EMPLOYMENT TRIBUNALS

Claimant: Mr M Whittaker

Respondents: 1. Governing Body of Sutton Oak Church of England Primary School
2. St Helens Borough Council
3. Iwan Williams

HELD AT: Liverpool **ON:** 13, 14, 15, 16, 17, 20, 21 and 22 November 2017

BEFORE: Employment Judge Robinson
Mr A G Barker
Mrs A Ramsden

REPRESENTATION:

Claimant: In person
Respondents: Mr M Mensah

JUDGMENT

The judgment of the Tribunal is that:

1. The claims relating to unfair dismissal and direct discrimination in relation to Mr Whittaker's sexual orientation succeed. The first respondent is responsible for the unfair dismissal. The direct discrimination claims are the responsibility of all three respondents.

2. The claims for discrimination relating to any or all of the claimant's disability claims fail and are dismissed, as are the claims of victimisation and harassment.

REASONS

The Issues

1. The claimant's list of issues as contained in his Scott Schedule is lengthy.

2. The claims relate to the claimant's sexual orientation as a gay man and his disability as someone who is HIV positive.

3. The claimant set out 52 claims in his Scott Schedule, many of which replicated/duplicated themselves, but the central factual issue in this case, and it is

worth stating it at the outset, was that on 30 April 2015 the Head Teacher, doing his lunchtime rounds, came across the claimant alone in a classroom with a male Year 5 pupil who we will refer to during the course of this Judgment as LK. The Head Teacher, Mr Williams who is the third respondent, saw the claimant give the pupil a packet of Rolos.

4. The claimant accepted those straightforward facts.

5. Those factual findings which led to the claimant's dismissal have caused this litigation.

6. In coming to our judgment we heard from the claimant himself, his trade union representative from the NASUWT, Mr Fenton, and from Mr Williams, Dr Kathy Holland who was a member of the governor's panel which dismissed the claimant and we also heard from the governor who dealt with the appeal, Alice Edgerton.

7. We accepted that each of the witnesses were doing their best to give their evidence as they remember it, especially as these events had occurred some time ago.

8. However, Mr Fenton's contribution to the internal processes was less than helpful for Mr Whittaker. He took an adversarial and aggressive approach at each of the many hearings that took place. Some of the witnesses giving their evidence to the governors, who were trying their best to deal with a sensitive issue, felt intimidated by Mr Fenton's stance. They became confused because of the way Mr Fenton went about his business representing Mr Whittaker.

9. We have no doubt that Mr Fenton considered he acted in the best interests of his member.

10. Mr Fenton's involvement in the whole process did have an affect on the internal processes which we explain later.

Facts (regarding unfair dismissal)

11. The claimant was a newly qualified teacher in September 2001. He did not have an auspicious first year as he was given a written warning. The allegation against Mr Whittaker in 2002 was that he had inappropriate and unprofessional contact and involvement with a pupil, JJ, at this primary school.

12. The claimant was suspended. The police interviewed the boy's mother and conducted a video interview with JJ. There were very specific allegations against Mr Whittaker in relation to hugging and tickling JJ, giving him a birthday card and photograph to JJ, visiting his home and offering him "a long ride" in his car.

13. Mr Whittaker gave explanations for all the things that he did in 2001/2002. The upshot was that he was not dismissed nor given a final written warning. He was given a first written warning, and given some guidelines which he signed up to with the Head Teacher at that time, Mrs Evans.

14. The relevant guidelines of the eight that were given to him are as follows:

(3) Mr Whittaker will ensure that he is not left alone with a pupil except in an open area accessible to all.

(4) Mr Whittaker will ensure that any actions involving the pastoral care of pupils are discussed with the Deputy or Head Teacher.

(6) There will be no physical contact with a child which may be misconstrued.

(7) There will be no contact with parents or pupils outside school.

15. The only other issue on Mr Whittaker's record was a final written warning on 10 December 2003 in that he attempted to use the internet at school to access inappropriate information, and by so doing risked bringing the reputation of the school into disrepute.

16. Mr Whittaker accepted that he had had both a first warning and a final written warning in 2002 and 2003 respectively. It is important to stress that the incident in 2002 and the one in 2015 are very different factually. For example the claimant was never accused of touching LK. Both these warnings had long since expired.

17. No other member of staff now involved in this case was at the school at the time. The Head Teacher, Mr Williams joined the school in 2003 as a Deputy Head Teacher and became Head Teacher in February 2011. He did know that Mr Whittaker had been disciplined in 2002 because he was told by the, then, Head Teacher.

18. However, very little of the detail of the issue in 2002 was before Mr Williams or Dr Holland's panel in 2015/16. Indeed Mr Williams had not seen for some time, if he had seen them at all, the guidelines referred to in paragraph 14.

19. In the intervening 13 years, however, it was accepted that Mr Whittaker had become a very good teacher, that he had been given specific classes which were difficult to deal with because he was good at dealing with behavioural issues. Mr Whittaker's pastoral care of the children was that of a caring teacher. It was accepted that Mr Whittaker, in relation to the 2002 incident, had been naïve.

20. The pupil, LK, was interviewed. The notes of the interview were not produced during the disciplinary process. The notes are extremely sketchy and it is appropriate to set them out exactly as they appear in a handwritten note at page 859 of the bundle:

"L1/15/15

11.15am

Called him in

After dinner go to him on Thursday – LK can go other days

Talk about how his week's been

LK said

He will give him £10 each week when he is a footballer

If he thinks of something and he asks him for it he will get it

Bouncy ball

Has been sweets so far

Just [LK]"

21. Mr Whittaker was not suspended but there was a strategy meeting where the incident was discussed. Mr Whittaker was not present.

22. The Head Teacher reported the matter to both Mr Phil Ingham, Human Resources (HR) at St Helens Borough Council, and the LADO ("Local Authority Designated Officer"). The Head Teacher is the safeguarding lead for the school.

23. Mr Williams took the above action because of the claimant's previous disciplinary in 2002, the claimant's reaction when he went into the classroom (the claimant went red), finding the claimant alone with LK, and because the claimant said "what will happen now?"

24. The Head Teacher wanted to suspend the claimant but was dissuaded from doing so by Mr Ingham.

25. The decision was taken to allow the claimant to remain teaching so long as there were two full-time teaching assistants in the claimant's classroom. The senior leadership team were informed to be extra vigilant at lunch and break times. The senior leadership team included the Head Teacher, Claire Hill, Linda Lewis, Sharon Green and Liz Tinsley.

26. The Head Teacher also instructed the claimant not to have one-to-one contact with pupils, and in particular have no contact with LK or give any pupils chocolate.

27. The Head Teacher discussed the incident with Mavis Hyland who was the Chair of the Governors and told her there would be a disciplinary investigation.

28. In attendance at the professional strategy meeting on 19 May 2015 were Margaret Gribbon who was the LADO Chair, Claire Hill and a Detective Sergeant from Merseyside Police. The police did not pursue the matter.

29. The significant entries in the minutes of that meeting include a report that Mr Whittaker lived alone, that in the past he had caused concerns around his practice in contact with children, and he was internally disciplined "a couple of years ago" (that refers to the incident 13 years before). The meeting was told what safeguards had been put in place as Mr Whittaker still remained at the school teaching.

