EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104882/2018 Preliminary Hearing at Edinburgh on 11 December 2018

Employment Judge: M A Macleod (sitting alone)

Michael Steiner	Claimant In Person
Heriot-Watt University	Respondent Represented by Mr M Leon Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

(1) That the respondent's application to strike out the claim of discrimination on the grounds of religion or belief is refused, as is the respondent's application for a deposit order in respect of this claim;

(2) That the claimant's claim of unfair dismissal is struck out on the basis that it has no reasonable prospect of success; and

(3) That the claimant's application for a restricted reporting order in relation to these proceedings is refused.

REASONS

1. In this case, the claimant presented a claim to the Employment Tribunal on 23 May 2018, in which he complained that he had been unfairly dismissed and discriminated against on the grounds of disability and religion or belief by the respondent, and also that he had been subjected to a "Permanent bar from employment without prior due process".

2. The respondent submitted an ET3 resisting all claims made by the claimant against them.

3. A Preliminary Hearing was fixed to take place on 11 December 2018 in order to determine the respondent's application for strike out of the claimant's claims on the basis that they have no reasonable prospects of success, which failing a deposit order to be granted as a condition of the claimant's continued pursuit of the claims, on the grounds that they have little reasonable prospects of success.

4. The claimant appeared on his own behalf, and Mr Leon, solicitor, appeared for the respondent.

5. A joint bundle of documents was presented to the Tribunal at the outset of the hearing, upon which reliance was placed by both parties. A joint statement of agreed facts was also presented, duly signed by the claimant and Mr Leon.

6. No evidence was led by either party, but submissions were made by each.

7. The Tribunal considered the terms of the application and the claimant's opposition to it, then heard both parties on their respective positions. A summary of those submissions is set out below, together with a short statement of the applicable law and then the decision to which the Tribunal has come following deliberations. The Tribunal also considered the application made by the claimant for a Restricted Reporting Order, and the response by the respondent to that application, and reached its conclusion on that.

The Application for Strike-Out

8. The respondent submitted its ET3 to the Tribunal resisting the claims made by the claimant, and therein submitted (paragraph 2, paper apart to ET3)(24) that the claimant's claim had no reasonable prospect of success and should be struck out. In addition, the respondent submitted that in the alternative, if the Tribunal were not minded to strike out the claim, a deposit

order should be granted on the grounds that the claim has little reasonable prospect of success (paragraph 3, paper apart to ET3)(24).

9. The respondent expanded upon these points in the legal submissions set out towards the end of the ET3 paper apart. At paragraph 18, they submitted (26) that the claimant's claim for unfair dismissal was misconceived and lacking in merit, on the basis that the claimant was not dismissed by the respondent. His fixed term role came to an end in August 2017 and his application for appointment in the 2018 intake was unsuccessful.

10. Following the provision of further and better particulars of claim by the claimant, the respondent presented an amended ET3 paper apart (33ff). There, they reiterated their submission that the claim should be struck out on the grounds that it lacked any reasonable prospect of success, failing which a deposit order should be issued on the grounds that the claim has little reasonable prospect of success.

11. The respondent's legal submissions (35) reiterated the submission, at paragraph 17, that the claim for unfair dismissal was misconceived, and expanded upon the factual basis for that submission.

12. The respondent went on to repeat its rejection of the claimant's assertion that he was at the material time a disabled person within the meaning of section 6 of the Equality Act 2010, but that is not an issue forming part of the hearing before this Tribunal.

13. At paragraph 23 (35), the respondent submitted that the claimant had failed to particularise a belief protected by the 2010 Act, and asserted that the claimant was not offered employment because he had distributed particular material online on social media, specifically of a "racist and Islamophobic nature". They argued that the racist views represented by such material do not attract the required level of cogency, seriousness, cohesiveness and importance necessary in order to qualify as "beliefs" under the 2010 Act, and that they were not worthy of respect in a democratic society and conflict

with the fundamental rights of others and therefore do not qualify as "beliefs".

14. The respondent therefore submitted (paragraph 24)(36) that the claim of discrimination was misconceived, and sought strike out of it.

15. On 20 September 2018, a Preliminary Hearing took place by telephone conference call before Employment Judge Ian McFatridge, for the purposes of case management, following which a Note of that discussion was issued by the Tribunal (42ff).

16. Employment Judge McFatridge issued an Order that an Open Preliminary Hearing be fixed to take place on 11 December 2018, to determine the following matters:

"(i) Whether all or part of the claimant's claims should be struck out as having no reasonable prospect of success.

