



EMPLOYMENT TRIBUNALS

Claimant: Mr R Faraz

Respondent: Core Education Trust

Heard at: Nottingham

On: 17 January 2018 (Reading day)
18, 19, 22, 23, 24 and 25 January 2018 (Hearing days)
7 February 2018 (Reserved Judgment day)

Before: Employment Judge Hutchinson
Members: Ms F Newstead
Mr M J Pavey

Representation

Claimant: Mr R O'Dair of Counsel
Respondent: Miss T Ranales-Cotos of Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

1. The claim of unfair dismissal fails and is dismissed.
2. The claim of discrimination on grounds of religion or belief fails and is dismissed.
3. The remedy hearing set for 13 April 2018 is cancelled.

REASONS

Background and issues

1. The Claimant presented his claim to the employment tribunal on 10 July 2015. He had been employed as Deputy Head Teacher of Nansen Primary School, which is a non-faith school in the East of Birmingham governed by the Respondent.
2. He had been dismissed for gross misconduct on 9 February 2015. The Respondent said that the reason for his dismissal was for making homophobic comments on a WhatsApp group known as the Park View Brotherhood.

3. He claimed:

3.1 That his dismissal was unfair contrary to Section 94 of the Employment Rights Act 1996 ("ERA").

3.2 That the dismissal amounted to direct discrimination because of the protected characteristic of religion or belief contrary to Section 13 of the Equality Act 2010 ("EA"). The Claimant is a Muslim and said that his dismissal amounted to discrimination because of his Muslim beliefs. That he had been treated less favourably than the Respondent treats or would treat others.

The issues

4. Unfair dismissal

4.1 It was not in dispute that the Claimant was dismissed by the Respondent. It is for the Respondent to establish the reason for the dismissal and that it is a potentially fair reason. They say that the reason related to the Claimant's conduct.

4.2 The crucial issue for the tribunal was whether the Claimant's dismissal was unfair having regard to the provisions of Section 98(4) of the ERA and Articles 8, 9 and 10 of the European Convention of Human Rights.

4.3 In the Claimant's ET1, the Claimant set out the matters he relied on to show that dismissal was not within the band of reasonable responses, namely

The investigation

(a) The Claimant had not been provided with details of the factual allegations made against him prior to the investigation meeting with Richard Powell, notwithstanding repeated requests for this information, to which he was entitled under the 2013 disciplinary policy.

(b) Richard Powell failed to carry out a reasonable investigation into the allegations in that;

(i) the investigation report alleged that the Claimant had breached his contract of employment, and set out an extract of the contract which did not form part of the Claimant's contract of employment of 9 July 2013;

(ii) the investigation report made reference to an equal opportunities policy which was not in place at the time of either the gay marriage or homosexuality posts (and further, did not apply to matters outside of the School);

(iii) the investigation report suggested that, as a matter of contract, the Claimant had breached the Teachers'

Standards Part 2, when those standards did not form part of the School's disciplinary policy or the Claimant's contract of employment at the time of the homosexuality posts;

- (iv) the investigator paid little, if any, regard to the response of the Claimant, and failed to interview those witnesses the Claimant suggested he interviewed;
- (v) in concluding his investigation, Mr Powell wrongly suggested that the Teaching Standards and/or Equal Opportunities Policy required the Claimant to ensure that members of the public did not discriminate against other members of the general public;
- (vi) the investigation report wrongly concluded that the Claimant had brought the Respondent into disrepute, when no reasonable reader of the WhatsApp messages would think that private messages exchanged consisted of or included statements made on behalf of the School, and were anything other than an exchange of personal views. Rather, as a matter of fact, it was the report of Peter Clarke and the statements contained within that report that brought the School into disrepute;
- (vii) the investigation failed to take into account that the Respondent did not have guidance for the School's employees on the use of social media at the time of the two WhatsApp messages.

The disciplinary hearing

- (c) The investigator failed to maintain an unbiased, objective stance towards the allegation and instead presented the case against the Claimant.
- (d) The Respondent failed to provide the Claimant with the opportunity for legal representation at the first disciplinary hearing, in circumstances when the case against the Claimant was presented on behalf of the School by Richard Powell of Counsel, who had investigated the matter.
- (e) The investigation and disciplinary panel did not look at the policies and procedures in place at the time of the events in question, but looked at later policies and procedures.

The disciplinary appeal hearing

- (f) In the case of the appeal hearing although it was a re-hearing, the appeal panel still relied on the inadequacies of the investigating officer's report. For instance (and in addition to the above);
 - having collected documentary and witness statements for

the allegations faced by the Claimant, the investigating officer's failure "*to collect documentary and witness statements ... against the allegations*" as he was required to do by the Respondent's 2013 disciplinary policy;

- the investigating officer failed to amend his investigation report to take into account the evidence relied on by the Claimant in his statement submitted on 26 January 2015
 - the panel still took into account the teaching standards when those standards do not automatically apply to the Respondent;
 - the panel ignored the fact that the investigating officer relied on the wrong policies and procedures at the time in question and failed to refer to, or appreciate the existence of, the correct policies and procedures at the time of the event.
- (g) The Respondent failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. In this case, the Respondent did not have clear rules on the use of WhatsApp or on the private use of social media forums.
- (h) The Respondent failed to give weight, or sufficient weight, to the absence of any use of social media guidance in place at the School at the time of either gay marriage or homosexuality posts.
- (i) The September 2013 disciplinary policy and the earlier policy do not list inappropriate or improper private use of social media as an example of misconduct or gross misconduct.
- (j) The equal opportunities policy that was in force at the time of the two WhatsApp messages makes no mention of use of social media.
- (k) The contract of employment in force at the time of the two WhatsApp messages makes no mention of use of social media.
- (l) The Respondent failed to respect sufficiently, or at all, the exercise by the Claimant of his Article 8, 9 and 10 rights and in particular Article 8, which protects the right to respect of one's private life and correspondence.
- (m) The Respondent wrongly attributed the Claimant as bringing the School into serious disrepute, when this arose from the terms of the Peter Clarke report, and Mr Clarke's decision to publish private WhatsApp messages.

5. Direct discrimination claim

- 5.1 The Claimant's faith is Muslim and at the time he believed that gay marriage and gay practice were offensive to Allah. These were his religious beliefs.

5.2 The issues for us, therefore, were;

5.2.1 Whether the Claimant has been treated less favourably because of his religious beliefs contrary to Section 13 EA. The less favourable treatment complained of was his dismissal.

5.2.2. For the purpose of determining the issue, the comparator will be hypothetical. According to the Respondent, a non-Muslim who had posted homophobic private WhatsApp messages, namely

(i) *“These animals are going out full force. As teachers, we must be aware and counter their satanic ways of influencing young people”*

(ii) *“I agree that the BBC will exploit any situation however the problem of homosexuality is rife in Pakistan in the village and the cities”, and “Sign of the end of times”.*

5.2.3 The Claimant says the appropriate comparator is;

(i) a person having a profound religious/or other belief in the moral equivalent of gay relationships and expressing such belief to people of a similar standpoint; alternatively

(ii) a person having a profound religious/other belief in the moral equivalent of gay relationships and expressing to people of similar standpoint containing intemperate remarks about those not sharing such beliefs.

5.3 This was further developed by Mr O’Dair, who rather unusually for the tribunal, in a case such as this, provided us with a skeleton/written opening, which opened with the phrase;

“I hate what you say but will defend to the death your right to say it” from Moliere.