30. The notes of the meeting confirmed that Mr Whittaker accepted that it was silly to meet with LK. The Head Teacher told the meeting that he was concerned about the claimant's whole demeanour when challenged about his behaviour and he thought that behaviour was unusual. The school did not inform the parent of LK because of "the knock on effect on the whole school community".

31. It was suggested that the family of LK was a vulnerable family with regard to LK's behaviour at home and the behaviour of LK's brother who was in Mr Whittaker's class, and that LK's mother was a single parent.

32. There was a further professional strategy meeting on 24 July 2015. Mr Williams confirmed that he would be able to monitor the claimant's conduct whilst he was working.

33. On 4 June 2015 the claimant was invited to an investigatory interview and the investigatory interview took place on 15 June 2015.

34. The allegations against the claimant, which continued to be the allegations during the disciplinary hearing, were:

(1) That the claimant had engaged in inappropriate contact with child LK;

(2) That Mr Whittaker's actions had breached a reasonable lawful management instruction.

35. At that investigatory interview Mr Fenton was in attendance with Mr Ingham and Mr Williams. The claimant explained that LK had often been in trouble, giving him sweets was not planned and that he did not specifically tell LK's teacher or Mr Holland (who was the behaviour lead at the school) about his meetings. The claimant accepted that he had met LK on five or six occasions in March and April and that the meetings were prompted after a parents' evening when he had seen LK outside his classroom and asked him if there were "issues". Mr Whittaker explained that he talked to LK. Despite not telling the class teacher of the meetings, he thought she knew that he was talking to LK because he said it had been written in the report book and she had approached him about the meetings. He was also seen by other people talking to LK. He was not hiding anything, he said.

36. It was the claimant who initiated the meetings between himself and LK.

37. There was some discussion about what LK had said to the Head Teacher at the meeting on 1 May 2015. It was put to the claimant at the meeting:

> "LK has said that you have told him he can ask you for anything he needs. What do you mean by that?".

The response by the claimant was this:

> "I didn't say that. I do say to the children 'if there is any help you need you can always ask'. I let them know there are people they can go to for help. I didn't say anything about getting things for him."

38. The claimant confirmed that his teaching assistant, Jane, and two other teaching assistants, Debbie Lakes and Janet Williams, knew that he was seeing LK during breaks.

39. The claimant told the meeting that the Head Teacher had walked through the classroom some weeks before and had seen LK with the claimant and had asked the claimant "was LK in trouble". The claimant replied they were just talking.

40. The investigators were told that the claimant had been seen speaking to LK and MK, his brother, at the gate at 8.45am on 22 April before walking them into school. That was before the incident in Mr Whittaker's classroom.

41. From that interview a report was prepared by the Head Teacher and Mr Ingham. The only witness statements that were taken for the investigation were from Leanne Partington, a student social worker; Will Holland, the behaviour support worker; and Andrea Hayes, the teacher for LK.

42. The teaching assistants were not interviewed.

43. The 2002 incident was considered, as it was felt by Mr Ingham and Mr Williams that "they provide important context on the recent conduct of Mr Whittaker". At that point Mr Williams had obtained the set of guidelines that the claimant had been given in 2002.

44. The investigation report included the following: "that LK, the pupil involved in the recent issue, shared a similar profile with the child involved in 2002. They were of similar physical appearance." The school at the relevant times recognised both pupils as vulnerable due to their home situations.

45. The school had policies for dealing with challenging behaviour and rewarding good behaviour. There was a structured reward system in place, including stickers, stamps, house points, etc. The policy does allow for teaching staff to introduce their own rewards at a personal level to encourage children to work hard and behave well.

46. LK had been issued with a behaviour monitoring book. It was that book into which the claimant had said he had made entries. However the book was lost and never seen by the governors.

47. Andrea Hayes, the class teacher, said that she was not aware that Mr Whittaker had been meeting with LK but became aware (it was never clear when that was) when she asked LK about why his behaviour support book had not been signed. LK told her that Mr Whittaker had seen him during lunchtimes.

48. The report states that Ms Hayes then approached Mr Whittaker because she assumed that LK had been in trouble. Mr Whittaker explained to her, according to the report, that he wanted to be sure that LK was "ok" especially as his brother was in Mr Whittaker's class. Ms Hayes was not told by Mr Whittaker that he had given chocolate or sweets to LK as a reward.

49. Mr Holland confirmed he was not aware that Mr Whittaker had been meeting LK. Mr Holland suggested that he could not think of a reason why Mr Whittaker needed to meet LK because there was a robust system in place to deal with behavioural issues.

50. Mr Holland did say that there had been previous issues with Mr Whittaker's management and behaviour and he (Mr Whittaker) had not engaged with the pastoral team. Mr Whittaker had not contacted Mr Holland about any of LK's behaviour.

51. The student social worker, Leanne Partington, spoke to LK as a result of the allegations. LK confirmed to Ms Partington that he often met with Mr Whittaker alone

in his classroom with the door open. Sometimes Mr Whittaker gave him gifts and that the meetings between LK and Mr Whittaker were prompted by Mr Whittaker.

52. Ms Partington's opinion was that Mr Whittaker's behaviour in "arranging to meet privately with LK and giving gifts, if done without the knowledge of LK's parents and teacher, was highly inappropriate".

53. The conclusions of the investigating duo were not disputed, in many respects, by Mr Whittaker. There was a reference to the fact that Mr Whittaker, in the guidelines of 2002, had been told that he must discuss pastoral issues with a Deputy or Head Teacher and he had made no attempt to do that with regard to LK. The report suggested that it was "of great concern that despite clear guidance that Mr Whittaker should not be alone with a pupil and despite having no legitimate reason to meet, on several occasions he instigated a situation where he would be alone in his classroom with LK". Management did not accept that meeting alone in a classroom constituted meeting in a "open area accessible to all".

54. The investigatory panel felt that Mr Whittaker's actions were contrary to the guidance for safer working practice for adults who work with children and young people in education settings. That document sets out the guidelines for one-to-one situations and includes this paragraph:

> "One-to-one situations have the potential to make [children] more vulnerable to harm by those who seek to exploit the position of trust. Adults working in one-to-one settings with pupils may also be more vulnerable to unjust or unfounded allegations being made against them. Both possibilities should be recognised so that when one-to-one situations are unavoidable reasonable and sensible precautions are taken. Every attempt should be made to ensure the safety and security of pupils and the adults who work with them."

55. With regard to gifts, the guidance suggests that all adults working with children should be aware of the school's guidance on rewards including arrangements for the declaration of gifts received or given. The guidance also suggests that the giving of gifts or rewards to pupils should be part of an agreed policy for supporting positive behaviour or recognising particular achievements.

56. The final conclusion and recommendation of the report was this. Taking into account the clear direction that had been given previously to Mr Whittaker which the investigating panel thought he had ignored, the lack of any legitimate reason to meet with the child, the failure to inform the class teacher, the Head Teacher or the behaviour support worker about the meetings, the inappropriate treats given to LK and the views of other professionals the "management have serious concerns over Mr Whittaker's intentions and cannot ignore that the actions could be considered to constitute the early stages of grooming".

