Belief

91. The Equality Act 2010 prohibits discrimination because of religion or belief. Section 10 (2) says this means:

“any religious or philosophical belief and a reference to belief includes reference to a lack of belief”.

92. The case law on philosophical belief is reviewed by the Employment Appeal Tribunal in **Grainger plc and others v Nicholson UKEAT/0219/09**. The tribunal must assess, as a matter of fact, whether the belief is genuine.

93. It must also be a belief, not an opinion or viewpoint based on the present state of information available. This is a reference to **McClintock**, a case where the claimant was disciplined because he did not think that children should be adopted by single sex parents. He made it clear his was not a fixed belief, but a view based on current research, which might change if further research reached other conclusions about outcomes of such adoptions. An opinion (as distinct from a belief) was not protected.

94. The belief must concern a weighty and substantial aspect of human life or behaviour; it must attain a certain level of urgency, seriousness, cohesion and importance. Finally, it must be worthy of respect in a democratic society, not incompatible with human dignity, and not conflict with the fundamental rights of others. Political beliefs were not excluded just because they are were political, but political beliefs should be distinguished from political opinions. Beliefs in Socialism, Marxism, Communism or Free-market Capitalism might qualify.

95. With this guidance in mind, we considered the evidence.

96. The tribunal accepts that the claimant’s belief is genuine, as did the respondent’s witnesses.

97. We also concluded that it was a philosophical belief, rather than an opinion. The claimant’s articulation of her belief was not easy to follow – republican heads of state are also heads of the Armed Forces (the US president is commander-in-chief, for example), and the death penalty exists in democratic (the United States again), and sometimes socialist republics (Cuba). But lack of logic cannot be fatal, otherwise much religious belief might fail the test. We understand the claimant’s belief as an identification with opposition to inherited wealth and privilege, in which the monarchy is what now remains in Britain of an earlier and wider system of rule by an aristocratic elite. This sits with left-leaning views on other matters of social organisation, even though others on the left may take more pragmatic views on the role of the monarch in the UK constitution. The extent to which that view of the monarchy is symbolic of a wider evil in social organisation is characteristic of belief rather than fact-based opinion.

98. The belief is also, as a belief about how we should be governed, weighty and substantial.

99. We concluded that it was a philosophical belief, such that its holders are to be protected from discrimination.

### **Direct discrimination because of philosophical belief**

100. The Equality Act, section 13, defines direct discrimination as where a person discriminates against another:

“if because of a protected characteristic he treats that person less favourably than he treats or would treat others”.

The wording implies a comparison with a material comparator: someone (actual or hypothetical) who did not manifest a republican belief but caused similar public criticism of the Respondent. The use of comparison tests the real reason for the employer’s treatment of the employee.

101. Discrimination can be hard to prove, because it is rarely admitted, and because the discriminator may genuinely not recognise what he is doing. The Act therefore provides a special burden of proof in section 136:

“(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 subsection (2) does not apply if A shows that A did not contravene the provision”.

102. In **Igen v Wong (2005) IRLR 258**, this is set out as a two-stage test. The tribunal first assesses what facts the claimant has proved, and whether discrimination could be inferred from those facts, in the absence of explanation from the respondent. If prima facie there is a case, then any explanation by the respondent should be considered. Other cases indicate that a Tribunal need not follow the two stages rigorously, but should focus on the reason why the respondent acted as it did, for example, **Madarassey v Nomura International**, and **Nagarajan v London Regional Transport (1999) IRLR 572**, where it was observed that deciding the claimant’s treatment “will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator”. Simple unreasonableness, without other evidence that the protected characteristic is the reason for it does not imply discrimination - **Zafar v Glasgow City Council 1998 IRLR 36**. EU Council Directive 2000/78/EEC sets out a general framework for equal treatment in employment, and provides that there shall be “no direct or indirect discrimination whatsoever” on the protected ground. For that reason, if the protected characteristic (here, republican belief) was one of the reasons for the treatment, that is sufficient if it is more than minor or trivial, even if it is not the main reason – **London Borough of Islington v Ladele (2009) IRLR 154**, a case about manifestation of Christian belief by a registrar who did not wish to officiate (as she was required by the employer) in ceremonies for same sex couples.

