EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4120668/2018

Held in Glasgow on 12, 13, 14, 17,18 19, 20 and 24 June 2019

Employment Judge: **M Sutherland**
Members: **R McPherson**
A McMillan

Mr J Guetta — **Claimant**
In Person

East Renfrewshire Council — **Respondent**
Represented by:
Ms Wilson -
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that-

- the claimant was not treated less favourably because of a protected characteristic and his claim for direct discrimination is dismissed.

- the claimant is not entitled to damages for breach of contract and this claim is dismissed.

REASONS

Introduction

1. The Claimant made a complaint of direct discrimination because of religion and a complaint of breach of contract.

2. The Claimant had initially made a complaint of discrimination because of his religion and race. At a preliminary hearing on 13 December 2018 the Claimant advised his complaint was in respect of his religion, on account of his

Judaism, rather than because of race discrimination. The Claimant described himself as being Jewish and we have adopted this approach.

3. The Claimant had also made a complaint of direct discrimination against the Disciplinary Officer which was withdrawn and dismissed during the final hearing.

4. The Claimant was unrepresented and appeared in person. The Respondent was represented by Ms Wilson, Solicitor.

5. The Claimant's employment circumstances were in flux and it was agreed that that the Tribunal would consider liability at this hearing with remedy to be determined if required at a later stage.

6. It was agreed that the pupils would not be referred to by name. The pupils have been ascribed a number in the order of the register of names as at 10 January 2018 with the first pupil being referred to as Pupil 1, etc. We have adopted the same approach to their parents. Where there is a material risk that a pupil could be identified from descriptive information we have not used the ascribed number.

7. Following discussion at a preliminary hearing held on 13 December 2018 (and at the final hearing) the following list of issues was agreed –

Direct Discrimination

a. Did the Respondent treat the Claimant less favourably than they would treat others? Was that treatment because of his religion or belief?

b. Did the following alleged acts occur, and if so, did that amount to less favourable treatment, and if so was there a causal link to the claimant's relegation or belief?

(i). The failure to cross-check the initial complaint prior to suspension and investigation;

(ii). Informing the Claimant's trade union representative of the claimant's suspension meeting and reason for the meeting

(iii). The inclusion of allegation 3 as a ground for investigation

(iv). The dropping of allegation 3 at the disciplinary hearing

(v). The length of time taken to investigate the Claimant's conduct

(vi). The production of a biased and dishonest investigation report tainted with anti-Semitism

(vii). The deliberate removal of discussion of anti-Semitism from the Claimant's investigation interview notes

(viii). The investigation office falsely advising the appeal committee that all pupils said that the claimant had advised them not to tell their parents about the film having been shown.

(ix). The decision to dismiss the Claimant

(x). The length of time taken to set a date for an appeal hearing

(xi). A page having not been included initially in the appeal hearing papers

(xii). The interruption of the Claimant discussing anti-Semitism by Tracy Morton at the appeal hearing.

(xiii). The Head of Education (Mhairi Shaw) saying "a normal teacher wound not do that and I agree".

<u>Breach of Contract</u>

a. Did the following acts occur and did they amount to a breach of the Claimant's contract?

(i) The failure to cross check the allegations against him

(ii) The time taken to investigate the Claimant's conduct

(iii) The time take to notify a date for an appeal hearing

8. At the preliminary hearing on 7 March 2019 the Claimant proposed to call Lesley Ann Connick (Teacher), Cllr McLean, Jennifer Graham (Note taker at appeal), and Alison Finlay (Appeal administration). The Respondent had proposed to call Marion Carlton (Head Teacher) but had concluded that her evidence was not materially relevant. None of these witnesses attended to give evidence at the final hearing and no witness order had been sought or issued. At the final hearing, and after discussion, the Claimant agreed that the attendance of these witnesses was not required because their evidence was either not materially relevant to the issues or because their evidence pertained to material facts which were not in dispute.