57. The report goes on to say that in 2002 Mr Whittaker was given the benefit of the doubt in that his actions were naïve rather than having any ill intent, and consequently the conclusion was that the investigatory panel had serious safeguarding concerns in respect of Mr Whittaker and that he had left himself extremely vulnerable to the allegations. The recommendation was that formal disciplinary action should be taken.

58. There was reference to a number of other alleged incidents witnesses raised. For example Andrea Hayes' unsolicited comment that there was an occasion when, because of poor behaviour, LK was not allowed to go swimming with the rest of the class. It was arranged that he would go into Mr Whittaker's class. Another child arrived without his swimming kit so he was also sent to Mr Whittaker's class. Andrea Hayes' criticism of Mr Whittaker was that the child who had not misbehaved was made to sit outside the classroom but that LK was allowed into the classroom and as a result the child outside felt he was being punished. Ms Hayes felt that LK had been given preferential treatment.

59. The claimant was taken through a disciplinary process which lasted an inordinate length of time. This was due to a number of factors which we will set out below. He was called to a disciplinary hearing arranged for 21 September 2015. The allegations in that letter were the same as the allegations that had been put to him at the investigatory interview.

60. Mr Whittaker was absent from 7 September to 9 November 2015. The disciplinary hearing was postponed. The claimant declared himself fit to return to work from 4 November 2015 and the first disciplinary hearing took place on 12 November 2015 with Mr Williams, Mr Ingham, Mr Fenton and the claimant in attendance. The disciplinary panel, which included Ms Hyland, as chair, and Dr Holland, was advised by Jane Carter who was the principal HR officer at St Helens Borough Council.

61. There were then disciplinary hearings on 24 November 2015, 26 January 2016, 11 February 2016, 24 February 2016, 17 March 2016 and eventually on 17 May 2016. At the conclusion of all the evidence the Chair of the panel, who did not give evidence to us, asked the investigating officers to present their summary. Mr Fenton objected. Virtually the whole day was taken up with hearing the investigating officers' and Mr Fenton's summary. The meeting finished at 6.20pm because of the length of time it took for Mr Fenton to read his summary document.

62. During the course of the internal proceedings a further issue arose in that the claimant had further contact with LK on 24 November 2015.

63. The disciplinary hearing on that day was about to start when Mr Williams, who was attending the hearing, received a phone call from Claire Hill, his Deputy Head, who told him that Andrea Hayes had told her that the claimant approached LK, had spoken to him at lunchtime and had consequently broke the arrangement with regard to one-to-one meetings with LK.

64. LK was spoken to by his new class teacher for that year, Linda Lewis, and she asked him what had happened. Claire Hill was in attendance. The note of that meeting on 24 November with LK states this:

> "Reluctant to share the information. Asked what Mr Whittaker said, He's sorry for when he made me sad. Said some other things but I can't remember. Paused for a minute before saying 'asked me what I think of him'. Mr Whittaker said to other children 'if I'm not here tomorrow I won't be back'."

65. The meeting proposed for 24 November 2015 was postponed. The claimant went into work the next day and was suspended. The reason for his suspension was that he had contact with pupil LK when asked not to. The claimant was told he must

not contact his colleagues without prior consent. The claimant broke that condition because a teacher informed Mr Williams that he had received messages from the claimant on Facebook.

66. The Facebook messages between Mr Whittaker and the teacher, Mr Price, read as follows:

> Mr Whittaker to Mr Price:
>
> "I tried to sneak out of the classroom today without saying goodbye and making a fuss. That didn't work. Sorry again. I may need to come clean. Let me see what happens. If I get the chance to tell you face to face I will. Take care. Cheers."

67. Mr Price replied and then later Mr Whittaker then says to Mr Price:

> "You won't be seeing me again now. The kids won't either. Back in March and April I was chatting to a Year 5 boy for ten minutes at dinner time once a week. It was in my class, doors open, lights on. I reported it in his report book. Ewan saw me. Other staff saw me and I told his class teacher three times. Ewan accused me of grooming the boy. I have been in work all this time. They allowed me full access to all children. They did not monitor me and so on. They went the route that I am a paedophile which is obviously absurd, wrong and false. They made serious errors in their investigations…..I am responding by claiming victimisation. Now I was told not to contact the boy or have any contact with him but I said my goodbyes to him yesterday. I was seen and reported and now they've suspended me while they investigate this. I will not return now and my career is basically over. I am not supposed to have contact with staff but I thought you could do with knowing."

68. The outcome letter of 29 June 2016 explained why the panel had come to their decision and why the claimant was summarily dismissed. The findings in relation to the two allegations are as follows:

> (1) The governors were also informed that the investigation found that you had been meeting with LK at lunchtimes, alone, and on occasions had given LK sweets. It was alleged that these meetings had been instigated by you without the knowledge of anyone else within the school. Management maintain that you had no legitimate reason for meeting with LK despite your claim that the meetings were to address his poor behaviour. Management believe that these meetings were in direct contravention of the guidelines issued to you in 2002.
>
> (2) Just prior to the reconvening of your disciplinary hearing on 24 November 2015 the panel was informed that whilst in school you approached LK, which in management's view contravened the restrictions placed on you whilst a disciplinary investigation was being conducted. Following a request by management to adjourn the hearing to investigate this incident further the governors agreed to this request."

69. The governors who decided to dismiss the claimant also had copies of the screenshot of the Facebook account which is set out above.

70. The findings of the panel were (having visited the classroom without the claimant or his representative being in attendance) that there was a door that opens onto the playground but they did not accept that the classroom was a thoroughfare. The finding was that the governors were of the view that the classroom was not open and accessible to all. They also noted the claimant's admission that he met with LK for ten minutes once a week for about 4-6 weeks and that he accepted that he had left himself vulnerable to other interpretations and he had apologised for that.

71. There was a difference of opinion, the governors noted, between Ms Hayes and the claimant in terms of what Ms Hayes knew. However the governors accepted that Ms Hayes had found out about the meetings between the claimant and LK when she noticed a gap in LK's behaviour book. The governors accepted that there was an issue with LK's behaviour and there was a behaviour plan in place and it was not open to the claimant to, unilaterally, decide that he could manage LK's behaviour more effectively. Moreover, his meetings with LK were not part of the agreed plan nor had they been agreed with LK's mother.

72. The governors noted that the claimant thought it was unreasonable that the guidelines issued in 2002, in particular points 3 and 4 set out above, should still be in place and that management should rely on information issued some 13 years ago. The governors found that there was no evidence to indicate that the information issued ceased to apply or had been withdrawn. The governors therefore found that in not following points 3 and 4 of the guidelines the claimant had breached a reasonable lawful management instruction.

73. The governors were also concerned that the claimant had given LK sweets and that they referred to the guide for safer working practices for adults. The guidance sets out that such gifts should be given as a reward to pupils and be part of an agreed policy. They noted that the claimant accepted that that was an error of judgment but there was no ill intent.

74. The governors also noted that the claimant was unable to provide names of any other pupils whom he had met alone during lunchtime.

75. The governors also criticised the claimant for speaking to LK on 24 November 2015 when he had received an instruction not to do so. Although the claimant said that he felt the instruction was no longer in place we find that it was in place and that he should not have met LK.