103. The protection of religious or philosophical beliefs includes manifestation of

that belief, as provided in article 9 of the European Convention on Human Rights, though subject to limitations for protection of the rights and freedoms of others. Tribunals may have to consider whether the treatment complained of was because of the manifestation of the belief, or because of the complainant's inappropriate conduct - **Wastenev v East London NHS Foundation Trust (2016) IRLR 388**, a case where a Christian claimant was disciplined for attempting to convert a Muslim colleague.

104. What has the claimant proved from which we could conclude that there was discrimination?

104.1 Her posts concerned the Prince being "Royal", and stated that her criticism was based on Republican belief on the role of the Royal family in a modern democracy.

104.2 This post was conflated by the media with the Dub Pistols' abusive language, and the authorship was not clarified in respondent's press statements. The conflation with the obscenity stoked the outrage, and the obscene words about a small and famous child ensured widespread coverage of the story.

104.3 Even without the obscene words, in our view, there would have been allegations of hypocrisy and comment on the claimant's own apparently privileged position, but more limited in volume because the matter would have attracted less publicity.

104.4 Most of the media criticism rested on support for the monarchy. Some sections of the print media, and many of the social media commentators, took the view that holding Republican opinions was incompatible with any employment by respondent.

104.5 The Respondent expressed concern for their reputation, but did not consider it significant enough for a report to the Charity Commission.

104.6 The Respondent did not, or could not, when preparing the investigation report or writing the invitation to the disciplinary hearing, identify exactly how the claimant's actions breached the Code.

104.7 The pressure of the media storm led to a demand for an early decision, and prevented clear thinking about what the claimant had or had not done, and whether expressing a view that an inherited monarchy was wrong should lead to dismissal. An immediate apology to Kensington Palace was insisted on by the respondent.

104.8 The respondent referred to its particular relationship with the monarch as its Patron when identifying how the claimant brought respondent into disrepute. All this points to the centrality of the criticism of the monarchy in the respondent's decision to move to discipline and then dismissal.

105. What are the Respondent's explanations of why their action was not because of the expression of republican belief?

105.1 Principally, it is not that she expressed republican beliefs, but that she had publicly expressed her beliefs in the context of an attack on child. The fact that the child was royal, and attracted much interest from the media and its readers,

gave the story traction.

105.2 The claimant's views were well known, and had not hitherto been a problem for the respondent - though they had been manifested within the organisation at a low level, and did not interfere with her duties.

105.3 A known republican, Helena Kennedy, had chaired the trustees for several years.

105.4 Rebecca Walton was asked about her own views on the monarchy, and cautiously volunteered that she had considered the alternatives, and was not opposed to monarchy as an institution, but on a personal level chose not to accept invitations to celebrations of Royal birthdays or anniversaries.

104.5 The claimant's right to freedom of expression was acknowledged.

105. For the tribunal, the issue is about public manifestation of belief, in the form of the Facebook comments, though the claimant did not intend them to be available to more than the section of the public represented by her 150 Facebook friends.

106. In cross-examination, Jo Beall referred to criticism of the Patron being a problem for the British Council, rather than criticism of the monarch and her family. She said that if Elton John had been the patron and the claimant had expressed trenchant criticism of same-sex parents adopting children, as he has, they would have considered discipline. This is a valid point, but we are not sure that Dr. Beall had it in mind at the time, if only because it is so close to the facts of **McClintock** that it may have arisen in discussion with lawyers subsequently.

107. When Rebecca Walton and Jo Beall both, in various ways, referred to the claimant's comments being made about a child, that seems to us the true explanation of the decision that what the claimant had done was both unacceptable, and damaging to the respondent's reputation. Both showed distaste for an association with an attack on a 3-year-old. So had the claimant's Facebook friend, Alex, and so did other social media commentators quoted in the investigation report. The claimant did not post the abusive comments about the Prince, but she did associate herself with the comment about the Prince by the reference to his cheeky smile and privileged future.