9. At the preliminary hearing on 7 March 2019 the Claimant was ordered to specify the material facts that he would rely on to show that the treatment was because of his religion and whether in respect of that alleged act the claimant was relying upon a particular comparator. His response to that order contained a significant number of new allegations of less favourable which were not contained within his employment tribunal claim. At the final hearing, and after discussion, the Claimant identified those which were intended as background information rather than separate allegations, those which were not being insisted upon and were withdrawn, and those in respect of which he sought to make an application to amend his claim.

10. Two applications to amend were made at the final hearing. The Tribunal has discretion as to whether to grant or refuse an application to amend having regard to the overriding objective. Guidance as to the exercise of that discretion was given in *Selkent Bus Co Ltd v Moore* [1996] IRLR 661. The tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The following are relevant considerations in conducting that balancing exercise: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

11. At the final hearing, the Claimant made an application to amend his claim to include a claim that Marion Carlton, Head Teacher had wrongly asserted that the Claimant received £14,000 of resources because of his religion. Ms Carlton's assertion was made on 31 August 2018. The Claimant did not seek an itemised breakdown of that assertion until 7 March 2019 and was provided with that on 11 March 2019. The Claimant did not specify any facts upon which it could reasonably be inferred that the treatment was because of his religion. The issue would have required substantial additional areas of enquiry. The alleged act occurred on 31 August 2018 and was on the face of it time barred. Ms Carlton was not in attendance to give evidence. Having regard to these considerations including the parties' submissions and comments, it was considered that on balance the injustice and hardship of refusing the amendment exceeded the injustice and hardship of allowing it and the amendment was therefore refused.

12. At the final hearing the Claimant also made an application to amend his claim to include a claim that the notes of the appeal hearing were edited in his disfavour because of his religion. The Claimant did not specify in what way the notes had been edited in his disfavour and on what basis it could reasonably be inferred that this was because of his religion. The Claimant received the notes of the appeal hearing on 7 November 2018. The Claimant did not raise any issue with the notes until the final hearing. Determination of the issue would have required substantial additional inquiry. The note taker was not in attendance to give evidence. Having regard to these considerations including the parties' submissions and comments, it was considered that on balance the injustice and hardship of refusing the amendment exceeded the injustice and hardship of allowing it and the amendment was therefore refused.

13. The Claimant gave evidence on his own behalf. The Respondent led evidence from Tracy Morton (Education Senior Manager), Ruth Baillie (HR Officer), Mhairi Shaw (Director of Education).

14. The parties lodged an agreed set of documents. Additional documents were lodged at the start of the hearing.

15. The parties made closing submissions.

16. The following initials are used by way of abbreviation in the findings in fact:

Initials	**Name**	**Title**
AR, DHT	Andy Robson	Deputy Head Teacher, Calderwood Lodge PS
DS, HT	Dean Smith	Head Teacher, Mearns Castle High School
JD, IO	John Docherty	Head Teacher ('Investigating Officer')
MC, HT	Marion Carlton	Head Teacher, Calderwood Lodge Primary School
MS, DO	Mhairi Shaw	Director of Education ('Disciplinary Officer')
RB, HR	Ruth Bailey	HR Officer
TM, ESM	Tracey Morton	Education Senior Manager

Findings in fact

17. The Tribunal makes the following findings in fact:

18. The Claimant is Jewish and a follower of Judaism. He wears a kippah (head covering) as a symbol of his faith. The Claimant has lived and worked in France, Israel, and Scotland. The Claimant is qualified to teach French and Modern Hebrew. Modern Hebrew is the official language of Israel. Although it is not his first language, the Claimant is fluent in English.

19. The Claimant was employed as a Modern Hebrew (Ivrit) Teacher at Calderwood Lodge Primary School in East Renfrewshire from 11 August 2016 until 31 May 2018. Calderwood PS is a Jewish school which encourages understanding of Jewish heritage, culture and faith. The school is open to pupils of all denominations and there are a significant number of non-Jewish teachers and pupils at the school.