5.5 He went on to say that we might be tempted to think this is a simple case about misconduct unfair dismissal to which the familiar **Burchell** principles apply, together with the band of reasonable responses and the *“no substitution principle”*. He says that this is not a straightforward case.

5.6 He referred us to the European Convention on Human Rights and in particular;

- the right to privacy (including the respect for correspondence) under Article 8;
- freedom of expression and belief under Article 9;
- freedom of expression under Article 10.

5.7 So far as the claim of discrimination on grounds of religion or belief is concerned, he said that the views that the Claimant expressed at

the time (which it was said by Mr O'Dair he no longer holds) in the WhatsApp messages were the product of his socialisation into a conservative Islamic culture both;

- as to their content, and
- as to the virulence with which they were expressed.

5.8 It was Mr O'Dair's contention that "A very considerable number of teachers from conservative Islamic backgrounds were forced out of the School". He relied on the Claimant's witness statement at paragraph 17. Mr O'Dair said in his opening that their fate illustrates the homophobia allegations made against him were little more than a pretext. It was the Claimant's case that those of conservative Islamic views were no longer welcome at the schools. He said that the position of conservative Islamic views (in his case on sexuality) was enough.

Preliminary matters

6. Although the Claimant was dismissed on 9 February 2015 and submitted his claim to the tribunal on 10 July 2015, these proceedings were delayed pending the hearing of proceedings before the National College for Teaching and Leadership ("NCTL"), which is the Claimant's professional conduct body. These proceedings had also been transferred from the Birmingham employment tribunal because of the involvement of a fee-paid Judge (Richard Powell) who sits at Birmingham.
7. As a result of those proceedings, matters were stayed until they were resolved. Although the NCTL proceedings had not been finally resolved, this case was listed for hearing by my colleague, Regional Employment Judge Swann on 24 April 2017. Those proceedings before the NCTL were withdrawn in July 2017. The parties did not exchange witness statement though until Friday 12 January 2018.
8. In the Claimant's witness statement for the first time (at paragraph 17); he alleged that there was a conspiracy in relation to his dismissal and the treatment of a number of other teachers who were also members of the same WhatsApp group. He named 8 individuals who he said were "forced" to leave the School.
9. There ensued a dispute about discovery of documents, which should have been dealt with well before the hearing. As a result of this dispute, the Respondent agreed to disclose documents which had been referred to specifically in the appeal and this led to a delay in the start of the hearing.
10. There was no witness statement from Mr Powell, the investigating officer who had been subject to much criticism by the Claimant in his original claim to the tribunal. Although we expressed surprise at him not being called as a witness, it is a matter for the parties as to whom they call before us. After some discussions on the first day of the hearing, we delayed the commencement of the hearing until the following morning to enable the Respondent to provide certain limited disclosure relating to the appeal and to make enquiries about the possibility of calling Mr Powell to give evidence. The following day, we were told that Mr Powell would not be giving evidence.

11. In respect of the alleged conspiracy, this was dealt with by way of an amended witness statement provided by Ammo Talwar who was the Chair of the appeal panel. He prepared an amended witness statement dealing with what had happened to the Claimant's colleagues, although it was clear from his evidence that he was very much reliant on information provided by others and it was certainly not a matter that was before him at the appeal hearing.

Evidence

12. The tribunal heard evidence from the following witnesses;
 - Bryony Flint, Chair of the dismissing panel
 - Ammo Talwar, Chair of the appeal panel
 - The Claimant
 - Adam Klug, a trainee teacher.
13. It was clearly difficult for all witnesses to recall exactly what happened and what was said at least 3 years previously.
14. Miss Flint was a credible witness who gave consistent and compelling evidence to the tribunal. She was an experienced HR professional and had been employed at Ocado as Head of HR since 2012. She was Director and Chair of Governors at the relevant time. She had a great deal of experience in dealing with disciplinary matters over the last 15 years.
15. Mr Talwar was not a convincing witness. He was reluctant to answer questions and clearly had difficulty remembering what happened 3 years ago.
16. Most of the evidence before us that was most relevant to our findings was documented at the time in the minutes of the meetings. What was said at the hearings was not largely in dispute.
17. The evidence of Mr Klug had little bearing on the matters that we had to deal with.
18. Mr Faraz was not a credible witness. The allegation that he made at paragraph 17 of his witness statement that his dismissal was part of a wider conspiracy to dismiss him and rid the School of a number of other teachers who were members of his WhatsApp group was made at a very late stage. It was not referred to in any of the hearings relating to his case, including his appeal when he had been represented by Counsel and it was not referred to in his ET1, which was prepared on his behalf by his lawyers.
19. In his evidence before us, we found the Claimant evasive. He was reluctant to give a straight answer to a straightforward question. On more than one occasion, I had to ask the Claimant to answer questions directly. It was not the first time that he had been evasive, including when he had been asked questions by Mr Powell in the investigation meeting with him. We saw in the record of the meeting produced by the Claimant himself that he was reluctant to give straightforward answers to questions put to him. In the interview (the notes of which are at pages 471 – 510 of the bundle) it can be seen that the Claimant was not prepared to give any

explanation for his conduct, his excuse being that he wanted to see statements before he was prepared to answer any questions. This was despite the fact that prior to the meeting, he was written to with details of the allegations that he faced. His evidence to us that the reason for his evasiveness was that he was not aware of the allegations he faced is, we are satisfied, not credible. Nor was it credible his belief that this was a “fishing exercise” by Mr Powell.

20. Although we were told that the Claimant had changed his views about homosexuality since the time of the WhatsApp conversations, in his cross-examination, he appeared to be reluctant to say what his views were now.
21. There were other inconsistencies in his evidence. He accepted in his witness statement at paragraph 25;
“I understand fully why it would be intolerable to have a teacher with homophobic beliefs and practices seeking to spread those amongst pupils and parents”.
He sought, however, to excuse his behaviour saying that his comments were not homophobic; that his comments related to those “promoting gay marriage and not towards any individual from the LGBT community”.
22. Similarly, in respect of his comments about same sex marriage, he sought to excuse them by asserting they were no more than him stating a view that same sex marriage was wrong. The comments made were clearly much more than that as will be seen from our findings of fact.
23. In our findings of fact where I refer to page numbers, it is from the final bundle of documents that was agreed between the parties.

The facts

24. The Claimant belongs to the Muslim faith. He told us that he grew up with the understanding and being taught, that the practice of homosexuality is abhorrent in Islam. The Koran says little about homosexuality but Sharia law teaches that homosexuality is a “*vile form of fornication*”. In some Muslim countries, it is punishable by death.
25. The Claimant has been a teacher since April 2007, having previously been employed in the charity sector. The Claimant commenced his employment as Deputy Head Teacher at the Nansen Primary School on 16 April 2012. At that time, he was employed by Birmingham City Council. His offer letter is at pages 30 – 31. His contract of employment is at pages 33 – 39. His continuous employment had commenced on 7 April 2008. The contract referred to disciplinary rules being available at his place of work. The disciplinary procedure for schools issued by the Authority is at pages 40 – 47.
26. On 1 September 2013, Nansen Primary School became part of Park View Academy and the Claimant was issued with a new statement of employment particulars, which is at pages 48 – 53. The document refers to disciplinary rules and procedures which did not form part of his contract of employment.
27. The disciplinary policy and procedure that was applicable to the Claimant was issued on 22 August 2013 and updated on 27 March 2014 and is at pages 420 – 434.