76. The claimant had been asked by the Head Teacher a few days before 24 November 2015 to teach LK's class but as soon as the claimant pointed it out to the Head Teacher the Head Teacher confirmed that that was a mistake. The Head Teacher made arrangements for another person to teach LK's class so that there would not be any contact between LK and the claimant. The explanation by the claimant that he thought his condition, not to meet with LK on school premises, had been removed because of that request was not accepted by the governors.

77. The governors felt that the Facebook details they had seen showed that the claimant knew about the "no contact" rule with LK.

78. The governors found that Mr Price had approached Mr Williams about the information on Facebook of his own accord. He had not been coerced by either the Head Teacher or Mr Ingham to come forward. The governors also noted that it was a

condition of the claimant's suspension that he should not contact colleagues without prior consent.

79. The governors recognised that the claimant had not been interviewed by the investigating officer with regard to the incident on 24 November but that he had been given every opportunity during the disciplinary process to explain himself. In short the governors found that the claimant's contact with LK on 24 November was unnecessary and in breach of the condition placed upon him.

80. The governors confirmed that they had no suspicion over Ms Partington's involvement in the process. She had been asked to interview the child by the Children and Young People Service Department by the Chair of the Professional Strategy Meeting on 19 May 2015. Her remit was to interview both LK and MK to obtain information. The governors rejected any impropriety with regard to any Facebook contact between Ms Partington, LK's family and Mr Ingham. Ms Partington did not know Mr Ingham before her involvement in the case.

81. Part of the claimant's submissions to the disciplinary hearing related to examples of staff being treated differently from him. He suggested that no action had been taken against other members of staff who had acted inappropriately. The governors felt that the claimant had provided no evidence to substantiate those claims and that the claimant did not know what action was or was not taken against those members of staff because of confidentiality.

82. Before us, Mr Williams set out paragraph 71 of his statement, explanations for each and every issue raised by the claimant or his trade union representative. We accept that none of the incidents with other members of staff had any similarity to the allegations facing the claimant.

83. At the end of the letter which was signed by Mavis Hyland, the Chair of the panel, she confirmed that the governors had found both allegations proven and that together, they constituted gross misconduct, and that having considered the sanctions available, the governors had decided unanimously that summary dismissal was appropriate and the claimant's employment with the school was terminated on 9 June 2016, which was the effective date of termination.

84. The claimant appealed.

85. The claimant was suspended from November 2015 to the end of his employment. Although Mr Williams suggested that the suspension was reviewed we find that it was not. Or that, at the very least, the review did not involve the claimant.

86. Since the appeal was issued by the claimant and since August 2016 Mrs Hyland has not been fit enough to either deal with the appeal or come to the Tribunal to give evidence. Dr Holland has stepped in and agreed to deal with those issues.

87. There was a great deal of correspondence between Mr Ingham and Mr Fenton about the appeal process.

88. In short it came to this. Neither Mr Whittaker nor Mr Fenton attended the appeal hearing. Mr Fenton wrote to Mr Ingham on 14 October 2016 saying that the notes taken were incomplete, inaccurately recorded, misleading and misrepresentative. He makes the point that it is a mammoth job for him, almost six

months after the last hearing, and 12 months from the beginning of the process to undertake a full review of the notes and therefore he could not agree those notes.

89. However, at no time did Mr Fenton produce his notes, either to this Tribunal or indeed to the appeal hearing.

90. Angela Farrell, an HR Manager, wrote to Mr Fenton on 17 October 2016 making it clear to him that he had been provided with the notes of the hearing taken by the respondent's note taker and that they were not intended to be a verbatim transcript, and she confirmed that the disciplinary panel had had access to those notes when making their decision. She pointed out that Mr Fenton has had the opportunity to supply his and Mr Whittaker's notes and had not done so. She pointed out to Mr Fenton that full written reasons had been given as to why the panel reached the decision that they did when dismissing Mr Whittaker.

91. She told Mr Fenton on 17 October 2016 that there was no merit in postponing the hearing in an attempt to gain agreement on notes which cannot be changed. She confirmed that the notes were a contemporaneous account and more importantly it was not necessary to gain agreement to go through to the appeal.

92. The request therefore for a postponement of the appeal hearing was refused.

93. On the same date, 17 October 2016, Mr Fenton wrote to Ms Farrell to confirm that he has been instructed by his member not to attend the hearing arranged for 18 October 2016. He confirmed that his member had been made so ill by his treatment by the school and St Helens Human Resources that he was unable to attend the hearing. Mr Fenton continued to complain that he had not had sight of a full set of minutes to which both sides could agree.

94. On 19 October 2016 Mr Fenton was informed by Ms Farrell that the appeal panel had started their deliberations and that the hearing had been adjourned prior to reaching a conclusion because the panel wanted copies of Mr Fenton's notes, or any notes taken by Mr Whittaker, so that they could be considered. They also wanted to see sight of evidence the union representative intended to present in support of the grounds being quoted in Mr Whittaker's appeal. A time limit was put on the production of this information which expired on Monday 24 October 2016.

95. Mr Fenton was given more time to provide the notes in legible format and ultimately the time limit was extended to 27 October 2016.

96. On 27 October 2016 it was noted that Mr Whittaker had been afforded the opportunity to present his appeal or that Mr Fenton could have attended on his behalf. Ultimately neither Mr Fenton nor Mr Whittaker attended at the appeal hearing.

97. On 2 November 2016 a letter went out to Mr Whittaker confirming that his appeal had been dismissed. Mr Whittaker was told that the panel considered whether to postpone the appeal hearing because the claimant was unfit to attend, but the panel noted that the fit note said that the claimant was not able to attend an appeal until 19 December 2016.

98. The panel felt that as the matter had been ongoing since June 2015 in the interests of all parties a conclusion should be reached.

99. Moreover, the panel noted that the only way in which Mr Fenton and Mr Whittaker would attend such a hearing would be if the notes were mutually agreed.

100. The appeal panel felt that that was unachievable and unnecessary.

101. Mr Dawson, who was the Chair of the panel and who sat with Tony Redmond and Alice Edgerton (from whom we heard at this hearing), considered the reasons the claimant had set out for overturning the decision to dismiss and considered the management case presented by Mr Ingham and Mr Williams. They also heard from Dr Holland who attended as the representative of the original disciplinary panel.

102. The panel adjourned the hearing without making a decision in order to provide Mr Fenton with the opportunity to submit his own notes. The panel wanted to see Mr Fenton's notes because Mr Fenton felt that the HR advice to the original disciplinary panel was "incomplete, inaccurate, misleading and misrepresentative".

103. The panel was disappointed that, having made the request, no notes were produced.

104. Consequently the panel reconvened to consider the additional evidence and to make a decision. The panel considered that the allegations were proven and constituted gross misconduct, and that the sanction imposed of summary dismissal fell within the band of reasonable responses open to the original panel.

Facts (regarding procedure)

105. Much of the procedure that took place with regard to the dismissal and appeal of Mr Whittaker was criticised by Mr Fenton. Indeed that criticism was taken up by Mr Whittaker in the Tribunal hearing.

106. There are a number of issues which we shall criticise in the conclusion part of this judgment, but in terms of the totality of the process, Mr Whittaker, with the assistance of Mr Fenton, was able to challenge the allegations put to him.