20. The Claimant is an engaging, intelligent and dynamic individual. He is regarded as a good, dedicated and hard-working teacher. During his free-time he created a Hebrew Library, a weekly chess club and other school related activities. The Claimant also taught a Hebrew afterschool class for high school pupils from Mearns Castle High School. The Claimant undertook this class on a voluntary basis. His high school Hebrew class was attended by about 15

pupils. The majority of pupils were in S1, some were in S2 and a few were in s3 and above. The pupils were aged between 12 and 16 years old.

21. In the period leading up to the showing of the film, the Claimant was finding work stressful and he considered he had a lack of resources. On 3 September 2017 the Claimant fainted whilst driving.

22. A few weeks prior to its showing on 20 December 2017, the Claimant had identified the film '*Waltz with Bashir*' ('WWB') for potential use with that class. The film was not course material. He had added a link to the Hebrew language version of the film (with English subtitles) to his list of resources. He believed he had checked the film rating but thinks he had confused the trailer rating with the film rating.

23. WWB is an animated film which was written and directed by Israeli filmmaker, Ari Folman. It depicts his search for lost memories of his experience as a soldier in the 1982 Lebanon War. It received critical acclaim and a number of awards. At the time of its release in the UK it was reviewed in the Guardian newspaper by Peter Bradshaw and separately by Jonathon Freedland. According to Peter Bradshaw's review the film asks "Has Israel made a mass, semi-conscious decision to forget about the Sabra and Chatila massacres of the 1982 Lebanese war, in which Israeli forces allowed Christin Phalangist militia into Palestinian refugee camps to slaughter civilians?" He notes that "it is open to the objection that the overdog's pain takes precedence over that of the oppressed". He concludes that "this is an extraordinary film – a military sortie into the past". This sentiment is echoed by Johnathan Freedland's review where he describes it as "among the very best films about conflict". He notes that the 1982 Lebanon War as "one of the most divisive chapters in modern Israeli history" and that the script stresses that the massacre was committed by Lebanese Christian Phalangists and not by the Israeli soldiers. The film was according to Freeland welcomed in Israeli. The film was banned in Lebanon.

24. Although animated the film is not a child's cartoon and is instead akin to a graphic novel. It contains war violence including real life video footage of the

aftermath of the massacre showing lifeless bodies of adults and children. It also has a brief explicit pornographic scene showing an animated man penetrating an animated woman. The exert shown by the Claimant did not show the real-life video footage or the explicit pornography. The exert shown by the Claimant showed violence (including dogs being shot), inappropriate language, and male and female nudity. The film was rated 18 by the British Board of Film Classification. The trailer was given a rating of 12A. The Claimant had first seen the film in France where it had been given a universal rating.

25. On 20 December 2017, which was the last day of term, only 5 of his 15 pupils had turned up to his High school Hebrew class, namely Pupils 1, 2, 4, 8 and 10. All of these pupils were from S1 apart from one from S2. The pupils were aged 12 and upwards. Towards the end of the class the Claimant elected to show them about the first 20 minutes of the film WWB. The Claimant did not seek parental consent or the head teacher's consent before showing the film. The Claimant endeavoured to cover up or fast forward during the more inappropriate parts of exert shown.

26. On 3 January 2018, the first day of the next term, Pupil 2's father emailed a complaint to AR, DHT that: the film was wholly inappropriate for children; it deals with the 1st Israeli- Lebanon war; it contains explicit pornography, children being killed, and psychological issues; it should be shown with a sensitive contextual understanding; and that his child would not attend class until the matter was dealt with. That email was not received by AR, DHT and a copy was hand delivered by the parent on 10 January 2018. Complaints from other parents were received on 11 and 12 January and some parents withdrew their children from the class. (A pupil's fathers had been an Israeli soldier in the 1982 Lebanon War. A pupil's mothers had applied unsuccessfully for the Claimant's post. The Claimant believed this motivated that parent to complain.)