(ii) Whether a Deposit Order should be made in respect of all or part of the claims on the basis that they have little reasonable prospect of success."

17. Paragraph 3 of that Note (44) records that: "In his initial ET1 the claimant had referred to a possible claim of disability discrimination based on his poor eyesight. This is not referred to in his further particulars and my assumption was that this is not being proceeded with."

18. The claimant opposed this application, in particular in his letter of 2 September 2018 (37ff). It is worth noting at this stage that the claimant had confirmed, before the PH of 20 September, that he was retracting his claim of discrimination on the grounds of disability.

19. He sought to set out in further details the particulars of his claims, and then at the conclusion of his letter, he stated as follows:

"Re strike-out and deposit orders: I once again repudiate the Respondent's efforts to dissuade me from pursuing justice by outright and unreasonable rejection of my arguments and endeavors to pursue a monetary burden on me. I humbly remind the Tribunal that I incurred considerable financial and

reputational losses because Heriot-Watt denied me a job that was, by convention, certain to be mine, on the basis of an anonymous complaint about an undisclosed matter whereof it found me guilty without ever soliciting my representation."

Submissions

Respondent

20. Mr Leon invited the Tribunal to strike out the claimant's claims on the grounds that they have no reasonable prospect of success, and as an alternative, sought the imposition of a deposit order upon the claimant as a condition of his continuing to pursue his claim, on the basis that his claims may have little reasonable prospect of success.

21. He summarised the claimant's claims as, firstly, a claim of unfair dismissal under section 108 of the Employment Rights Act 1996 (ERA), on the grounds of political belief or affiliation; and secondly, discrimination on the grounds of philosophical belief under section 39(1) of the Equality Act 2010.

22. He referred to the facts set out in the Joint Minute, and then pointed to the beliefs relied upon by the claimant as set out in his further particulars dated 2 September 2018 (37), indicated by bullet points, as follows:

"…the philosophical beliefs against which I allege discrimination against me on the part of the Heriot-Watt University include, but are not limited to –

- *Rule of law and equality before the law, in particular that one of the State's principal duties is to be protect those within its jurisdiction and to do so with proportionate attention and without prejudice (q.v.social contract),*

- *Freedom of association, in particular, that people must be free to form, inter alia, epistemic communities but also that mere association may not be used to justify collective punishment,*

- *The right to life, in particular that life begins at a point before the physical birth of a child and that terminating that life prior to physical birth is hence morally equivalent to homicide,*

- *Meritocracy and equality of opportunity, in particular that a person's innate and immutable characteristics can be a source of neither pride nor shame, nor may they be used to justify more or less favourable treatment of the person, and*

- *Generally, liberal democracy, classical liberalism, libertarianism, and primacy of individual civil liberties, in particular the freedom of expression, within the ambit of the law."*

23. Mr Leon noted that the less favourable treatment of which the claimant complains is that he was not offered employment by the respondent; the respondent accepts that the reason why employment was not offered was that a complaint was made against the claimant.

24. He then pointed to a number of documents produced before this Tribunal, at 57-87, which he pointed to as "Tweets" (that is, postings on the social media website Twitter) or similar social media postings either composed by or approved by the claimant. He maintained that the issue for the Tribunal is whether the complaint bears out the protected characteristic of philosophical belief: does the content of these tweets constitute a philosophical belief?

25. Mr Leon's position on the respondent's behalf was that the claimant's claims have no reasonable prospect of success in demonstrating that the tweets bear out the beliefs pleaded.

26. The claimant has accepted that he was responsible for the tweets on 59 and 60, reposting some and tweeting some himself. Jayda Franzen is known to be deputy leader of Britain First, which Mr Leon described as an extreme right organisation which has a history of violence, and whose constitution refers to the restoration of control of the United Kingdom to white people. He maintained that Ms Franzen has also served time in prison for inciting violence.

27. He pointed to the tweet at the top of 60, and described this as a comparison which suggests that one death was receiving excessive publicity compared to that accorded the death of a European child. He submitted that this post was objectively offensive and Islamophobic in nature.

28. Mr Leon continued by referring to tweets in these documents, submitting that they were racist or Islamophobic. For example, at 63, a tweet authored by the claimant was referred to, in which the claimant is said to have discredited an American Democratic politician by reference to the colour of her skin, and described by Mr Leon as "racist"; and at 66, the claimant had posted a tweet by another Twitter user, listing a series of incidents said to have involved Muslims, and accompanied this with the comment: *"TL:DR: Moslems are a problem, wherever they are."* Mr Leon explained that "TL:DR" is understood to mean "Too Long: Didn't Read". He went on to say that this tweet is intended to show that Muslims are incapable of living alongside other religious groups. He submitted that this post is Islamophobic, is objectively highly offensive and objectionable in a modern democratic society.