107. It is not necessary for us to go through each and every allegation made by Mr Fenton. Some of the criticisms levelled at the panel were justifiable but we do not think that they affected the fairness or not of the decision, for example Mrs Flynn pulling faces. It seems that it was in exasperation at Mr Fenton's behaviour.

108. The disciplinary panel concluded that Mr Fenton's behaviour was inappropriate, unprofessional and intimidatory.

109. Adjournments and cancellations, when requested, were given. In all there were seven hearings. That was an inordinate and disproportionate way of dealing with the two simple allegations that had been put to Mr Whittaker. It was unfortunate that on 24 November 2015 the disciplinary hearing had to be adjourned because of the further issue when the claimant contacted LK. It was appropriate to postpone the hearing at that point in order for further allegations, if necessary, to be put. Mr Fenton's complaint that the claimant had only received the letter advising him that the hearing would take place on 24 November on 20 November 2015 is therefore otiose. There was no prejudice to the claimant. But the later delays did put the claimant to a disadvantage and was unfair.

110. Mr Fenton's availability was sometimes difficult to obtain. The governors are busy people. In particular Dr Holland had to juggle attendance at the disciplinary hearings with her clinics.

111. In any event, each and every time a hearing was adjourned or postponed a proper enquiry was made of all the potential attendees to see what their availability was.

112. Further documents were produced at various times, both by the respondent and by Mr Fenton, and it was appropriate that the panel considered those documents, and they did.

113. Mr Fenton was able to cross examine all the witnesses who attended. With regard to closing submissions, although there were some issues about whether the parties should be allowed to make closing submissions. Both the investigating officers and Mr Fenton were able to have a free rein when giving their final submissions to the disciplinary panel.

114. No obstacle was put in Mr Fenton's way on 24 February 2016 when he produced Facebook profiles showing (allegedly) some connection between Leanne Partington, the social worker, and family members of the child in question (LK). That was considered by the panel.

115. Mr Fenton's allegation that Ms Partington had failed to follow the council's safeguarding procedures were also dealt with by the disciplinary panel. Mr Fenton suggested that it was inappropriate for an unqualified social worker to undertake the role.

116. At the meeting on 17 March 2016 further documents were produced by Mr Fenton to show a connection between Ms Partington and Mr Ingham and that they were "friends" on Facebook. That issue was also dealt with by the disciplinary panel and ultimately they felt that there was no connection between the various parties with regard to the Facebook entries.

117. The disciplinary panel were advised by Mrs Carter and where they were unsure of their position they took advice from her. An example of this was where Mr Fenton requested to re-examine the claimant after the conclusion of all the evidence and that request was refused because Mrs Carter advised the panel that there was no right to re-examine the claimant.

118. Asking Mr Fenton for a copy of his pre-prepared summary document did not offend the fairness of the hearing.

Disability Discrimination

119. The claimant was diagnosed with HIV in 2011. He was in hospital for a period of time with pneumonia. Mr Williams did not know that there was a connection between the claimant's pneumonia and a diagnosis of HIV.

120. At no point during the investigation interview of Mr Williams and Mr Ingham did the claimant say that he was HIV positive. It was only shortly after the investigatory interview on 15 June 2015 that Mr Fenton approached Mr Ingham and

asked him whether he knew that the claimant was HIV positive, to which Mr Ingham replied "no". It was at that point that Mr Ingham informed the Head Teacher.

121. Therefore the knowledge of the school and all the respondents with regard to that status only occurred in June 2015.

Sexual Orientation

122. It was known that the claimant was gay. It is difficulty to actually pin down the moment when that was known. It is likely that there were rumours about the claimant's sexual orientation for some considerable time. The claimant informed some of his colleagues that he was gay. However, the Head Teacher could not remember when he discovered that the claimant was gay, although it was before these disciplinary proceedings took place.

The Law

123. With regard to unfair dismissal, the burden is upon the respondent to show that they have dismissed for one of the potentially fair reasons set out in section 98(1) and section 98(2) of the Employment Rights act 1996. If the respondent overcomes that burden then the burden is neutral as between the parties when it comes to deciding whether the dismissal is fair or not. In determining whether the dismissal is fair or unfair the Tribunal must have regard to the reason shown by the employer and consider whether in all 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. That issue shall be determined in accordance with equity and the substantial merits of the case.

124. The Tribunal must not substitute its views for the views of the dismissing officer, and must consider whether the dismissal is within the band of reasonable responses recognising that that band is extremely wide.

125. In coming to our conclusions we must consider the judgment in **British Home Stores v Burchell [1980] ICR 303 EAT** and consider whether the employer has shown that it believed the employee guilty of misconduct, it had in mind reasonable grounds upon which to sustain that belief and at the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

126. The range of reasonable responses test also applies equally to the conduct of the investigation as set out in the case of **Sainsbury's Supermarkets v Hitt**. The Tribunal must consider the gravity of the charge, the potential effect upon the employee especially when the allegations, if proven, could potentially be career ending, and the investigation must be thorough especially when the integrity of the teacher, as in this case, is in question.

127. We should consider whether the investigating officer, dismissing officer and all those involved in the dismissal understood that the investigation should focus on any evidence that proves the innocence of the claimant as much as finding evidence that supports the charges against the claimant. It is also essential for the dismissing officer or panel to make sure that if he or she feels the investigation that has taken place does not deal with all the issues, then the dismissing officer must enquire

further as to the circumstances. Mitigation must also be taken into account when deciding on the sanction and an alternative sanction to dismissal should also be considered, even in gross misconduct cases.

128. With regard to discrimination, we had to identify the protected characteristic, which under section 4 of the Equality Act 2010 in this case is the claimant's sexual orientation as a gay man.

129. With regard to sexual orientation and direct discrimination contrary to section 13 of the Equality Act 2010, the claimant believes the respondents have discriminated against him because of a protected characteristic, and that he has been treated less favourably than the respondents would treat others in that regard. The claimant also believes that he has been harassed in the workplace in that the respondents have engaged in unwanted conduct related to a protected characteristic, and that conduct had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The claimant also suggests he has been victimised because he and Mr Fenton made complaints about discrimination. Those are the protected acts. We asked ourselves, has the claimant been treated less favourably than an hypothetical comparator or those comparators that the school dealt with mentioned in paragraphs 81 and 82 above? Has the claimant proved facts as required under the principles of Igen v Wong (see below) ? Was the allegations made by the claimant false and not made in good faith?

130. With regard to disability, the claimant also claims harassment and also claims that the respondents have discriminated against him and treated him unfavourably because of something arising in consequence of his disability, and that the respondents cannot show that the treatment is a proportionate means of achieving a legitimate aim.

131. With regard to disability discrimination, there is a duty to make, for example, reasonable adjustments, and that duty only arises where the employer knows or ought to know that the employee is disabled. Therefore an employer is not subject to the duty to make reasonable adjustments if he does not know or could not reasonably be expected to know that the employee has a disability and is likely to be placed at a disadvantage by the employer's provision, criterion or practice, a physical feature of the workplace or a failure to provide an auxiliary aid.