28. The Respondent's Equality Policy is at pages 435 – 452. This was also issued on 22 August 2013 and updated on 27 March 2014. This is at pages 435 – 452.
29. The Equal Opportunities Policy for Birmingham City Council is at pages 365 – 373. There are no significant differences between the policies.
30. The tribunal also had before it the staff handbook, which is at pages 374 – 399. The Claimant had been involved in the writing of that handbook, including the provision at page 387;

"7.02 What is expected of me in terms of confidentiality?"

5. Furthermore, school issues and matters should not be shared with parents and the community other than through formal routes of communication, the school newsletter, general letters, website and notice boards."

31. Most teachers (including the Claimant) are subject to the Teachers' Standards which are issued by the Department for Education. The document is at pages 453 – 467. Part 2 of the document sets out personal and professional conduct (page 466) which states:

"A teacher is expected to demonstrate consistently high standards of personal and professional conduct. The following statements define the behaviour and attitudes which set the required standard for conduct throughout a teacher's career.

- *Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school, by:*
 - *treating pupils with dignity, building relationships rooted in mutual respect, and at all times observing proper boundaries appropriate to a teacher's professional position*
 - *having regard for the need to safeguard pupils' well-being, in accordance with statutory provisions*
 - *showing tolerance of and respect for the rights of others*
 - *not undermining fundamental British values, including democracy, the rule of law, individual liberty and mutual respect, and tolerance of those with different faiths and beliefs*
 - *ensuring that personal beliefs are not expressed in ways which exploit pupils' vulnerability or might lead them to break the law.*
- *Teachers must have proper and professional regard for the ethos, policies and practices of the school in which they teach, and maintain high standards in their own attendance and punctuality.*
- *Teachers must have an understanding of, and always act within, the statutory framework which sets out their professional duties and responsibilities."*

32. Nansen Primary School is a secular (i.e. non-faith school) in the East of Birmingham and is part of the Park View Academy.
33. In November 2013, Birmingham City Council received an anonymous letter which intimated that there was a conspiracy to “take over” local schools and run them to strict Islamic principles (pages 191 – 195). The letter outlined a strategy which was called “Operation Trojan Horse”.
34. Peter Clarke MP and Education Commissioner for Birmingham carried out an investigation into what has become known as “Operation Trojan Horse”. His report was published in July 2014 (pages 83 – 211).
35. In the report, he dealt with what he described as “The Park View Brotherhood”. This was a group of teachers who exchanged messages via the “WhatsApp” social medial ‘phone application or “App”. This is dealt with in section 7 of the report, which is at pages 139 – 157. It can be seen that Mr Clarke had come into possession of a printout of the posting on that group and that the material covered the period from April 2013 until it was closed down in March 2014. The group was set up and administered by Monzoor Hussain who was the Acting Principal at Park View School. There were 55 users of the group during this time period (page 156). He identified that the Claimant was the second most prolific contributor, who had formerly been a teacher at Park View and Adderley Primary Schools and had been Chair of the Governors and a Governor of two other local schools before he became Vice Principal at Nansen Primary School.
36. Mr Clarke identified a group of 13 teachers who were involved in making inappropriate contributions on the WhatsApp group, which he placed under the heading “Homophobia” at pages 145 – 147.
37. In May 2013, the Claimant posted a link to a Guardian article about gay marriage. He preceded the link with a comment which went unchallenged by other members of the group, namely “These animals are going out full force. As teachers we must be aware and counter their satanic ways of influencing young people”.
38. In September 2013, a discussion took place when another teacher posted a link to a BBC news magazine item. The title of the item was “Gay Pakistan; where sex is available and relationships are difficult”. Part of the article that the tribunal has seen described how a shrine in Karachi was used as a meeting place by gay men. Mr Clarke set out the conversation in full;

“Teacher A IF YOU HAVE JUST EATEN READ AFTER 2 HOURS CAUTION ADVISED...”

This is what happens at some shrines in Pakistan!

Teacher B BBC propaganda.. File under “why don’t they use the space to name our brothers and sisters murdered by British funded Israeli owned American sanctioned drones in Northwest Pakistan?”

This stuff is disgusting and must happen but we should try to lift our Iman in these difficult times rather

than buy into this type of cheap sensational garbage..

...

(thanks for the info XXXXX, that's jus my personal view)

Razwan Faraz I agree that the BBC will exploit any situation however the problem of homosexuality is rife in Pakistan both in the village and the cities

Sign of the end of times

Teacher B May Allah swt safeguard us all

Razwan Faraz May Allah further expose this and give us the strength to deal and eradicate it

Eeman when tested grows only when the actual reality of our surroundings are made apparent to us. One cannot live in an illusory state and expect his/her eeman to grow. By it's very nature eeman must embrace the reality even if it is riddled with fahisha because only then can the fahishah be eliminated and subsequently eeman grow inshAllah

So I say jazakAllah XXXXX for sharing this

Teacher B MaashaAllah u r right Razwan. I guess my weakness is i fear i am not strong enough to stay focussed whilst in the midst of such darkness. May Allah swt increase us all to be ready and prepared through these tests to forever increase our Iman, in shaa Allah

Razwan Faraz Ameen, this is the challenge in these testing times. The end of times are near. I pray we remain conscious of what we are here to do and are guided to the path of our beloved Prophet (sas)."

39. Mr Clarke recommended that the Department for Education should take action against teachers who may have breached Teachers' Standards.
40. On 23 July 2014, the Respondent suspended the Claimant (pages 212 – 214). The Claimant had declined to meet Kamal Hanif, who was Chair of the Trustees who dealt with the suspension. The letter set out the allegations that the Claimant was subject to and told him that during his suspension, he must not communicate with fellow employees of Park View Education Trust or service users about any matters relating to his suspension unless it had been specifically agreed with Mr Hanif.
41. A number of individuals wrote to the Respondent in support of the Claimant, namely;
- Nasir Unia (page 215 – 216)
 - Tim Brighthouse (page 217)
 - Steph Green (page 218 – 219)
 - Ray Gaston (page 230)
 - Andrew Smith (page 241)

42. In September 2014, Richard Powell (Counsel and fee-paid Employment Judge) was appointed to conduct the investigation into the conduct in respect of the Claimant and a number of other employees.

43. Mr Powell wrote to Mr Faraz via Ms Gurpreet Dhillon, HR Manager for PVET, inviting him to attend an investigation meeting on 6 October (page 221 – 222). The letter referred to various sections of the report that he wished to discuss with the Claimant. He said that the aspects of the report which appeared to be relevant were;

“ ...

The initial examination of the Clarke report (that is its opinions, summaries of parts of evidence it received and its stated conclusions) suggest the following are possible standards which have been breached:

Aspects of the Teacher s’ Standards as noted in the letters of suspension

The duty to demonstrate behaviour which does not undermine fundamental British values (page 14 of the standards).

Aspects of the duties arising from the Equality Act 2010 (see page 9 of the Teacher’s Standards under the heading of Statutory Frameworks).

Bringing the Trust into disrepute.

...”

44. The letter goes on to set out a number of potential instances of alleged conduct, or failure to act, by the suspended employees. It goes on to set out the relevant paragraphs in the report that contained allegations which amounted to a breach (or a failure to act) in accordance with their duties. It then says that;

“ ...

I would welcome any information from you which would identify any sources of evidence or witnesses which I should investigate to ensure that I adopt a balanced approach. The above paragraphs do not give precise particulars in every example but they do appear to be sufficiently clear to alert the suspended employee to the nature and time frame of the allegations made in the Clarke report.

...”