29. At 71, Mr Leon said, the claimant wrote that "#Islam = #Nazism", making a comparison between images shown there, and making a comparison between one of the world's major faiths and Nazi Germany. This, he maintained, was Islamophobic and discriminatory towards all Muslims on the grounds of their religion, suggesting all Muslims are equally guilty.

30. Mr Leon made references to other posts set out in the documents, and continued to argue that none of the tweets bear out any ostensible or reasonable interpretation of the beliefs pleaded by the claimant at 37. In fact, he submitted, there is nothing here which can amount to a philosophical belief under the 2010 Act.

31. He pointed to section 10 of the 2010 Act, in which philosophical belief is defined, and in order to be protected, it must amount to a philosophical belief. He referred to the leading case of **Grainger Plc v Nicholson [2010] IRLR 4**, and in particular to the test of a philosophical belief set out at

paragraph 24 of that decision. Although that referred to the Regulations which preceded the 2010 Act, it is still good law, he submitted.

32. He submitted that beliefs which infringe on the fundamental rights of others and that conflict with the values of modern democratic society are not be protected by the Act. There is nothing in this claim, he said, which gets anywhere near to having the status or cogency of a religious belief, as set out in paragraph 26 of the **Grainger** judgment.

33. His primary argument, therefore, was that the beliefs pleaded at 37 by the claimant are not borne out by the complaint, and since the complaint is the reason for the less favourable treatment, and there is no basis for the beliefs, the claim must fail as having no reasonable prospect of success.

34. The claimant is guilty of discrimination, he said, not the respondent, since he has expressed discriminatory views about other people. The Equality Act 2010 does not entitle an individual to discriminate against any person, but those whom the claimant has sought to demonise in these postings are entitled to the protection of the Act.

35. He went on to submit that there is no cogency between the beliefs set out at 37, which are 5 separate beliefs. He queried what the beliefs actually were – for example, asking whether meritocracy amounts to a belief.

36. Mr Leon then sought to draw a distinction between the claimant's beliefs and the manifestation of those beliefs. His application for employment was not progressed not because of his beliefs or because of his social media use but because of his conduct.

37. He invited the Tribunal to strike out the claimant's discrimination claim. In the alternative he sought that a deposit order of £1,000 for each separate claim should be imposed on the claimant.

38. Mr Leon turned to the unfair dismissal claim made by the claimant. The claimant's employment with the respondent ended on 23 August 2017, on the expiry of a fixed term contract. He had been employed for approximately 8 weeks. It was agreed by the respondent that the claimant

had been invited by them to apply for a further position on 24 November 2017 and that he had made an application for that position in February 2018.

39. He pointed out that the claimant accepts in his ET1 (14) that there was no contract of employment in place, and in those circumstances there can be no dismissal. An employer cannot dismiss an applicant for a job before that person has taken up the job.

40. Even an individual who has the status of a worker cannot claim unfair dismissal, but this claimant did not, he submitted, have that status either. There were no obligations by either party after the fixed term contract expired. There was no pay, no duties, and no statutory rights accruing to the claimant. The fact that the claimant was not offered a job due to start almost a year after termination cannot amount to a dismissal, he said.

41. The claimant has referred to a "quasi-contract", but Mr Leon submitted that this is not a part of the statutory landscape which makes up the law of unfair dismissal.

42. He argued that employment and dismissal are statutory concepts to be found in ERA, and in this case, there is no basis for saying that the claimant was an employee at the point when the dismissal allegedly took place.

43. This case therefore has no reasonable prospect of success, and should be struck out. In any event, it is unclear what political belief is relied upon by the claimant in respect of his dismissal, and a political belief is not the same as a philosophical belief.

44. Again Mr Leon sought the alternative disposal of a deposit order in relation to the unfair dismissal claim if the Tribunal were not prepared to strike out this claim.

Claimant

45. The claimant address the discrimination claim first.

46. He pointed out that he had not expected the respondent's agent to have gone into such detail in analysing the tweets and retweets. He referred to the repost from Ms Franzen which Mr Leon had described as objectionable. The claimant submitted that reposting something does not under any reasonable understanding of the human mind entail agreeing with everything that person says. If she had tweeted that she liked apples, and the claimant had reposted that tweet, does that mean, he asked, that he agreed with that? He said it did not. He submitted that he is not a member of Britain First, and does not particularly know what they stand for, beyond what he had read parenthetically.