108. There is a widespread social consensus that children are innocent, that is, outside the fray of public and political life, and to be protected from it. Children are off limits. It may be related to children not being able, as adults are, to answer back, or to children needing space to develop to maturity before contending with life's hardships. That consensus that children are to be protected is shown by rules protecting children from being identified in trials of adults connected with them, or about publishing photographs of celebrities' children. There is greater public horror at attacks and assaults on children, or at accidents involving them. There is public concern about child carers and child poverty that goes beyond concern about adult carers and adult poverty. If the claimant had reflected, she would have recognised that the enormous power of the pictures of Alan Kurdi dead on a Turkish beach, to which she referred in her post, which had led to a surge in international concern for the refugee crisis, and in donations to refugee charities, and to a (temporary) increase in the number of refugees admitted to European countries, was because of the poignancy of his young age. Numerous images of older migrants drowned attempting to reach the EU had not had that

impact.

109. Had the claimant made, or associated herself with, unkind comment on any other child, which had attracted public attention and criticism, we think those who decided to dismiss her and not to allow her appeal against dismissal would have disapproved of her conduct, and concluded that she lacked judgment. The element of publicity for the comments would have informed any decision about disciplinary action. If the child was in the public eye (it is hard to think of a child whose image is more well known in Britain than Prince George) the comments would have attracted public comment, proportionate to public recognition of the image. Put another way, if the claimant had made comments about privilege in a similar context about a more senior member of the royal family, we think her defence of private comment on a matter of belief would have been more persuasive, she would have received more measured sympathy, and she and the respondent would have weathered the storm. The evidence of Helena Kennedy's association with the Respondent in a public role, despite public expression of republican belief, is telling here.

110. We concluded that it was not the expression of republican belief that was the reason for concluding that the claimant had lacked judgment and thereby brought the respondent into disrepute. It was that she had associated herself with a distasteful and personal attack on a small child.

### **Indirect discrimination because of philosophical belief**

111. Section 19 of the Equality Act provides:

- (1) a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's
- (2) for the purpose of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of these if –
  - (a) A applies, would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

112. The provision, criterion or practice pleaded by the claimant is: "that employees must never make statements about politics and/or statements which are regarded by the respondent as being controversial or sensitive".

113. The respondent denies that it had such a provision criterion or practice, or if it did, that it applied it to the claimant, or that it would put people with a republican belief at a particular disadvantage when compared to others, or would put the claimant at a particular disadvantage. Finally, the respondent states that if there is such a practice, it is a proportionate means of achieving its legitimate aim, which is:

"the protection of the respondent's reputation, upholding public trust in the respondent and giving people confidence in the integrity of the respondent".

114. The claimant argues that the provision or criterion comes from the Code of

Conduct, section 8, that employees must never behave: “in a manner which may damage the British Council’s reputation”, and section 10: “never make statements on or off the record about politics or on any subject which may damage our reputation or cause a loss of confidence in the British Council”. The Respondent counters (taken from a document on its website– “the future of the UK –discussing the forthcoming referendum on Europe), that this is not the case: “our staff and our partners reflect the diversity of the UK. Their views therefore reflect the broad spectrum of opinion in the UK”, while going on to stress that it is “organisationally apolitical”. The EU referendum guidance already cited had stated “we are all entitled to express and share personal views on social media”, before (the tribunal notes), qualifying that view with the with a warning that even on a personal account they could be identified as having an association with the British Council which could in turn have an impact on the British Council’s reputation.

115. The Tribunal concludes that was a provision criterion or practice not to express political views in a public forum where the person holding those views could be associated with the British Council.

116. Did this put republicans in general, or the claimant in particular at a disadvantage? Arguably, it put anyone with political views at a disadvantage, compared with a with no strong particular views. The claimant also argues that the respondent’s particular relationship with the Royal family through its patrons, referred to explicitly by Ms Walton and Dr Beall, means that statements about the privileged status of the Royal family in Britain, such as may be made by republicans, are not acceptable, and republicans, and the claimant, are at a disadvantage thereby. If the provision criterion or practice is read as a requirement not to criticise the (royal) Patron (by name or by implication), then republicans are at a disadvantage if they want to express their views.

117. If the Tribunal accepts that there was such a practice (no public criticism of the monarch or her family) in operation, whatever the general statements about entitlement to share personal views on social media, the real issue in this claim is that of justifying the practice.