132. With regard to the burden of proof in the discrimination claims, if there are facts upon which the Tribunal could decide in the absence of any other explanation that the employer has contravened the provision, the Tribunal must hold that contravention occurred unless the employer shows that they did not contravene the provision. In other words, there is an explanation from the employer's action or inaction applying the principles set out in **Igen v Wong**.

133. This is a two stage process. Firstly that the employee establishes the detrimental action, and if the Tribunal finds that the employer treated the employee less favourably than they would have treated an actual or hypothetical comparator and there is no material difference between the circumstances relating to the comparator and the claimant, and there is no valid explanation forthcoming from the respondent, and the Tribunal finds that the less favourable treatment is because of the protected characteristic, then there has been direct discrimination made out pursuant to section 13 of the Equality Act 2010.

Conclusions

134. Applying that law to the facts of this case (and for ease of presentation we set out further facts below) we came to the following conclusions.

135. We were inundated with allegations from Mr Whittaker in a long Scott Schedule.

136. We decided the disability issue first. We concluded that the respondents had no idea that the claimant was HIV positive until June 2015. Although the claimant is clearly disabled and was accepted as such, the fact is that none of the actions of the respondents or their officers had any connection with the claimant's disability. In other words, nothing untoward occurred because of the claimant's HIV status whether it be a failure to make reasonable adjustments, direct discrimination or discrimination arising from disability. We even considered whether the claimant had been harassed or victimised because he is HIV. The respondents only became aware of the claimant's HIV status after the disciplinary process had been started and nothing that occurred during the process suggested that the respondents were in breach of the claimant's equality rights during the whole of that period which had a connection with him being HIV.

137. Some of the claimant's claims were out of time. For example the allegation that Elizabeth Glynn from the HR department back in April 2006 had called him a "sickie".

138. This is an allegation which has no connection with the main part of this claim. It is a different type of allegation and took place so long ago that it would be difficult to deal with because of the passage of time. The word is used in an email and refers to another employee as well. It was an "off the cuff" comment in a private email about the claimant and someone else and had no connection to the claimant's disability as he was not HIV at the time. There is no link between that phrase and his sexual orientation. The claimant was referred to as a "sickie" as was someone else. We were not told of that persons sexuality or whether they were disabled. It is for the claimant to show he has been treated differently from a comparator and he has not done so.

139. In any event, given the circumstances of this case, it is not appropriate to extend time on a just and equitable basis. The claim is out of time and consequently we dismiss it.

140. The claimant's claim that he had his pay stopped and that there was some documentation that showed that also fails. The claimant did not know about it at the time. It could not have had any effect upon him because of that lack of knowledge and nothing ever happened to the claimant's detriment in that regard.

141. There were vague allegations within the Scott Schedule that the respondents ignored his equality rights. We do not believe that the claimant's equality rights were ignored, save in the limited circumstances set out below, but generally that was not the case.

142. The claimant's allegation that he was moved from one job to another in a different way from other teachers has no substance to it. He was the Key Stage 2 curriculum leader in English and Maths. Another teacher dealt with Key Stage 3 in

English and Maths and all that happened was that the other teacher took over the Key Stage for English for the whole school and the claimant took over the Key Stage for Maths for the whole school. A practical decision made for sound educational reasons.

143. These changes were in the gift of the Head Teacher. All teachers were given different roles within the school at different times, and there was no less favourable treatment of the claimant in this regard. The claimant was not harassed. He made no complaint at the time about being harassed. The conduct of the Head Teacher did not create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. If the claimant believed that that was the case it was not reasonable for the conduct to have that effect. All that the Head Teacher was doing was moving his staff around in order to make the best use of his resources. The claimant was acknowledged as a talented teacher.

144. The claimant put in a grievance in 2013 but the five points that he raises had nothing to do with his HIV status or sexual orientation. They were general complaints. The matter was dealt with by the Deputy Head Teacher, Claire Hill, and a full response was given to the claimant on 28 February 2013. The claimant did not appeal to the governors as he was entitled to do. The claimant made his grievance and was satisfied with the outcome, or at the very least did not want to take it any further. This was not direct discrimination of him because of his sexual orientation nor did the response of the school's hierarchy harass him. If the claimant maintains that, after this complaint, he was victimised (and we are not sure he is saying that) he did not produce any evidence to suggest that were the case.

145. The next allegation related to the claimant's PPA time. If the claimant went for doctor or hospital appointments his management time was changed to PPA time. He was not entitled to management time as of right. He did not miss any PPA time. That was protected like any other teacher.

146. No other person would have been treated any differently. This issue did not concern the claimant at the time.

147. We considered whether the conduct had the effect of violating the claimant's dignity or causing an intimidating, hostile, degrading, humiliating or offensive environment, and we took into account the claimant's perception, other circumstances of the case and whether it was reasonable for the conduct to have that effect. We could not see anything in the way that the claimant was treated that could make it a reasonable allegation to be made.

148. The claimant claims that both Mr Williams and Ms Hill accused him, wrongly, of breaching the marking policy. We find that the claimant was on that occasion slap dash with his marking. It may have been because he was training a student teacher Hannah Boyd, how to mark. We accepted the Head Teacher's evidence that there was a problem with the claimant's marking. The claimant was simply told there was an issue. No other person would have been treated differently, whether they were gay or not. It was unreasonable for the claimant to consider that such treatment of him was discriminatory.

149. The next allegation relates to the claimant suggesting that Iwan Williams' view on his potential suspension contrasted with the Human Resources view. We accepted that the Human Resources advice to Mr Williams was that the claimant

should not be suspended. Mr Williams wanted the claimant suspended but was persuaded by Mr Ingham not to. That is what Mr Ingham was there to do. Other than the concerns we have below we do not think that Mr Williams involving Human Resources at that time was unnecessary. It was right that he should seek advice as to what he should do and in taking that advice he did not breach the claimant's equality rights, nor was it unfair.

150. Mr Williams did speak to the Chair of Governors before she was seised of the disciplinary process.

151. We do not find that this was in any way discriminatory. It was not harassment of the claimant. It did not affect the environment in the school, but we do say, as set out below, that it was an element in the unfairness with regard to the process followed by the school. The Head Teacher should not have discussed anything with his Chair when he knew, or ought to have known, she might be involved in the disciplinary process.. Providing her panel with an investigatory report was, however, appropriate. Insofar as it is said this claim is out of time, we concluded that this is part of a continuing series of events leading through the disciplinary process and onto the dismissal.

152. The allegations set out in the Scott Schedule from allegation 12 onwards we shall deal with as one whole.

153. There are some positive findings with regard to the respondent's treatment of the claimant. For example:-

154. The claimant accepted that he should not have been with LK, consequently the process of disciplining the claimant or discussing it with him was not something that the claimant can complain about. The claimant also, we find, did not tell the Head Teacher or Mr Holland that he was meeting LK. The school had reward structures in place with regard to giving gifts to children, and the claimant did not need to supplement those policies.

155. Teachers should know, and Mr Whittaker in particular because of the 2002 warning, that having one to one meetings with pupils leave them open to allegations of impropriety and they should be wary of allowing themselves to be drawn into such situations.

156. The suspension of the claimant on 24 November 2015 was virtually inevitable once he had contacted LK when told not to.

157. We did not accept the claimant's evidence that he thought the condition, that he should not contact LK, was not still in place. That is a ludicrous thing for the claimant to suggest.