47. He submitted that reposting the tweets of Ms Franzen could not possibly lead to the connection that he agreed with everything that those persons represented. He described this as nonsensical.

48. If merely reposting something solely on the grounds of who the person responsible for the posting is is unacceptable, that has serious implications for the right of freedom of association, one of the fundamental human rights.

49. He moved on to refer to the respondent having called a posting Islamophobic (60). He explained that the juxtaposition was merely to highlight the media's different treatment of comparable stories, which surely could not be deemed objectionable, far less offensive.

50. With regard to the posting about Rep Sheila Jackson (63), he found it "utterly preposterous" that the respondent would suggest that he was trying to discredit her due to the colour of her skin. His objection, he said, was not with the colour of her skin but her choice of career and her methods of pursuing that career. He had made similar comments about white people who also made careers out of supposedly fighting racism, whether real or not. He said that it is ridiculous to suggest that he had targeted her due to being African-American, as his concern relates to people in her position.

51. He pointed out that the respondent refers to Islamophobia, but that this is not a legal concept defined in any legal document; it is a contested notion which can mean whatever a person wants it to mean. He also denied that

by comparing Islam to Nazism he was comparing a faith to a movement, but maintained that he was in fact comparing two ideologies, one with a spiritual element and the other with a political element. Both have real world manifestations which he was comparing.

52. The claimant argued that what the respondent was seeking to do was place an interpretation upon what was posted. This kind of question – what his beliefs are, what he meant – should have been asked by the respondent before taking action against him. He should have been asked, he said, about the content, and his opinions should have been ascertained, before being penalised with extreme prejudice based on their assumptions.

53. He submitted that from his perspective, the issue of whether these are philosophical beliefs is not the principal question for the Tribunal to answer, but rather the Tribunal should address the question of whether the respondent should have taken steps to ascertain his beliefs prior to making assumptions and acting on those assumptions.

54. It cannot be discriminatory to express opinions, even those opinions which some may find distasteful. He said that he is married to a Muslim-born woman who is now an atheist, but whose sister and mother are practising Muslims. He spent 10 years working as a university lecturer in 4 different Muslim-majority countries. He said he had not had a single complaint made against him in Oman, Saudi Arabia, Kuwait or Bahrain. During his employment with the respondent in 2017, he had a Muslim student in his class, a Jordanian gentleman, with whom he never had any conflict, and indeed with whom he formed a bond owing to having worked in Arabic countries.

55. He confirmed that he does have strong feelings towards Islam as an ideology, but makes a clear distinction between the ideology of Islam – not the spiritual aspect – and Muslims as people. He also makes a distinction between Muslims as people and as adherents to the ideology of Islam. He accepts Muslims as people of whatever background, sex, sexual preferences, beliefs and so on. He debates Muslims in relation to ideology.

He does not, he said, discriminate against nor abuse them in any way, and never would.

56. The claimant indicated that he proposed not to address the cogency of his beliefs unless the Tribunal confirmed it were necessary. I advised him that it was necessary to do so, for the purposes of this hearing. Accordingly, he proceeded to do so. The beliefs expressed in the controversial content should be seen in the context of hundreds or thousands of tweets, blog posts and so on. There may be some which are contentious, or subjectively offensive. He acknowledged that he could have phrased some of them differently. He maintained that his philosophical beliefs cannot be ascertained from a couple of dozen posts excerpted from hundreds.

57. He pointed to the values set out at 37. He noted that in the final point, he spoke fairly generally, according to his own understanding (not being a political science major) and the foregoing four points are subsumed in the values of a liberal democracy. He argued that it is very difficult to argue that liberal democracy is not a set of cogent beliefs.

58. He maintained, however, that his philosophical beliefs should have been ascertained by the respondent before taking action against him.

59. The claimant then moved to the argument about dismissal. He argued that the respondent seems to conceive of the employment relationship as being binary – total employment or nothing. He submitted that these are in fact the extremes of a spectrum of possible relationships.

60. His position is that the relationship between the respondent and him fell somewhere within that spectrum, at the point when the “dismissal” took place. That spectrum includes relationships governed by implied and quasi-contracts.

61. Where that relationship did fall is for the Tribunal to determine as well as whether any obligations proceeded from that relationship. There is ample authority to demonstrate that Tribunals have entertained verbal promises, offers of employment and other forms of implied contractual relationships.