45. Later that day, the Claimant’s trade union representative (Andrew Sladen) wrote to Ms Dhillon about the invitation (pages 148-151). The letter complained that the letters of 23 July and 10 September 2014 had failed to provide factual particulars. He said that they had merely set out that there had been breaches of the Teachers’ Standards and that the Park View Educational Trust had been brought into disrepute. The letter went on to say;

“ ...

It is plainly unfair to our member not to provide the factual basis of

the allegations he faces, before any disciplinary investigation meeting. Otherwise, he will not be in a position properly to prepare for the investigation meeting (or to be in a position to provide such appropriate documentation as may be necessary to meet those allegations)."

46. The Claimant was interviewed by Mr Powell on 8 October 2014. Mr Powell did not make any notes of the meeting and there was no note taker in attendance to take notes. The meeting was recorded by the Claimant with the agreement of Mr Powell and the tribunal had the typed transcript of the recording of the meeting at pages 471 – 510. The transcript is in different parts and is difficult to follow, partly because the name of the participants is changed at the various parts of it. In the first part, for example, Mr Powell is described as the facilitator and the Claimant is described as male 1. In the second part of the transcript, the Claimant is described as facilitator 1 and Mr Powell is described as the interviewee. In the third part of the transcript, Mr Powell is again referred to as the facilitator and the Claimant is described as male 1.
47. The Claimant declined to provide any explanation in respect of the allegations made against him. This was despite having been informed of the specific paragraphs of the report that were to be the subject of the interview. He said that he had commenced a draft of a statement but that he did not understand the issues sufficiently well to comment. After the meeting Mr Sladen wrote to Ms Dhillon (page 234). He said that Mr Faraz had not been able to engage in the discussions because he had not had a reply to the points he had raised in his letter of 3 October 2014. There was an exchange which followed between Mr Sladen and Ms Dhillon (pages 236-9). It culminated in a letter from Ms Dhillon which encouraged the Claimant to participate in the investigation and provide a witness statement responding to the allegations set out in the earlier correspondence and the Clarke report.
48. In a letter from his trade union official on 24 October 2014 (page 240), his union officer said that they were preparing a statement in response to the disciplinary allegations and would forward this to Mr Powell. By the time Mr Powell submitted his report on 30 November 2014, he had not received any information from the Claimant.
49. Mr Powell's report was dated 30 November 2014 and is at pages 242 – 253. He referred to what he described as "homophobic comments" made by Mr Faraz and explained that he had little in the way of any response from Mr Faraz to the allegations. He recommended that there was a case to answer; that Mr Faraz had acted in breach of his contract of employment and the equal opportunities policy in respect of his comments on homosexuality and about the members of the Mosque. He said that such conduct had brought the Academy and Trust into disrepute and brought into question his suitability for employment.
50. The Respondent decided that there was a case to answer and wrote to Mr Faraz on 13 January 2015 inviting him to attend a disciplinary hearing (pages 255 – 257). The letter set out the allegations, which were in the same format as the suspension letter and the invitation to an investigatory meeting. It said the school's case would be presented by Andrew Packer and Mr Powell would be appearing as a witness as the investigating officer. The hearing would be conducted on 3 February 2015.

51. On 26 January 2015, the Claimant submitted a statement to Mr Powell in support of his position (page 267 – 282).
52. The statement provided a full response to all the allegations made in the Clarke report. No explanation was given as to why it had taken him so long to provide this information and he had not received any information that was not before him at the time of the meeting with Mr Powell on 8 October 2014.
53. In respect of the WhatsApp group, he described this as a “*private communication platform where texts, videos, images and audio can be exchanged by members of the group*”.
54. He did not dispute that he had posted the particular items that were subject to the allegations. He said that he had not retained the conversations on his ‘phone so he could not check them or put any comments attributed to him in full context.
55. He said the group was in existence before he was invited to the group by the administrator, Mansoor Husain. He said that he had no knowledge of the nature or purpose of the group, except that it was a private social group. He described that the WhatsApp group was not the sole place for discussion within the group members. Some discussions took place either face to face or electronically outside the platform where ideas expressed were challenged.
56. He said that he would welcome sight of the full set of messages so he could put what was alleged into “*proper context*”.
57. He said that the “*views alleged against me are not true of who I am or what I now believe*”.
58. He went on to explain at paragraph 41 that in relation to the content of the message contained in paragraph 7.16 of the Clarke report, he was referring to individuals who were propagating that gay marriage be taught in schools and was not referring to all within the LGBT community. He said that he had posted the article against a backdrop of a national debate over the teaching of gay marriage in schools; to which Christians and other faiths contributed. He said that many people were very antagonistic to this idea. He accepted that “*the language was loaded with high emotion it was not in any way intended towards anyone from the LGBT community, but rather a comment on those seeking to encourage gay marriage; something that at the time I, like a majority of Muslims and many Christians at the time, was against. Made in May 2013, these comments were made before my views moved on as they had done in any event.*”
59. In respect of the WhatsApp posting referred to at paragraph 7.17 of the Clarke report he provided his response at paragraphs 42-3. He said that the exchange “*referred to reports of the practice of sexual relations in a spiritual shrine in Pakistan. In the Islamic faith the burial site is a sacred place. I was at the time very upset about the abuse of that sanctified space and my upset had nothing to do with whether the practice comprised homosexual or heterosexual sex*”.

60. He said that his comments were not against anyone from the LGBT community but about the practice of sex publicly in a spiritual place, namely a shrine.
61. The disciplinary hearing was held on Thursday 5 February 2015. The disciplinary panel comprised;
- Bryony Flint (Trust Governor and Chair)
 - Sabina Kauser (Parent Governor)
 - Steve Ball (Trust Governor)
62. The Claimant was represented by Lawrence Shaw from NASUWT and had three witnesses, namely;
- Nina Laumann
 - Steph Green
 - Gus John
63. The investigation team for the Respondent were Richard Powell and Andrew Packer, who was Executive Principal, Park View Educational Trust. Also in attendance was Heather Mitchell, adviser to the panel from Browne Jacobson Solicitors and Jenny Steckles acting clerk.
64. The meeting commenced at 9.30 am and concluded at 6.05 pm and the notes of the meeting are at pages 285 – 303.
65. Prior to the meeting on 2 February, Mr Powell had written to the Claimant's union representative, Mr Oyebitan (page 283). He said that certain matters would be raised at the meeting arising from Mr Faraz's statement and the documentation he had provided in the previous week, namely:
- (i) The Claimant's failure to disclose the audio file of the meeting in October 2014;
 - (ii) Mr Powell may wish to question Mr Faraz on his contributions to, and his membership of, the Educational Activists WhatsApp.
 - (iii) No statement had been served from Mr J Mahmood or Steph Green which could be remedied by attachments of their proposed evidence to an email to the Trust.
66. At the commencement of the hearing, Mr Shaw raised a concern about Mr Powell presenting the case and not being a witness. Whilst Mr Shaw had 15 years' experience as a trade union representative, he had never had a trained barrister present a case at a hearing and said that in the interests of fairness, the Claimant should have a barrister representing him as he did not have the same skill sets as a barrister.
67. After hearing from Mr Shaw and Mr Powell, Miss Flint and the panel decided that whilst normally the investigating officer would merely present the case, on balance they had decided to proceed rather than postpone. Mr Powell was requested not to use jargon or legalise and that the School were happy to proceed without a copy of the tape recording of the meeting between Mr Faraz and Mr Powell that had not been provided subsequent to it taking place on 8 October.
68. Mr Powell opened the case and explained that there was a concern about the complete nature of the WhatsApp messages. He had done what he could to obtain the information but the Department for Education had

refused to disclose it and he had no legal power to obtain it and could not get any further information.