118. The legitimate aim asserted is maintaining public trust, both in Britain and overseas, in the reputation of the British Council as an independent organisation representing British values of tolerance, free speech, and democracy, but outside politics. The Tribunal accepts that an employer’s desire to protect its reputation (whether it is a business or non-profit making organisation) is a legitimate aim. If that image is damaged, it finds it difficult to achieve its objectives. This is set most recently in **Ewieda v United Kingdom (2013) IRLR 231**; the Equality and Human Rights Commission leaflet “Religion or Belief: a Guide to the Law”, aimed at UK employers, says “genuine organisational needs” will almost always be accepted as legitimate aims, and then gives examples, which include: “maintain a brand or company image”, and “ensure neutrality in delivering public services”.

119. The Tribunal accepts that protection of its reputation was a legitimate aim of the Respondent, by restricting staff from expression of a politically controversial view (abolition of the monarchy) in a way which might damage the British Council’s reputation for fairness, tolerance and neutrality, is a legitimate aim.

120. The real issue is whether the requirement – breach of which in this case led to disciplinary action and dismissal – was proportionate to the legitimate aim. As

stated in **Homer v Chief Constable of West Yorkshire (2012) UKSC15**, “part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim of the employer”.

121. It is for the Tribunal to judge whether the provision is proportionate to the legitimate aim, not whether a reasonable employer would have judged it proportionate. It is not clear in this case whether any reputational damage would have been done if the claimant had said something like: “there is a political debate in Britain about whether a hereditary monarchy is the right way to do things; I personally think it isn’t”; or if in joining the thread of comment she had said “there is a point here about white people having privileged status, and about whether the royal family should have the privileges they do, but it’s not fair to attack a kid”. Both could have breached a requirement for political neutrality, but it is unlikely that either would have damaged the respondent’s reputation for fairness and tolerance; if they had led to media attack they could have more easily have been defended as free expression of a private view. The damage to reputation came from the manner in which the view was expressed, both in her own words and by association with the offensive meme, in a forum where she was identifiable as a British Council employee. In our assessment, being seen to maintain the dignity of and respect for individual members of the Royal family was important for an organisation with the British Council’s mission in promoting the values of a country which is, for the time being, a constitutional monarchy, not least because tolerance, respect and fairness are seen as part of those values. Republicans could express their views publicly, but the expression of those views must be consonant with those values. The way the claimant expressed her views was seen by a Facebook friend, some of her colleagues, and sections of the public as unfair to children, and by some of the public, and media, as hypocritical (because of the reference to living on public money) and even racist (entering the debate about white privilege), all as set out in the investigation report. It is also the case that the way the story was picked up and presented in the press led to a major media storm which had started to go beyond outrage at the claimant personally and was widening to focus on the legitimacy of the way the Respondent conducted its operation, and if this persisted, public debate on their role, in the press and in Parliament, could have led to funding cuts or even rethinking of its necessity. It was not fanciful to contemplate permanent damage. That may not have been the claimant’s intention, but she acted unwisely given the warnings already given to the respondent staff about the dangers of social media, and in any event she knew she was posting to 150 people, enough to be regarded as a section of the public, and too many for her to be confident that they would all agree with her. The respondent’s aim had to be balanced against the claimant’s ability to manifest a republican belief. The belief did not require her to associate herself with a provocatively offensive meme without reservation, and she could have manifested her belief that the monarchy had no legitimate role in a modern socialist democracy while saying that she had no quarrel with infant members of the family. Taking disciplinary action for damaging the respondent’s reputation by having run the risk, and the risk materialising, was a proportionate means of achieving the respondent’s aim of preserving its reputation.

122. Our conclusion was that the claim of indirect discrimination was not made out, because if the requirement did place the claimant and republicans at group disadvantage, it was justified as a proportionate to the legitimate aim.

## Unfair Dismissal

123. The right not to be unfairly dismissed is conferred by the Employment Rights Act 1996, which at section 98 states that it is for the employer to show the reason for the dismissal, and that it is one of the potentially fair reason is set out in that section. A dismissal for conduct is potentially fair.