62. His argument, he said, is that he was, by being invited to apply for work with the respondent in 2018, being told, in effect, that if he wanted the job, he should simply apply for it and it would be his. He did apply, and from that point on, he said, a relationship existed on the spectrum between full active employment and nothing, which the respondent unilaterally violated, and here again the question arises of the respondent failing to ask him about the postings. If the respondent wanted to terminate that quasi-contract, they should have afford him the opportunity to make representations first.

63. He drew attention to 97, in which he maintains that he has seen an internal document which provides that the claimant ought to be involved in an investigation of the complaint. He acknowledged that he would not have been in a position to benefit from a full disciplinary hearing, but he should have been afforded some opportunity to defend himself or at least address the allegations prior to the respondent severing that relationship completely, such as it was.

64. He sought to argue that even if the jurisprudence of labour law does not provide the Tribunal with the notion of quasi-contract, that does not mean that the Tribunal has no jurisdiction in the matter.

65. The claimant then addressed the application for a deposit order. He said he would prefer not to have such orders issued. He believed that he had a case on both points, otherwise he would not have raised these proceedings. He felt it was “somewhat crass” for the respondent to be seeking to punish him financially for the second time. He was not given a job which consistent practice would dictate was going to be his barring some extraordinary peremptory circumstances, and then when seeking justice and recompense the respondent then tries to affect his financial position adversely.

66. If a deposit order were imposed, it would serve to dissuade him from pursuing this matter further.

Ancillary Matters

67. Both parties addressed me on the claimant's application for a Restricted Reporting Order. This was largely based on the correspondence which had been provided to the Tribunal on this point.

68. Essentially, the claimant pointed out that on his social media profile, although his name is identified, there is nothing which shows his full name or location, or his professional identity. Anyone coming across these profiles, he said, would conclude that this was "some random American guy living in the USA sounding off online". If these posts were not written so as to be traced back to the claimant as a person, far less as an academic, it would have a very deleterious effect upon him if they were to be treated as having been posted by him. There have been numerous examples of people with unfashionable views being mobbed in restaurants, accosted in the street or having people turn up on their doorsteps. He added that his wife ran away from her family to marry him, and that her family is still looking for her. He said that he does not know whether the family are aware of him and his identity, but giving this case a high profile could well imperil her safety as well as his.

69. He said that ultimately the fact that he did post the content has no bearing on this Tribunal, since the respondent did not know whether or not it was him at the time, not having asked him until well after the point when action was taken against him.

70. He concluded by saying that his application is only for the fact that he posted the content.

71. Mr Leon responded by saying that the claimant continues to pursue his claim. The open way in which litigation is conducted means that people who pursue litigation must accept the fact that justice is administered in public. It cannot be right to make an exception to the rule of open justice as a consequence of what the claimant placed on social media.

72. There was also a discussion about the voluntary disclosure of certain documentation, by the respondent, and Mr Leon undertook to look into whether there is an email from HR to a manager suggesting a form of words to be used in replying to the claimant, and if so, to produce it by 9 January 2019 subject to necessary redactions. It was noted that if the claimant is not satisfied by the response received, he may apply for an Order for the Production of Documents, setting out the basis upon which he seeks such an Order.

Discussion and Decision

73. The issues for the Tribunal to determine in this Judgment are:

(i) Whether the claimant's claim of discrimination on the grounds of religion or belief should be struck out on the grounds that it has no reasonable prospect of success; which failing, whether it has little reasonable prospect of success and therefore a deposit order should be granted;

(ii) Whether the claimant's claim of unfair dismissal should be struck out on the ground that it has no reasonable prospect of success; which failing, whether it has little reasonable prospect of success and therefore a deposit order should be granted;

(iii) Whether the claimant's application for a Restricted Reporting Order should be granted.

74. It is appropriate then to consider each of these issues in turn.

Whether the claimant's claim of discrimination on the grounds of religion or belief should be struck out on the grounds that it has no reasonable prospect of success; which failing, whether it has little reasonable prospect of success and therefore a deposit order should be granted.

75. The respondent's argument in this regard is, essentially, that the claimant is unable to point to a coherent belief or set of beliefs which could properly be defined as a religion or belief in terms of section 10 of the 2010 Act, by reference to the tweets and other social media postings which have been produced to the Tribunal in this hearing; and that he will be unable to demonstrate that the complaint (which he says led to the discriminatory treatment) reflects the beliefs which he says he holds. Section 10 defines belief as "any religious or philosophical belief and a reference to belief includes a reference to a lack of belief".