69. He referred the panel to the Teaching Standards which relate to the Claimant's duties as a teacher. He also referred to the equality policy. He took the Governors through the contents of the WhatsApp.
70. He requested that the Governors look at what he set out in his report. He said that all teachers had a moral and contractual responsibility to challenge but the Claimant had not done that and he had breached the minimum standards. He said that the Claimant had done damage to the School's reputation by his comments on WhatsApp. That he knew what the standards as a teacher were and he had not protected them.
71. Mr Powell was then questioned by Mr Shaw. Miss Flint then asked questions herself. The questioning of Mr Powell lasted about 40 minutes. Mr Faraz then presented, with Mr Shaw's assistance, his statement. After he had gone through his statement, he was then questioned by Mr Powell. Mr Faraz during this time spoke about homophobia. His comments are at the foot of page 292 of the bundle. It says;

"... as part of Islamic faith homosexuality is not permissible in the faith. In his entire life he hadn't met anyone who was a Muslim who was homosexual until a year ago. It was a real dilemma to him, was told to avoid gays. To go and confront this within Islam wasn't allowed. This emphasised the dilemma he was going through. He confirmed that Section 28 was around but needed to reconsider as he was still a Muslim, had many discussions about this. The view he was taught as a child was that it was a sin to be homosexual. He confirmed that his view has now changed as he was pro-gay rights and supports gay marriage now although Nicky Morgan doesn't. He then explained about the teaching resources in the school that didn't have commentary before or after to deal with the issue. He explained that he did take issue at promoting homosexuality at the time but didn't agree with any discrimination.

He then stated that should schools teach about homosexuality, yes they should and should prepare children to choosing sexual orientation. This is prompted by Government and this should be in an open discussion and Muslims should challenge themselves. The Muslim Community is homophobic and there is no place for this in the community. He referred the Governors to the statement of Steph Green and Rev Ray Gaston's statement on page 37 of his submission. He confirmed that people can pull wool over eyes about it but it was never right to practice or promote homosexuality within his faith. Within schools they do teach about different relationships. At the school there was one person who was a lesbian and I asked her partner to come into the school to talk about their relationship. As a Muslim I hadn't met a gay Muslim in my 32 years."

72. With regard to the sexual act on a holy site, he referred to this as being a desecration of the site. He said that the act that caused the issue was that it was at a holy site and not due to it being a homosexual act. In this respect, he said that his comments had been taken out of context and that he had been offended by people having sex at the holy site. He accepted

that his comments about "*the animals and satanic ways*" was an extreme way of saying this and explained that;

"The person I was 2 years ago isn't who I am today"

73. The panel then heard from the three witnesses who the Claimant called, who were all character witnesses for the Claimant.
74. On at least one occasion, Miss Flint did have to request Mr Powell to "*lighten his tone*" and it can be seen from the notes that Mr Powell cross-examined the Claimant and the witnesses as he might in a civil trial
75. After these three witnesses had been dealt with, Mr Faraz was then further cross-examined about his evidence. This commenced at 2:44 pm and did not conclude until 3.40 pm.
76. After a short break, Mr Powell summed up his case, as did Mr Shaw, and the parties left at 4.30 pm. The Governors then discussed the matter in-depth before closing themselves at 6.05 pm. In that discussion, Miss Flint described how they discussed each of the allegations, together with the evidence presented by both sides and they considered the Teaching Standards, equal opportunities policy and the disciplinary policies in place.
77. Miss Flint wrote to Mr Faraz on 9 February 2015 with the panel's decision (pages 323 – 328). They decided to dismiss the Claimant by reason of gross misconduct. The reasons for that decision were as follows:
- The WhatsApp postings were homophobic comments and grossly inappropriate.
 - The matter was made more serious by his position as a senior teacher.
 - They did not accept that this was a private forum.
 - The Claimant did not know the identity of all the members of the group.
 - Although he said that his views had changed, at no point did he show any genuine remorse for the offence caused by the comments or the damage they may have done to the School.
 - His position appeared to be contradictory.
 - When asked what he would do now if he was aware that a teacher had made those comments, he said that he would report it to the Head Teacher and to the Child Protection Officer.
 - This would indicate that he felt that the comments were grossly inappropriate.
 - However, throughout he argued that there was justification for the comments and that they were not in fact homophobic.
 - They could no longer trust his credibility or integrity as a teacher.
78. The letter also deals with various other aspects of how they reached their decision and in particular;
- Equality of representation.
 - The NCTL hearing.
 - The investigation carried out by Mr Powell.
 - The expected conduct of him as Deputy Head Teacher.
 - The Teachers' Standards.
 - The equal opportunities policy.
 - The disciplinary policy.
 - Mitigation.

79. On 25 February 2015, the Claimant appealed against the decision by his union representative, Sam Oyebitan (pages 329 – 334). The letter complained about the procedure during the disciplinary process. In particular, it complained about the behaviour of Mr Powell and the equality of representation and that their request for an adjournment to enable them to obtain legal representation had been refused.
80. The letter complained about the investigation undertaken by Mr Powell and that he had not been impartial as required by the School's disciplinary policy.
81. The letter complained that the panel failed to take into account, or give sufficient weight, to a number of matters and in particular;
- The private nature of the forum.
 - The fact that the comments were made public only through publication of the Peter Clarke report.
 - The absence of evidence that Mr Faraz had discriminated against a pupil, another teacher or any parent.
 - The heated environment in which the comments were made by Mr Faraz.
 - The explanations given by the Claimant about his comments.
 - The evidence of the other witnesses.
82. An appeal hearing was convened for Wednesday 20 May 2015. A letter inviting the Claimant to attend that hearing was sent to the Claimant on 8 May 2015 (pages 338 – 340). Attached to the letter was;
- The Claimant's appeal letter.
 - The original disciplinary hearing bundle.
 - The letter of dismissal.
 - The minutes of the disciplinary hearing.
83. It would be a full rehearing. The hearing would be conducted by a member and two Governors and Mr Powell would be presenting the School's case. Mr Packer would attend as Commissioning Manager. Miss Flint would be in attendance and was available for questioning. There would also be a legal advisor to the panel in attendance.
84. On 12 May, Mr Oyebitan wrote on behalf of the Claimant (pages 341 – 342) to object to the presence of Miss Flint. He said that it was inappropriate in view of the fact that the matter was to proceed by way of a full re-hearing.
85. On 15 May, the Respondent's solicitor, Daniella Glynn, wrote to Mr Oyebitan to again request the disclosure of the audio recording taken by Mr Faraz's union representative during the investigatory meeting in October 2014 (page 345). It had still not been provided despite numerous requests for it.
86. On 15 May, Daniella Glynn wrote to Sam Oyebitan about the disciplinary hearing and in reply to his earlier letter. She said that the panel would comprise Yvonne Wilkinson, Ammo Talwar and Saud Khan. She also explained the purpose of the legal adviser and Mr Powell and Mr Packer's roles in the appeal hearing. It acknowledged that the Claimant would now be represented at the appeal hearing by Claire Darwin of Counsel.