124. Once the reason is established, the tribunal has to determine:

“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 entreating as a sufficient reason for dismissing the employee and
- (b) shall be determined in accordance with equity and the substantial merits of the case”

125. In deciding whether an employer dismissing an employee for misconduct acts fairly, the tribunal must decide whether the employer’s belief in the employee’s guilt was genuine, whether that belief was founded on the facts found after a reasonable investigation, and finally, whether a reasonable employer would have dismissed for that reason – **British Home Stores v Burchell (1978) ICR 378**. Reasonable employers may have a range of different responses to particular conduct. Employment Tribunals should not substitute their own judgement of what they would have done for that of a reasonable employer.

126. With regard to the investigatory process, Tribunals have regard to the ACAS Code on Discipline and Grievance, with a minimum procedure involving employees knowing what conduct they are accused of, having representation if they wish it at the disciplinary hearing, and a right of appeal. If there are defects in the process, the tribunal must “evaluate whether that is so significant as to amount to unfairness” – **Sharkey v Lloyds Bank plc UKEATS/0005/15**. There is made at one stage can be corrected as another, and an overall approach to the process is required – **Taylor v OCS Group Limited (2006) ICR 1602**.

127. If the reason for dismissal is not conduct, but damage to reputation, that can be “some other substantial reason justifying dismissal”. Such dismissals have been found fair, as in **Leech v Ofcom (2012) IRLR 839** which identified that the issue was not whether there was injustice to the employee, but what it was reasonable for the employer, in the circumstances, to do.

128. The claimant argues that a number of features of the process by which she was dismissed show that it was unfair.

129. She points to the inherent unfairness when it was accepted that her intention was to limit the comments to Facebook friends, and in treating her as in some way responsible for the media storm, when the respondent accepted that she had high privacy settings, and did not intend the damage (the investigation report) . It was unfair that they moved from acting “without due care and attention” to holding that she was reckless. She also argues that it was unfair that much of the damage arose from the initial misreporting, conflating remarks she



made with the “fucking dickhead” remark of the Dub Pistols, when the Respondent could have intervened early to assert that there had been misreporting, as she had intervened to stop the Mail on Sunday story.

130. It is also argued that the respondent never identified in the suspension letter or in the invitation to the disciplinary meeting exactly in what way she had breached the code of conduct, so she could not focus her answers to their concerns.

131. Perhaps the most damaging argument against the respondent is the speed of the process, as it is argued that it decided at an early stage that the claimant must be dismissed as an essential part of damage limitation, before there had been any investigation or discussion with her to find out how this had happened and this was then “reverse engineered” by managing the process. This is said to be shown by the comments of the human resources personnel and the minutes of the crisis meeting. The unusual speed with which proceedings moved on is said to show that the respondent was “hellbent on getting the disciplinary hearing on with a remarkably short period of time”, and before it could assess whether there had been actual reputational damage; had the decision been left until the storm died down, it is likely that the reputational damage would be seen in context, as it was when the respondent represented it to the Charity Commission that September as not meriting a major incident report. So this is put two ways: they had decided the outcome and the process was window dressing; alternatively, they had not prejudged the outcome, but made the decision too quickly to be able to assess how serious this episode really was. The respondent is said to have paid too much heed to sections of the press - and monarchists on social media - who called for her sacking on the basis that holding Republican views was incompatible with employment by the respondent. The Tribunal was invited to infer that the claimant was “ejected because of the substantially false and pro-monarchy media storm rather than by any actual misconduct which the claimant could reasonably be regarded as responsible”. She was punished for the story as misreported but not what she actually did.

132. The respondent argues that the claimant did or should have appreciated that her comments were not limited to the Facebook page, or appearing on a thread on the Dub Pistols’ page, over which she had no control, as shown by the fact that all comments had been taken down when she came to look at them. In any event, the respondent argues, 150 people is a section of the public. On conflation and misreporting, it is argued that not all the adverse publicity was related to the abuse, and some of it was clearly prompted by the use of the expression white privilege. The failure to correct the wrong attribution of the expletive was not done to damage the claimant, but a reasoned decision not to fan the flames by giving the media another excuse to run the story again. It is asserted that the facts are not seriously disputed, and the decision-makers made their own decisions based on the facts, not from any pressure from others in the background. The respondent points to the very recent guidance on the use of social media in the context of the referendum, and that the claimant is a senior employee who understood the responsibility for the British Council’s reputation, as justifying the decision-makers’ conclusion that she was responsible for the consequences of her careless action.