76. Further guidance is provided by the case of **Grainger plc v Nicholson [2010] IRLR 8**, in which the EAT, considering the terms of the Regulations which preceded the 2010 Act, said as follows at paragraph 24:

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

(i) The belief must be genuinely held.

*(ii) It must be a belief and not, as in **McLintock**, 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…"

77. At paragraph 28, the EAT expanded upon this:

*"…It seemed to me that the real concern that Mr Bowers had, and one which the court would naturally share, would be the fear that reliance could be placed upon an alleged philosophical belief based on a political philosophy which could be characterised as objectionable; a racist or homophobic political philosophy for example. In my judgment, the way to deal with that would be to conclude that it offended against the requirement set out in paragraph 36 of **Campbell**, that the belief relied on must be 'worthy of respect in a democratic society and not incompatible with human dignity' or, in accordance with paragraph 23 of **Williamson**, 'a belief consistent with basic standards of human dignity or integrity'. Paragraph 36 in **Campbell** expressly refers, as the source of this requirement/caveat to Article 17 of the ECHR, which deals with 'Prohibition of abuse of rights'."*

78. It is necessary, it seems to me, to consider the philosophical belief to which the claimant points as the basis upon which he is seeking to advance his claim.

79. It is agreed that the principles upon which the claimant relies are set out in his email of 2 September 2018 providing further particulars of this claim (37), as follows:

"…the philosophical beliefs against which I allege discrimination against me on the part of the Heriot-Watt University include, but are not limited to –

- *Rule of law and equality before the law, in particular that one of the State's principal duties is to be protect those within its jurisdiction and to do so with proportionate attention and without prejudice (q.v.social contract),*
- *Freedom of association, in particular, that people must be free to form, inter alia, epistemic communities but also that mere association may not be used to justify collective punishment,*
- *The right to life, in particular that life begins at a point before the physical birth of a child and that terminating that life prior to physical birth is hence morally equivalent to homicide,*

- *Meritocracy and equality of opportunity, in particular that a person's innate and immutable characteristics can be a source of neither pride nor shame, nor may they be used to justify more or less favourable treatment of the person, and*

- *Generally, liberal democracy, classical liberalism, libertarianism, and primacy of individual civil liberties, in particular the freedom of expression, within the ambit of the law."*

80. These are the principles upon which the claimant offers to prove his case. These, therefore, are the basis upon which it is necessary to determine whether the claimant is relying upon what might be described as a philosophy or belief in advancing his claim. In his submission, it was clear that he relies upon two principles, in particular, drawn from this list, namely freedom of speech (or, as he puts it, of expression, within the ambit of the law) and freedom of association.

81. The claimant acknowledges, now, that he was responsible for either composing or reposting the tweets and other social media posts to which the respondent took exception, though he has stressed repeatedly that the absence of any proper investigation involving him means that they were not entitled to reach that conclusion clearly at the time in question.

82. He maintains, essentially, that he was expressing unfashionable or unpopular views, but not views which were racist or Islamophobic. Indeed, the claimant regarded such criticisms as absurd and unfair.

83. That is not the issue before me at this stage. I have no view to express on whether the actions of the respondent amounted to unlawful discrimination on the grounds of religion or belief. What I require to determine is whether the beliefs which the claimant seeks to rely upon, as set out in the bullet point list at 37, amounts to a religion or belief in line with the principles of **Grainger**, and whether the claimant has no reasonable prospect of succeeding with his claim that those beliefs were the basis of the discriminatory treatment which he alleged he suffered at the hands of the respondent.

84. It is not contested by the respondent that the claimant's beliefs were sincerely held, though as I understood it the respondent's contention related to the content of the postings rather than the principles upon which he seeks to rely in this litigation. I am prepared to accept that on the face of it the claimant is sincere in his belief that he has the right of freedom of speech and freedom of association.

85. Given that these are two human rights which are protected by the Human Rights Act 1998 (albeit subject to certain qualifications, to which the claimant has adverted by his reference to the ambit of the law), it seems to me that these are rights which go beyond the definition of a viewpoint or opinion based on a current understanding.

86. The right of freedom of speech and of freedom of association do amount to beliefs which are substantial and weighty. This is why they are protected as human rights in our system of legislation.

87. There is, in my judgment, no doubt that belief in such rights amount to beliefs which are serious, cogent and cohesive, and that of itself, a belief in such rights is worthy of respect in human society.