87. On 18 May, Daniella Glynn wrote to say that Yvonne Wilkinson would not be able to attend the appeal hearing and they had arranged for Pat Smart to be in attendance as Chair (page 350).
88. On 18 May 2015, the Claimant's representative wrote to Daniella Glynn about the hearing. Various queries were made about the way the hearing was to be conducted. In respect of the transcript of the meeting on 8 October 2014, they proposed that a copy would be provided with certain matters redacted as conversations were recorded in the absence of Mr Powell and also provided that they release to them a copy of the notes of that meeting taken by Mr Powell.
89. This was responded to by Daniella Glynn on 19 May (pages 355 – 356).
90. The disciplinary appeal hearing was held on Wednesday 20 May 2015. The panel comprised;
- Ammo Talwar (Trust Director/Chair)
 - Pat Smart (Trust Director)
 - Saud Khan (Parent Governor).
91. The Claimant attended with;
- Sam Oyebitan (NASUWT)
 - Claire Darwin (Counsel)
92. Also in attendance were;
- Bryony Flint (Trust Governor and Chair of original panel)
 - Richard Powell (Investigator)
 - Jonathan Perkins (Advisor to the panel)
 - Marlene Price (Notetaker).
93. The hearing commenced at 10.20 am. At the commencement of the hearing, it was confirmed that the panel had been given the full WhatsApp transcript dated 5 April 2013 to 1 March 2014 and this had been distributed within this meeting. The employee had also had sight of this. The notes of this meeting are at pages 356p – 356bb. There were a number of preliminary issues raised by the Claimant's Counsel, Miss Darwin. Mr Powell then presented the case management report that had been presented before to the disciplinary investigation. He took the panel through;
- the contract of employment
 - the Teaching Standards
 - the equal opportunities policy of the Council
 - the equality policy
 - the appeal letter.
94. Mr Powell was then questioned by Miss Darwin. He was questioned between 1.20 pm and 3.10 pm.
95. Mr Faraz then read his statement to the panel. He was then questioned first by Miss Darwin then by Mr Powell and again by Miss Darwin. There then followed an exchange between Mr Powell and Miss Darwin before questions were asked of Mr Faraz by the panel.
96. Miss Flint was then questioned by the panel, Miss Darwin and Mr Powell. Mr Powell then summed up the case for the management and Miss

Darwin summarised the Claimant's case.

97. We have seen Miss Darwin's speaker notes at pages 356a – 356o, which was submitted to the panel towards the end of the hearing.
98. The panel then reconvened at a later date and at that meeting, they were advised by Jonathan Perkins. The unanimous decision of the panel is set out in their letter to Mr Faraz of 5 June 2015 (pages 357 – 364).
99. In the letter, they refer to an allegation regarding a posting of the comment "*These uncle toms were bound to get exposed, even if it were their own doing!*" They noted that the disciplinary panel had considered that there was insufficient evidence to conclude this allegation was well founded and they did not consider this allegation at all.
100. The appeal panel were dealing therefore with allegations relating to postings that the Claimant had made which were said to be homophobic in respect of two matters;
 - (i) His postings in response to a Guardian article entitled "*Gay marriage; news and teaching resources roundup*"; and
 - (ii) His postings in respect of a BBC article entitled "*Gay Pakistan; where sex is available and relationships are difficult*".
101. The panel were satisfied that;
 - (i) The Claimant had been responsible for these postings.
 - (ii) The comments in respect of the Guardian article were homophobic and offensive. The panel had considered the Claimant's explanation that he was referring to those who wished to promote gay marriage in schools and did not find this to be a credible explanation. They said that the article which he was referring to did not relate to promoting gay marriage, rather it referenced teaching tools to educate students about gay marriage. It was felt that the strength and nature of the language used, including the term "*animals*" and "*satanic*" showed the Claimant was not taking part in any reasonable debate about gay marriage. He was displaying extreme homophobic and offensive views.
 - (iii) In relation to the comments on the BBC article, they also found these homophobic and offensive. The panel did not find the Claimant's explanation that he was referring to the practice of homosexual sexual activity taking place at shrines to be credible. They found that the explanation was inconsistent with the remarks he actually posted, in particular; "*The problem of homosexuality is rife in Pakistan*". It was noted that he had not referred in the WhatsApp conversation to sex or shrines, which is what he said to the panel were what his comments were about.
 - (iv) The panel was satisfied that Part 2 of the Teachers' Standards applied to the Claimant and that it was reasonable to assess his conduct against Part 2 of the Standards.

102. The panel was satisfied that in posting the comments, his behaviour had fallen far below these standards. In particular, that he had;
- failed to demonstrate a consistently high standard of personal conduct;
 - failed to show tolerance of and respect for the rights of others;
 - undermined the value of tolerance of those with different beliefs;
 - failed to have proper and professional regard for the ethos policies and practices of the School in which he taught.
103. In respect of the last point, they had particular regard to the Trust's Equality policy and the Birmingham City Council Equal Opportunities policy. They found that both documents showed that the school had policies in place at the relevant times that were anti discrimination and pro equality. They found that the posting of homophobic comments on WhatsApp showed that he had little or no regard for such policies and the ethos behind them.
104. The panel were satisfied that the Claimant by his actions had brought the School into disrepute.
105. The panel had considered the issue of the Claimant's convention rights, i.e. those set out in the European Convention on Human Rights. They accepted that they were required to act in a way which was not incompatible with any of the specific rights relied on by Miss Darwin.
106. In respect of Article 8, they were satisfied that the right was not engaged. If it had been, they were satisfied that dismissal would have been a justified interference in that right because of the serious nature of the offensive and homophobic views which he shared. This was wholly unacceptable for a teacher and especially one in a leadership position.
107. In respect of Article 9; Freedom of Thought, Conscience and Religion, the panel accepted that the Claimant had an unqualified right to hold a religious belief but his right to manifest that belief is qualified. They did not accept that the WhatsApp comments posted were a religious belief. The comments did not portray a belief that homosexuality is not permissible in Islam. They portrayed offensive and insulting homophobia. The panel considered the comments to be offensive and homophobic rather than expressing a belief such as homosexuality not being permissible in Islam or a Christian expressing a view that gay marriage should not be allowed. Article 9 had therefore not been engaged.
108. In respect of Article 10; Freedom of Expression, the panel found that the right was qualified and subject to limitations set out in Article 10(2). The panel found that the posting of homophobic comments on the WhatsApp group when he did not know the identity of the members of the group and was aware that the comments could be forwarded in or out of the group and was aware of the links between the group and the Trust created a real risk to the reputation of the Trust. The panel therefore concluded that the action dismissing the Claimant for the comments was justified and there had been no infringement of his Article 10 rights.
109. The panel concluded that his behaviour constituted gross misconduct and justified summary dismissal. In their view, no other sanction was appropriate in the circumstances.

110. The panel considered mitigating circumstances relating to the character references and the Claimant's evidence that he had changed his view with regards to homosexuality. The mitigating point put forward though did not in the panel's view outweigh the gravity of the misconduct which he had committed, particularly bearing in mind his leadership position within the School.
111. The panel found in respect of the original disciplinary hearing that it had not led to any unfairness at the end of the day because the appeal hearing was a rehearing and the Claimant had been entitled to put forward any argument he wished and was represented by an able experienced barrister.
112. The appeal panel also found that the investigation by Mr Powell was not inadequate. The Claimant had had an opportunity to present his side of the case and to call witnesses. The procedure overall was fair.
113. The decision was that his employment with the School remained terminated and there was no further right of appeal.

The law

Unfair dismissal

114. The claim of unfair dismissal is made under Section 94 of the Employment Rights Act 1996 (ERA).
115. Section 98 provides;

"98 General.