133. If it is held that her conduct was not the reason for dismissal, it is argued in the alternative that a breakdown of trust and confidence because of her comment disparaging of a 3-year-old child, as well as freestanding “ongoing and sustained reputational risk” were substantial reasons for dismissal.

## Discussion

134. It is the view of the tribunal that the respondent held a genuine belief that the claimant was guilty of misconduct in carelessly posting remarks associated with obscene abuse of a child. The respondent appreciated that there was a degree of misreporting, as the obscene language did not come from the claimant, but nonetheless found that the claimant was at the very least careless in associating herself with the remark. It was that association that caused the huge and overwhelmingly hostile publicity. In any case it was not just the obscene abuse that led to critical comment, as some of it was about the claimant's own contribution. It is disputed that the code of conduct was specific enough to cover what she did, but it is our finding that the code made clear that employees must be conscious of public attention and that what they did or said could lead to adverse criticism of the organisation they worked for, and must be careful of its reputation. Employees had also been warned about the dangers of illusory privacy on social media. It was not clear to us why the claimant did not consider that this warning only applied to posting about the European referendum result.

135. There was no substantial criticism of the factual findings of the investigation report. Although Ms Heather did not consider the claimant's views required amendment of the report, the claimant herself was able to articulate her views at the disciplinary hearing, and then at more leisure and in writing in her letter of appeal.

136. As for the speed of the investigation, it is clear that the process was fast moving, especially by the standards of public organisations. It did not in our view mean that the investigation report was flawed, or less than thorough. In view of the tribunal, it was a competent report.

137. Turning to the criticism of the speed with which events moved, the claimant was having to give answers, at any rate to investigation, while under media siege, when she had difficulty appreciating the objective picture, or even the extent of the damage. However, in our view, by the date of the disciplinary hearing, she had had the opportunity to assimilate the investigation report's findings, and was able to answer them. It is not clear what else she would have said with more notice. In any event, if this was a defect, it could be put right by the appeal process, in which the claimant was able to compose a reasoned and measured defence.

138. The criticism that the speed of the investigation indicates that the conclusion was forgone has to be taken seriously. We did not think that the human resource personnel's remarks on 27 July about dismissal as a conclusion indicate that this had been decided on: it is part of the job of human resource personnel to contemplate the different routes that employees and employers may go down, faced with a set of circumstances, and plan accordingly. We were more concerned about indications that the chief executive had taken a view that this employee must go in order to appease public criticism, throwing her to the wolves to keep them at bay so to speak, such as the discussion about resignation that preceded the disciplinary hearing, and bringing forward the hearing date by about a week. However, the people who made the decisions on dismissal and the appeal did so thoroughly, and gave their own reasons, based on the

investigation, and, we thought, with some sympathy for the claimant's predicament, and appreciating that she did not foresee, let alone intend, the media storm, even if they thought she should have done. While there must have been apprehension of pressure in the background to dismiss, we think the decision was made on its merits and within the process.

139. The claimant has criticised the respondent for reacting too quickly, in that waiting, and taking a more measured approach to assessment of the damage, would have put it in context, as an event limited in time, without long-term consequences. This was certainly an option, and the tribunal considered that some reasonable employers would have considered lesser discipline, such as a final warning, as a way of appeasing critics, and being proportionate to the claimant's lack of intention to do harm. Nevertheless, there was ample evidence at the time of substantial damage to reputation, which was starting to move from the claimant as an individual to the organisation as a whole. There was also the point, often made in the context of warnings as an alternative to dismissal, that the claimant had shown no sign of accepting responsibility for the reputational damage, so that a warning, even if final, might not be effective. It was also the case that the story had died down by the date of the appeal, so Dr. Beall could take a more measured approach to whether dismissal was the appropriate response now that media pressure had eased, but she still upheld the original decision and we could not say that her decision was wrong. It was reasoned, and careful.