158. However, against those issues we found that the respondent failed the claimant in a number of ways, and we set them out as follows.

159. The Head Teacher investigated the claimant yet he was not impartial. The claimant said that the Head Teacher had seen the claimant with LK alone a few weeks earlier than the April 2015 incident without criticism. If that was the case the Head's evidence on the point needed to be clarified. This was a disputed fact, and an important one in the context of this case, which an impartial investigator should

have looked at. Consequently Mr Williams should have withdrawn from the investigative process.

160. For Mr Ingham and Mr Williams to suggest, in their investigative report, that LK had a similar profile to the child in 2002 was inappropriate. Apparently information had been provided to the two investigating officers that the physical appearance of LK was similar to the young child in 2002. This was a comment made by a retired teacher. Furthermore, the minutes of the professional strategy meeting referred to in paragraph 29 above suggested the claimant's previous warning was a couple of years previously. That was wrong and never corrected. The claimant's other warning had occurred 13 years before the LK incident. That warning, and the conditions attached, were taken into account by the dismissing panel because of Mr Ingham's and Mr William's investigatory report. Mr Whittaker was a different, more experienced, teacher who had proved himself over the intervening 13 years. Furthermore it is our finding, as set out in paragraph 164 below that that guidance was not in place. In those circumstances it was unfair and directly discriminatory for the governors to take that long expired warning into account.

161. It was never made clear at what point Andrea Hayes, the class teacher of LK at the time, became aware that the claimant was meeting LK. It was never established by the investigating team, nor the disciplinary panel whether she knew before the incident on 30 April 2015.

162. The claimant was allowed to continue to teach in the school from April through to November 2015. Why, if he was a risk to children generally or to LK in particular?. The claimant was open when he agreed it was silly of him to meet LK. There was an important issue as to whether the claimant, sitting in a room with LK, was inappropriate. Looking back at the guidelines given to him (page 468) in 2002, condition 3 reads:

> "Mr Whittaker will ensure that he is not left alone with a pupil except in open area accessible to all."

163. Condition 4 reads:

> "Mr Whittaker will ensure that any actions involving the pastoral care of pupils are discussed with the Deputy or Head Teacher."

164. If, as they did , the governors considered whether the claimant had breached those previous conditions there are only two conditions that are relevant. The governors should have had regard to the fact that the claimant was never requested not to give rewards to the children. Moreover with regard to condition 3 there was a serious dispute as to whether the classroom was open and accessible. We found that that guidance was not strictly still in place. Mr Whittaker had had pastoral care of children without the input of the Head or Deputy in the intervening 13 years. New protocols with regard to pastoral care had been implemented since 2002.

165. There was an issue as to whether the claimant had logged meeting LK in the report book. That report book was lost and the governors never saw it. That was an important piece of information which could have assisted the governors come to their decision. We heard nothing of the attempts to locate the book. That was a flaw in the process.

166. The investigating officers and the governors did not interview the three teaching assistants who the claimant said saw him with LK. That was unfair. Although we accepted that Ms Partington's position was not fundamental to the decision that the governors made, there was some weight placed upon her opinion that Mr Whittaker's contact with LK was "highly inappropriate". This was from a trainee social worker, which together with the comment made in the investigative report describing the meeting between Mr Whittaker and LK as "being in the early stages of grooming" must have influenced the disciplinary panel even if only on a subconscious level and is not fair to Mr Whittaker.

167. Allegations which were not part of the initial investigation were considered. For example Andrea Hayes' suggestion that Mr Whittaker favoured LK when he was sent to Mr Whittaker because he forgot his swimming kit and had to stay back at the school. This was a highly prejudicial comment which had little to do with the issues that Mr Whittaker had to deal with.

168. The governors visited the classroom on a whim without either the claimant or his trade union representative in attendance. That was unfair. Especially so as there was a real dispute, both at the time and in this Tribunal as to how the classroom was set up, whether windows were covered, and whether the room was open and accessible. The Head Teacher had no difficulty gaining access to the room. The door was open. The Head Teacher himself accepted that the claimant was sitting with a desk between him and LK when he saw him handing the Rolos to LK. If the governors were going to look at the area where the incident took place, they should have had Mr Whittaker there to explain why he thought there was open accessibility to the room.

169. For a long period of time the claimant was allowed to teach at the school. It was made clear to him that he should not have one to one contact with LK. The Head Teacher was cavalier in the way that he dealt with that condition. At one point he asked the claimant to teach the class which LK was in. We accept that that was a mistake and that Mr Whittaker did not actually teach LK that day but the incident suggests that the Head did not feel he had to be overly alert to the possibility of the claimant having contact with LK. Furthermore, until the claimant was suspended, there were no concerns about the claimant being with other children. If the school hierarchy felt this was a safeguarding issue one wonders why the claimant was not kept away from all the children and not just LK. In other words suspended at the outset.

170. During the period of suspension from November 2015 through to June 2016 there was no review of the suspension with the claimant or his trade union representative. The Head Teacher suggested that he did review it with HR. What the Head did, did not amount to a full consideration as to whether the claimant's suspension should continue or not. The claimant was on suspension for over six months which meant that getting back to the school, if the outcome of the disciplinary had been different, would have been very difficult for him.

171. Dealing with the other issues that the claimant raised, we noted the following. It was right that the professional strategy meeting should be set up to consider the incident with LK. We do not think that the respondents have failed in their duty to provide freedom of information and subject access requests. Any dilatoriness in the

way that that was dealt with has nothing to do with the claimant's disability or his sexual orientation.

172. With regard to LADO's involvement, we see nothing suspicious in the way that that was dealt with. In the circumstances it was open to the Head and HR to deal with the LK incident as a safeguarding issue, though we note the school hierarchy did not think it serious enough to involve LK's mother. Indeed the impression given was that the mother should not be involved.

173. We do not accept that the respondents arranged for meetings and hearings when the claimant was unwell. Meetings were arranged as and when all parties were available as set out in the facts above, and to suit, in particular, Mr Fenton's availability. Similarly, we do not think that the claimant was given inadequate notice of hearings.

174. Either Mr Fenton was given the dates and he should have passed it on to the claimant, or the claimant received the dates of hearings in good time. If there had been any indication that either Mr Fenton or the claimant could not meet the dates the respondents would have changed the date of the hearing. We know that to be true because when asked they did so.

175. We do not accept that the interviewing of LK in November 2015 was done under duress. He was simply asked questions about what Mr Whittaker had said to him.

176. We do not accept that the respondents attempted to hold a disciplinary hearing without Mr Whittaker or his representative in attendance. We find that Mr Whittaker was able to put his case to the respondents. We find that the appeal was dealt with appropriately. If Mr Fenton had agreed the notes that were taken at the time by the respondents' note taker, Mr Whittaker would have been able to attend and to put his member's case.

177. We do not accept that the respondents ignored the claimant's disability status. They did not know that he was HIV positive and had no way of knowing. Just because the claimant had pneumonia in 2011 and that it was known that he was gay does not mean that the respondents and their officers could jump to the conclusion that the claimant is disabled. That would be inappropriate in itself.

178. There were no personal links between the social worker and Mr Ingham Those were spurious allegations made initially by Mr Fenton. Human Resources did not give discriminatory advice to the governors' panel.