88. It is therefore my conclusion that the claimant's beliefs, as represented by the principles set out at 37 and summarised above, are such as to justify the conclusion that the claimant seeks to rely upon a religion or belief within the meaning of section 10 of the 2010 Act.

89. The attacks made by the respondent upon the claimant's beliefs emerge from an analysis of the claimant's actions in either posting or reposting tweets which they found to be offensive in a variety of ways. However, in order to determine whether or not the claim should be permitted to proceed, it is critical, in my judgment, to consider carefully what it is the claimant offers to prove, rather than make any determination at this stage as to the findings in fact which are likely to be made, and the conclusions drawn from those findings in fact, at a merits hearing. The claimant is advancing his claim on the basis that he has been discriminated against because he held

the philosophical beliefs set out in the list on 37. In my judgment, that permits him to proceed with this claim.

90. It is important to note that this merely means that I am not prepared, at this stage, to strike out the claimant's claim of discrimination on the grounds that it has no reasonable prospect of success. In any discrimination claim, the Tribunal must be very cautious about striking out a claim without hearing any evidence on matters which are in dispute, and in this case, evidence will be required in order to consider the content and meaning of the tweets under examination in this case.

91. I have considered very carefully whether this is a case which has little reasonable prospect of success, and therefore suitable for the imposition of a deposit order against the claimant. It seems to me that this is a very difficult question. The content of the claimant's tweets and postings is, on the face of it, extraordinarily strong material. The claimant hinted that with hindsight he may even accept that he could have phrased himself better and more carefully. However, the claimant continues to assert that the respondent did not know, because it did not investigate the matter, whether he was in fact responsible for the postings, nor what his intentions were in setting forth such views on public social media sites. As a result, I have come, very hesitantly, to the conclusion that this is not a case in which I am prepared to grant a deposit order.

92. I am careful not to express any view about the terms of the postings, as a result of having heard no evidence about them, or about the terms of the complaint which was received by the respondent, nor of how the respondent handled that complaint, all of which are relevant matters in this case. However, while I may have found Mr Leon's approach to the material to be entirely understandable (and he expressed himself very strongly about the offensive nature of the postings), it appears to me that I would fall into error if I were to examine this issue, of the claimant's appeal to particular philosophical belief, from the perspective of the respondent. It is for the claimant to set forth his case, and to rely upon the philosophical belief which he considers has been the basis of his discriminatory treatment. It is also

for him to prove that that treatment was discriminatory on the grounds of those beliefs, and not for some other reason. I am not persuaded that this claim lacks any reasonable prospect of success, at this stage.

93. Accordingly, it is my judgment that the respondent's application for strike out of the claimant's discrimination claim should be refused, and that this matter should proceed to an evidential hearing at which the claimant's claims can be fully tested; and that the alternative application for a deposit order should also be refused.

Whether the claimant's claim of unfair dismissal should be struck out on the basis that it has no reasonable prospect of success; which failing, whether it has little reasonable prospect of success and therefore a deposit order should be granted;

94. The respondent seeks strike out of the claimant's claim of unfair dismissal on the basis that the claimant was not in employment with them at the point at which he maintains he was dismissed.

95. The right not to be unfairly dismissed is set out in section 94 of the Employment Rights Act 1996 (ERA). The circumstances in which an employee is dismissed are set out in section 95 of ERA, as follows:

"(1) For the purposes of this Part [of the Act] an employee is dismissed by his employer if (and, subject to subsection (2), only if)-

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if –

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."

96. Section 108(1) of ERA provides that section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

97. The claimant pointed out that section 108(4) disapplies subsection (1) *"if the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliation".*

98. The agreed facts about the claimant's employment with the respondent are set out in the Joint Minute.

99. On 3 July 2017, the claimant commenced employment with the respondent as an Assistant Professor on a fixed term contract. On 23 August 2017 the claimant's employment terminated on the expiry of his fixed term contract.

100. On 24 November 2017, the claimant was emailed an invitation to apply for the position of Assistant Professor in relation to summer 2018, and he did so on 4 February 2018. On 19 February 2018, the claimant was informed that his application for employment had not been progressed because a student had complained and made the respondent aware of some material that was published which was not in keeping with the values of the respondent. (The Joint Minute describes this material as being

published “in the Respondent’s name” but it appears to me that it was published in the claimant’s name, which is not in dispute.)

101. The facts of the matter are therefore that the claimant was employed by the respondent under a contract of employment whose term expired on 23 August 2017, and that he applied for a post in February 2018, for which he was not progressed owing to the complaint about his social media postings.