- (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
- (a) *the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it—*
 ...
 (b) *relates to the conduct of the employee,*
 ...
- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
- (a) *depends on whether in the circumstances (including the size and administrative resources of the*

employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

116. In the submissions the tribunal received from both Mr O'Dair and Miss Ranales-Cotos, we were referred to a great deal of case law but none of the case law that relates itself to unfair dismissal for gross misconduct. We remind ourselves that when we have to determine whether an employer has acted fairly within the meaning of Section 98(4) ERA, we apply the "band of reasonable responses" test. We have to ask ourselves whether the employer acted within the range of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own view for that of the reasonable employer. This is the test that was laid down many years ago in the case of ***Iceland Frozen Foods Ltd -v- Jones [1982] IRLR 439***.
117. In reaching that decision, we have to consider the three aspects of the employer's conduct set out in the test in ***British Home Stores -v- Burchell [1978] IRLR 379***. The questions that must be answered are;
- 117.1 Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?
- 117.2 Did the employer genuinely believe that the employee was guilty of the misconduct complained of?
- 117.3 Did the employer have reasonable grounds for that belief?
118. If the answer to each of these questions is yes, the employment tribunal must then decide on the reasonableness of the response of the employer.
119. The band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it is relevant to all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate (***Whitbread plc -v- Hall [2001] IRLR 275***) and whether the pre-dismissal investigation was fair and appropriate – ***J Sainsbury Ltd -v- Hitt [2003] IRLR 23***.
120. Miss Ranales-Cotos referred us to two cases that were helpful to us when considering social media and an alleged breach of human rights. The case of ***Game Retail Ltd -v- Laws [UKEAT/0188/14/DA 3*** reminded us that cases such as this are facts sensitive and the relevant test would continue to be that laid down in ***Iceland Frozen Foods Ltd -v- Jones***.
121. Useful guidance on the approach to be taken in cases where there has been an alleged breach of human rights is set out in the case of ***X -v- Y [2004] IRLR 625*** which was followed recently in ***Turner -v- East Midland Trains Ltd [2012] EWCA Civ 1470***. The headnote in that case reminds us that the "band of reasonable responses" test for unfair dismissal provides a sufficiently robust, flexible and objective analysis of all aspects of an employer's decision to dismiss to ensure compliance with Article 8".

122. In her submissions Miss Ranales-Cotos particularly referred us to paragraphs 52 to 58 of that judgment. That decision set out that it was for us to determine whether or not the Article 8 right had been infringed and it is not enough for the court simply to review the decision taken by the employer. As Miss Ranales-Cotos said to us;

“Whilst accepting that where Article 8 interests are engaged, matters bearing on the culpability of the employee must be investigated with a full appreciation of the potentially adverse consequences of the employee, it made clear that the “band of reasonable responses” test allows for a heightened standard to be adopted where those consequences are particularly grave. The assessment of the procedure is made by the tribunal and not the employer, and in making it the tribunal is adopting an objective test of whether the employer has acted as a reasonable employer might do.”

123. Mr O’Dair in his opening submissions to us had set out Articles 8, 9 and 10 of the European Convention on Human Rights. These were;

“Article 8

Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.*

Article 9

Freedom of thought, conscience and religion

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom for change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others.*

Article 10

Freedom of expression

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting television or cinema enterprise.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or right of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

124. In his submissions, Mr O'Dair referred to us the case of **X -v- Y** and **Turner -v- East Midland Trains Ltd** and then gave us details of a number of other cases which we have also considered namely;

- **Small-v- London Ambulance Service NHS Trust [2009] EWCA Civ 220**
- **Garamukanwa -v- Solent NHS Trust [2016] IRLR 476**
- **Lehideux -v- France [2000] EHRR 665**
- **De Haes -v- Gijssels and Belgium [1997] 25 EHRR**
- **Hashman & Harrup -v- United Kingdom [2000] EHRR 241**
- **Vogt -v- Germany [1995] EHRR 205**
- **Wingrow -v- United Kingdom [1996] 24 EHRR**

Discrimination on grounds of religion or belief

125. The Claimant's claim is of direct discrimination under Section 13 of the Equality Act 2010, which provides;

"13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

126. The protected characteristic relied upon is the Claimant's religion or belief.

127. In Mr O'Dair's submissions he relies on a hypothetical comparator with the following characteristics, namely;

- "1. *Having a profound religious/other belief in the moral equivalent of gay relationships and expressing such belief to people of a similar standpoint.*
2. *A profound religious/other belief in the moral equivalents of gay relationships and expressing to people of a similar standpoint*

containing intemperate remarks about those not sharing such beliefs.

128. Mr O'Dair referred us to case law in respect of the issue of the burden of proof. Section 136 of EA says;

“136 Burden of proof...

(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”*

129. Mr O'Dair referred us the case of ***Anya -v- University of Oxford 2001 ICR 847*** which reminded us that we should consider the whole picture in coming to our conclusions.

130. It is still the case that the burden is upon the Claimant to establish a prima facie case as was established in the case of ***Igen -v- Wong 2005 ICR 931*** many years ago. Only if the Claimant establishes a prima facie case does the burden of proof transfer to the Respondent.

131. In his submissions to us on discrimination, Mr O'Dair also referred us to the case of;

- ***King -v- Great British China Centre [1991] IRLR 513***
- ***Rice -v- McAvoy [2011] NICA 9***

132. Miss Ranales-Cotos then referred us to the following cases;

- ***Glasgow City Council -v- Zafar [1998] IRLR 36***
- ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***
- ***Nagarajan -v- London Regional Transport [1999] ICR 877***
- ***Amnesty International -v- Ahmed [2009] IRLR***
- ***CLFIS (UK) Ltd -v- Reynolds [2015] EWCA Civ 439***

Our conclusions

Unfair dismissal

133. It is not in dispute that the Claimant was dismissed. We are satisfied that the reason for the dismissal related to the Claimant's conduct, namely messages posted on the WhatsApp group known as the Park View Brotherhood. There were two sets of postings which the Respondent considered to be homophobic, namely;

133.1 In response to a Guardian article entitled “Gay marriage; news and teaching resources roundup”. The Claimant wrote on 26 May 2013;

“These animals are going out in full force. As teachers we must be aware and counter their satanic ways of influencing young people”.

133.2 In response to a BBC article entitled "Gay Pakistan; where sex is available and relationships are difficult", the Claimant posted on 1 September 2013;

"I agree that the BBC will exploit any situation however the problem of homosexuality is rife in Pakistan both in the village and in the other cities."

and

"Sign of the end of times"

and

"May Allah further expose this and gives us the strength to deal and eradicate it".

134. The Respondent was satisfied that the Claimant had posted these comments and they were homophobic and offensive.

135. They were satisfied that they;

- breached Part 2 of the Teaching Standards, and
- brought the Respondent into disrepute.

136. The Respondent was satisfied that Part 2 of the Teaching Standards applied to the Claimant and they decided to assess his conduct against Part 2 of the Standards. The Respondent found that his conduct in posting the comments meant that his behaviour had fallen below the Standards, in particular;

- Failed to demonstrate a consistently high standard of personal conduct.
- Failed to show tolerance of and respect for the rights of others (which the Standards identify applies within and outside the School).
- Undermined the value of tolerance of these of different beliefs (which the Standards identify applies within and outside the School).
- Failed to have proper and professional regard for the ethos, policies and practices of the School in which they teach.

137. The Respondent found that the Claimant's posting of homophobic comments on WhatsApp showed that he had little or no regard for the Respondent's equality policy and the Birmingham City Council equal opportunities policy.

138. The Trust also found that the School had been brought into disrepute by wider issues than the Claimant's own conduct and by what had been said in the Peter Clarke report. The Claimant's WhatsApp messages they were satisfied were a significant factor in causing the School to be brought into disrepute. The Claimant must bear responsibility for the effect of the comments in bringing the School into disrepute as he had written them.