179. The giving of written reasons for the dismissal 20 days after the hearing and not 14 days as required by the policy in place is unfortunate. However this was a complicated case which needed to be dealt with with care. The lateness of the written reasons was not unfair to the claimant or discriminatory. Any employee in the same situation as the claimant with such far ranging allegations made against them would expect it to take some time for written reasons for any sanction to be sent.

180. An appeal form not provided for the claimant is not unfair or discriminatory because the claimant was able to appeal and have his appeal heard. Not having the correct form sent to him for completion by the claimant did not jeopardise the claimant's ability to appeal.

181. We do not accept that the minutes of the meetings were inaccurate. It was never suggested by the respondents that the notes were verbatim. They were the best that a note taker could take in the circumstances. These were very lengthy hearings. If there was a complaint by Mr Whittaker and Mr Fenton about the notes then they should have produced their notes so that there could have been a discussion over whose notes were more accurate. Alternatively the two sets of notes could have been amalgamated and amended so that the notes were perfected to the satisfaction of both parties.

182. The holding of the appeal without the claimant and his representative in attendance was the fault of Mr Fenton and potentially the claimant as well. We have no criticism of the respondents when their various officers decided that the appeal should go ahead in the absence of the claimant. We do not accept that the claimant's complaints were not recorded nor do we accept that the whole proceedings were deliberately protracted. The fault for the length of the process falls at the door of both parties, but related only to the availability of the people involved. All of them were busy professional people.

183. No grievance was ever raised during the course of the disciplinary process. In any event all issues were dealt with by both the disciplinary panel and the appeal panel with regard to the claimant's complaints about the process.

184. Mr Fenton may have been interrupted when he represented the claimant. But only because he was so difficult to deal with. The respondents' officers were frustrated and intimidated by Mr Fenton' attitude during the course of the disciplinary process. The way in which Mr Fenton was handled by the respondents' officers was not discriminatory or unfair to the claimant.

185. With regard to the claimant's allegations of other staff breaching policy and management instructions, we have set out in the facts above how the Head Teacher dealt with those issues in his statement and we accept his explanations. In any event those allegations relating to other staff are not of a similar nature to the allegation that the claimant faced.

186. Although it is not clear whether the claimant has a victimisation claim, we considered that issue. The respondents only proceeded with the investigation and the disciplinary proceedings because the claimant met with LK. It had nothing to do with any complaint in the past that he had made.

187. We accept that some of the allegations have been made out of time as set out above. However we accept that all the allegations from the moment that the claimant was found with LK in his classroom on 30 April 2015 right through to his dismissal in June 2016 was one set of continuing acts.

188. For the most part, therefore, the allegations made by the claimant which were very full, but often vague, are rejected. It is only in relation to the specific issues that we set out above where we feel the respondents have fallen below the standard that we expect of a school and a Head Teacher, especially when advised by the legal department at St Helens Council with Human Resources support.

189. The claimant has been unfairly dismissed for the reasons set out above. The allegations against him were career ending allegations. There were parts of the investigation which were improperly dealt with and sketchy. The claimant was

entitled to have a proper and full process and for the reasons set out above he did not get that.

190. We also felt that a teacher who did not have the protected characteristic of the claimant would have been dealt with differently. We had much debate as to the proper comparator in this claim. We considered a hypothetical, heterosexual male teacher found alone with a male pupil and a hypothetical male teacher found alone with a female pupil. On balance we preferred that latter comparator. Such a male teacher would not have been dealt with as the claimant was. Nor would there have been a presumption that he was grooming, in the circumstances, that the Head came across in that classroom. An explanation by an heterosexual teacher that he was supporting the child in a pastoral way would have been more readily accepted by both the Head and Mr Ingham.

191. We were concerned about the word “grooming” in the investigative report. There was an assumption by both Mr Ingham and the Head that there was a connection between the claimant being gay and him and him being a paedophile.

192. The claimant may well have been something of a maverick in the school, and there was professional tension between the claimant and Mr Holland. Mr Holland was the teacher in the school who dealt with the pastoral care of the children. Mr Whittaker had a higher opinion of his own ability to give care to the children than he should have allowed himself, He was willing to be disdainful when dealing with such policies, if he thought he could help a particular pupil. That seemed to have led him into conflict with the senior leadership team at times.

193. Stepping back and looking at this claim objectively, however, it is difficult to see how the governors could conclude that they had to dismiss this claimant. He had been suspended for a long period and his actions were foolhardy in talking to LK in November 2015. However if the governors had dealt with the original incident instantly, all the later problems for both parties could and should have been avoided.

194. Whilst he was suspended conditions were put in place. Those conditions could have been kept in place in the future as they had been after 2002. We heard of no harm done to, of suffered by, LK. Indeed no complaint was made by any parent or the pupil himself.

195. The length of the process placed the claimant under great strain.

196. In all the circumstances of this case we find that the dismissal was unfair and the sanction of dismissal was outside the band of reasonable responses even though we recognise that is a very wide band.

Summary

197. We find that the claimant was unfairly dismissed for the reasons expounded in paragraphs 158-170 of this Judgment.

198. As this dismissal is potentially career ending, and the respondents knew that, the investigation needed to be thorough, in order to seek to find evidence in support of the claimant's contentions as much as seeking to find evidence against him. The respondents’ officers failed in that respect. That also makes the dismissal unfair.

199. The length of the process also made this dismissal unfair. Both the first respondent and the HR department of the second respondent allowed Mr Fenton to dictate the agenda. To have so many meetings relating to, what was factually, a very simple issue, extended the process beyond what can be considered to be fair. Even before the claimant's suspension the process had taken from April 2015 until November 2015 We note that Mr Whiittaker was absent from 7 September but this matter should have completed during the summer term of 2015. That delay is unacceptable especially as, the longer the process, the less likely it is that a professional will return to his post.

200. During the process the claimant came under intolerable stress. His poor judgment in 2015 when he spoke to LK and posted on Facebook was the result.

201. With regard to the direct discrimination claim, an assumption was made that the claimant was in the process of “grooming” LK. Both Mr Ingham and Mr Williams allowed themselves to assume that there was a correlation between the claimant being gay and a paedophile. The incident was blown up out of all proportion. A male heterosexual teacher would have been dealt with, in the same circumstances, in a much less heavy-handed way. For that reason ,the second respondent are vicariously liable for Mr Ingham’s actions and Mr Williams is personally liable for his actions and attitude to the claimant.

202. For the reasons set out in the main body of this decision the disability discrimination claims, the victimisation claim and the harassment claim all fail. Some of Mr Whittaker’s claims also fail because they are out of time as described above.

203. Consequently, the claimant's claim succeeds with regard to direct discrimination and unfair dismissal but no others.

204. This matter will move to a remedy hearing when all issues with regard to remedy, including mitigation and contributory fault, will be considered by the Tribunal.

205. If the parties require directions with regard to that remedy hearing they should apply to the Tribunal within 28 days.

206. Within that period they should also let the Tribunal know their availability for a one day remedy hearing between 1 April 2018 and 30 September 2018.

14-03-18

Employment Judge Robinson

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

16 March 2018

FOR THE TRIBUNAL OFFICE