102. The claimant accepts, as he must, that he was not in employment with the respondent as at the date when his application was not progressed. What he says is that the Tribunal may interpret his circumstances, and the relationship between himself and the respondent, as giving rise to an implied contract, or a quasi-contract. He referred to a “spectrum”, and suggested that he fell somewhere in the spectrum between employee and contractor.

103. In my judgment, this is a simple matter. The claimant was not an employee of the respondent as at 19 February 2018. He had been an employee, and was hoping that he would be an employee again, for the summer months as before, but at the date when he was applying for employment, he was not working under a contract of employment. The relationship had none of the features of a contract of employment. He was not carrying out any work for the respondent, nor was he under any obligation at all to them. The respondent was under no obligation, as at 19 February, to provide the claimant with any work. He was not paid by them in respect of services provided. He was not subject to any constraints as to where he might otherwise work at that date.

104. The claimant was only applying for appointment because he had not been appointed. He was not employed by the respondent in February 2018. There was no contractual relationship between the parties at that date. There was no continuity of employment following the termination of the earlier fixed term contract. It is agreed by the parties, and therefore by

the claimant, that his earlier contract had terminated. It came to an end. It was not, by any means, continuing to operate.

105. The claimant appears to suggest that being invited to apply meant that the respondent had therefore decided to appoint him to the post. That may well have been the case, but he accepted that there still required to be a process of application and appointment to follow. He did, after all, submit an application for the post. Had he really believed, or had the facts justified the conclusion, that he was already in employment with the respondent in February 2018, there would have been no need to have made an application to effect that appointment.

106. In my judgment, there is no basis whatever for suggesting that a contract of employment could be implied from these circumstances in February 2018. Were the claimant's submission to be sustained, it would have the consequence that any employer inviting an individual to apply for a post was thereby committed to appointing that individual. There is no authority known to this Tribunal (nor was I referred to any) which could justify the implication of a contractual relationship from such a set of facts. Neither party intended there to be a contractual relationship because there was no expression of such an intention. The respondent was willing to consider the claimant for appointment, but had not offered him a post; the claimant had not accepted an offer of appointment, nor does he suggest that he had, but was willing to make application through the normal process.

107. The claimant clearly regards the withdrawal of the opportunity of appointment as an unfair and unjustified act by the respondent, but in my judgment it cannot in any way be regarded as an act of dismissal. There was no contract of employment to be terminated, and therefore there was no termination.

108. I confess to having some difficulty understanding the basis of the claimant's submissions on this point, especially relating to a "quasi-contract", a concept to which he referred but which he did not explain, not did he provide any legal basis for such a concept.

109. Accordingly, there being no termination of employment, in circumstances where there was no contract of employment, the claimant's claim of unfair dismissal is bound to fail, as it has no reasonable prospect of success, and it is therefore struck out.

Whether the claimant's application for a Restricted Reporting Order should be granted.

110. The claimant's application is for the anonymisation of his identity from any reporting of the case, and in the court documents relating to the claim.

111. The basis upon which he made this application is, as I understand it, that he is concerned that his admission that he was the author or the poster of the relevant tweets is likely then to identify him in public as someone holding the unfashionable views he described. His argument was that although his name and photograph appear beside his biographical line on his social media pages, it could not be divined from that that he was the Michael Steiner in question. Publicising his admission in these proceedings, linked with the terms of the postings themselves, would put the matter beyond doubt, and this gave rise to a concern on his part to his own safety and security owing to the likely reaction of those who disagree with his opinions.

112. This application is opposed by the respondent.

113. In my judgment, this application has no merit. The fundamental principle of open justice is not to be compromised without good reason. In this case, the claimant placed material of a particular nature online, in a public way, on social media sites bearing his name and image. It seems to me that without making any judgment, from the perspective of the Tribunal, as to the nature of these postings, the claimant's own concerns arise quite simply from his own actions and choices. It is entirely reasonable that he should bear the consequences of those actions and choices. The Tribunal is a public forum. He was or should have been well aware of this when he raised these proceedings. It would be entirely contrary to the principle of

open justice to allow him anonymity when he himself has chosen not to be anonymous in making the posts in the first place.

114. Accordingly, this application is refused as being without merit.

115. A hearing will now be listed in this case in order to deal with the merits of the case.

Employment Judge: M A Macleod
Date of Judgement: 14 January 2019
Entered in register: 24 January 2019
And copied to parties