140. Looking at the question of the claimant's responsibility for her comment becoming widely known, we note the recent warning issued to staff about the lack of privacy on social media, but also accept that it was reasonable for the respondent to hold the view that even a group of 150 Facebook friends poses a risk. Counsel for the claimant used the analogy of what a host says in a speech at a wedding as a private setting for remarks, but wedding receptions, more than many social events perhaps, will comprise a disparate group of people whose views on a particular topic may not be known to the host, who might be unwise if he has any public role to consider this a suitable venue for expressing a private opinion, even if a guest making them public might be an abuse of hospitality.

141. Stepping back, reviewing the process of as a whole, no member of the tribunal was able to say that no reasonable employer could dismiss the claimant for these reasons and after this process. A robust leadership may have sought to face down the press by disciplining the claimant short of dismissal, but it cannot be said the decision was one that no reasonable employer could have made. Clearly the claimant deserves some sympathy for her slip of judgment, but that does not mean the decision was unfair.

### **Wrongful Dismissal**

142. The claimant was dismissed for gross misconduct without notice. The wrongful dismissal claim is that she was not guilty of gross misconduct, so the failure to give notice was in breach of the contract of employment.

143. In deciding this claim, the Tribunal must decide whether the claimant's conduct amounted to gross misconduct. It is not reviewing whether this was the action of a reasonable employer.

144. Misconduct is gross where it amounts to a deliberate intention to disregard

the essential requirements of the contract - **Laws v London Chronicle Ltd 1959 1WLR 698**, and gross misconduct has also been described as conduct which “must so undermine the trust and confidence which is inherent in the particular contract of employment that (the employer) should no longer be required to retain (the employee) in his employment” – **Neary and anor v Dean of Westminster 1999 IRLR 288**.

145. The claimant’s contract of employment provided three months’ notice of termination on either side. The contract also refers the employee to the policy on disciplinary action. This policy states that the code of conduct and performance management documentation set out the standards required of the employee. It also sets out a non-exhaustive list of conduct which might be considered to be gross misconduct. As well as theft, fraud, assault, incapability through drink or drugs and serious insubordination, it lists “bringing the British Council into disrepute”, “acting deliberately or recklessly in serious breach of the Code of conduct”, and “showing gross negligence in the performance of the job”.

146. The respondent’s stated reason for dismissal was “reckless lack of judgment, inexcusable in someone in a senior position”, and that posting as she did was “conscious risk taking”. The appeal decision concluded that “reckless” was no an inappropriate description.

147. The Tribunal agrees that “reckless lack of judgment” which had caused disrepute” is sufficient for gross misconduct. Does it agree that there was “reckless lack of judgment”? We were handicapped by the lack of expert evidence on Facebook settings, little practical experience of Facebook use of our own, and little evidence from the claimant on the technicalities of privacy settings and posting on threads of comment. Nevertheless we agree that posting controversially expressed views associated with an obscene remark about a child to 150 people by itself raised a risk that at least one of those might be so outraged by her comment as to pass it on, even if she was not in fact posting onto the Dub Pistols page - which could have occurred, and is not shown not to have occurred. The claimant agrees that her remarks would have been unacceptable if associated with the British Council. Against the information to staff about social media use, this was on a par with gross negligence, and did amount to reckless risk taking. It did also bring the respondent into disrepute. It is relevant that she was a senior employee. It was conduct undermining the respondent’s trust in her to express her views responsibly and not to bring them into disrepute. In view of her refusal to accept she had done wrong they could have no confidence something similar would not happen again. They could not be required to retain her in employment.

148. While accepting the publicity afforded to her posts was not courted deliberately, we find there was gross misconduct.

## **Delay**

149. This was a reserved judgment, and the parties have had to wait some time for it. The panel reached a collective conclusion in July, and the typed text down to paragraph 110 was complete in its current form by 2 August, leaving the rest in note form. This is said to reassure the parties that the essential decision making was done at a time when the evidence and submissions were fresh in our minds. Heavy sitting commitments have meant there has been no time to complete the text until now, which is regretted.

Employment Judge Goodman  
25 October 2017