139. We are satisfied that the Respondent had a genuine belief that the Claimant had made those homophobic postings and they had reasonable grounds for that belief.

140. We are satisfied that the Respondent was entitled to believe that the Claimant's conduct had fallen short of the requirements of Part 2 of the Teaching Standards and that the conduct had brought the School into disrepute.
141. We are satisfied that the decision to dismiss was within the band of reasonable responses. The Respondent had taken into account its policies and procedures in place at the relevant time and the Claimant's conduct fell below the standard that was expected of a deputy head at the School. Whilst the correct policies may not have been relied on at the disciplinary hearing this was rectified at the appeal. It was reasonable for the Respondent to come to the conclusion that the comments were offensive and homophobic and inconsistent with the School's policies. That his behaviour amounted to gross misconduct which justified summary dismissal. They were entitled to take the view that no other sanction was appropriate in the circumstances.
142. We are satisfied that the Respondent considered the mitigating circumstances which were put forward on his behalf. The panel decided it was significant that at no stage during the process did he apologise for his behaviour until the time of the appeal hearing.
143. We considered whether the conduct of the original disciplinary hearing made the decision to dismiss unfair. It was said that there was an "*inequality of arms*" because the School was represented by Mr Powell, an experienced barrister and he did not have legal representation. The tribunal were satisfied that this particular part of the process was unfair. Mr Faraz should have had his case postponed and been able to be legally represented in the circumstances of this case. However, we are satisfied that it did not make the decision unfair. The matter was rectified entirely at the appeal, which was a re-hearing where he was entitled to put forward all his arguments and was represented himself by an experienced barrister, Miss Darwin.
144. Much was made by the Claimant as to whether the Respondent had conducted a reasonable investigation and particularly that Mr Powell had failed to carry out a reasonable investigation into the allegations against the Claimant. We do not agree with those contentions. In our view, Mr Powell had carried out as reasonable an investigation as he could in the circumstances of the case.
145. We do not agree with the contentions of the Claimant that Mr Powell did not carry out a reasonable investigation. The Claimant was aware of the allegations that he faced and did not co-operate in the investigation process.
146. In his meeting with Mr Powell, he was evasive and would not answer questions in relation to the case, saying that he needed to have precise details of the allegations. We are satisfied he had sufficient details to answer the allegations, as indeed was shown when he eventually provided his response to the allegations just before the disciplinary hearing took place.

147. The Claimant was given ample opportunity to put forward his side of the case to Mr Powell but decided not to do so.
148. Mr Powell was entitled to ask the Claimant to answer the allegation that he had breached Part 2 of the Teaching Standards which applied to him and to answer the question that he had brought the School into disrepute. Until his statement presented just before the disciplinary hearing, he did not answer these questions.
149. Whilst there may well have been inequality of arms in the disciplinary hearing, it did not ultimately affect the outcome. We are satisfied that there was no inequality of arms at the appeal hearing and the Claimant was able to present his case fully to that hearing.
150. Whilst the investigation report included an extract from a clause that was not part of the Claimant's contract of employment, at the subsequent disciplinary and appeal hearings neither the disciplinary panel nor the appeal panel based their decisions upon any alleged breach of these contractual provisions by the Claimant. Although the Respondents did not have a social media policy and the subject is not referred to in the contract or other policies it made no difference to the fairness of the decision to dismiss. The Claimant was not dismissed for breach of such policies but for making homophobic remarks.
151. Whilst the investigation report also made reference to an equal opportunities policy which was not in place at the time of the postings, the policy in question came into force on 1 September 2013. The investigation report was not just focussed on the conduct of the Claimant but on other employees also. Some of those allegations under investigation concerned conduct that occurred on or after 1 September 2013 or related to an ongoing duty to report inappropriate behaviour which continued beyond 1 September 2013.
152. We are satisfied that the Teaching Standards did form part of the Claimant's contract of employment at the relevant time of the WhatsApp posts. It was introduced in July 2011 and Part 2 of the Teaching Standards, we are satisfied, was an implied term of the Claimant's contract.
153. We are further satisfied that the Respondent's decision to assess the Claimant's conduct against Part 2 of the Teaching Standards was within the range of reasonable responses.
154. We are satisfied that at the investigation meeting, the Claimant did not suggest that the investigator should interview specific persons on his behalf. The Claimant was asked to provide details of matters that would require further investigation but he did not do so.
155. We are satisfied that the Claimant had no reasonable expectation that the postings were or would remain private. The Claimant did not know all of the members of the WhatsApp group and there was evidence that messages posted on the group were forwarded in and out of the group from or to other sources.

156. That WhatsApp group had clear links to the Claimant's work, rather than his private life as shown by the name of the group and the fact that the members of the group were involved in, or interested in, education and that the group was used to exchange messages about school matters.
157. We are satisfied that the Respondent was entitled to come to the conclusion that the postings were not a private matter.
158. We are satisfied that the Respondent did not fail to respect the Claimant's rights under Articles 8, 9 and 10 of the European Commission on Human Rights. These matters were raised at the appeal hearing and the appeal panel gave full consideration to these issues. In our view, it quite rightly concluded that the Claimant's Article 8 and 9 rights were not engaged and there was no infringement of the Claimant's Article 10 rights. Full reasons for these conclusions were given in the outcome letter to the Claimant dated 5 June 2015 and the tribunal agrees with those conclusions. Those conclusions we are satisfied were within the range of reasonable responses.
159. The claim of unfair dismissal fails and is dismissed.

Direct discrimination claim

160. We are satisfied that the decision to dismiss the Claimant did not amount to direct discrimination on the grounds of the Claimant's religion or belief. We are satisfied that the Claimant was not expressing a profound religious or moral belief about gay relationships to people of a similar standpoint. He was also not expressing merely "intemperate remarks about those not sharing such beliefs"
161. We are satisfied that the cause of his dismissal was not because of his assertion of his views, which he says were a product of his socialisation into a conservative Islamic culture. This tribunal is satisfied that they were not an assertion of religious sentiments and had nothing to do with a profound religious or other belief in the moral equivalents of gay relationships. They were far more than that. They were homophobic and offensive remarks that were made in a WhatsApp group to people who he did not know.
162. As Miss Ranales-Cotos said to us, the comments were "*Demonstrably homophobic*". They should be viewed in the context of the articles they were commenting on. In the first set of comments, he was describing homosexuals or those who seek to promote homosexuality and inciting action to counter them or their ways. These first comments related to the Guardian newspaper's best teaching resources roundup to help teachers discuss the issue of same sex marriage in the classroom.
163. The second comment related to a BBC online magazine about gay Pakistan. His explanation that his comment was targeted at the issue in relation to the shrine and was in relation to both heterosexual and homosexual acts again is inconsistent with the actual words used, namely "*problem of homosexuality*" and the reference to taking action to eradicate it.

- 164. We take note that both the disciplinary and appeal panels (each differently constituted and including Muslim members) all concluded unanimously after a full consideration of the case that the Claimant's explanations were not credible. They were satisfied that the Claimant was not expressing a religious belief in his comments. The comments were homophobic. This tribunal is satisfied that his dismissal for making homophobic comments had nothing to do with the expression of any religious belief.

- 165. The claim therefore of discrimination on grounds of religion or belief also fails and is dismissed.

Employment Judge Hutchinson

Date: 23 March 2018

JUDGMENT SENT TO THE PARTIES ON

26 March 2018

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FOR THE TRIBUNAL OFFICE