27. On 10 January 2018, during the high school Hebrew class, the pupils advised the Claimant that Pupil 2 was no longer attending the class and his father had complained about him showing the film exert. The Respondent had not yet

advised the Claimant of the written complaint. During that class the Claimant handed Pupil 14 details of an online link to the film (Pupil 14 had not been in class when the film exert was shown). She was aged 16 and he considered her to be very mature. He advised her not to watch the very end of the film because there are real images some of which are disturbing.

28. In the evening of 10 January 2018 the Claimant phoned Pupil 2's father who reminded him that the film has an 18 rating. The Claimant apologised to him and said he would not show even a second of an 18 rating film in the future. Later that evening the Claimant watched the entire film and realised that parts were pornographic.

29. Later on 10 January 2018, after the phone call with Pupil 2's father, the Claimant emailed MC, HT and DS, HT to advise that he had shown an extract of an 18 rated film to his Hebrew Class, that a parent had expressed concerns, that he'd phoned the parent to apologise if he'd upset his son and to say he would not show a second of an 18 rated film in future.

30. In the early hours of 11 January 2018 the Claimant left a note on the windscreen of a car belonging to Pupil 14's mother stating that he gave a link to WWB to Pupil 14, that he made a mistake, that he has probably lost his job, that he'd forgotten how inappropriate the film was, that that he is not allowed to contact her (the mother) and by writing this note he is taking a risk, that he wants to ensure that Pupil 14 does not watch the film, and that he apologises sincerely.

31. The applicable disciplinary procedure is a locally agreed collective agreement informed by the SNCT Handbook of Conditions of Service which is incorporated into the Claimant's contract of employment. The Scottish Negotiating Committee for Teachers ('SNCT') is a national negotiating body which includes recognised trade unions for teachers.

32. That disciplinary procedure provides at Section 5.4: *"The investigatory process should be conducted as speedily as possible, consistent with the principles of fairness and natural justice. In most cases the investigation should take no longer than 15 working days. Where delay occurs,*

communication will take place with all those parties involved to advise the reason for the delay and revised timeframe". Section 10 of that procedure provides: that the time take to undertake an investigation shall be 15 days; that the date of notification of appeal hearing shall be no later than 20 days from receipt of notice of appeal; and that in each case, "these time limits could be shorter or longer by agreement in individual cases".

33. The allegations to be investigated were drafted by TM, ESM. She was aware that an exert was shown of an 18 rated film to a class of S1/S2 pupils and was aware of the parental complaints. She had not met the Claimant before. She was not aware that the Claimant was Jewish although she was aware that he was a Hebrew Teacher. She watched the film and had read reviews of the film including those from the Guardian and those from less reputable sources, including Spiked. The purpose of the allegations was to raise where concerns might lie regarding the alleged conduct to allow those concerns to be properly and fairly investigated. TM, ESM was concerned that the Claimant may have failed to make an informed choice regarding use of an 18 rated film; she was concerned that it may be considered a controversial film about a religious war; she was concerned to understand why that film had been chosen for that class; she was concerned to understand the context in which the film had been presented; she was concerned that the film may have been upsetting for the younger pupils; and she was concerned about the views of the parents.

34. The decision to suspend was taken by MC, HT in discussion with TM, ESM. All of the allegations were relevant to the decision to suspend but allegation 3 was a strong influencing factor. In the afternoon of 10 January 2018, TM, ESM called the local secretary of the relevant recognised union to advise that a teacher was being suspended to facilitate the investigation of the showing of an 18 rated film to S1/ S2 pupils. This was in line with TM, ESM's usual practice. The purpose of the call was to ensure that the Claimant had access to a union representative at the suspension meeting should he so wish. The Claimant himself was not advised of the allegations in advance of the suspension meeting.

35. On 11 January 2018, in the morning, the Claimant was invited to and attended a suspension meeting with MC, HT where he was suspended on full pay. The Claimant was asked for his comment on the allegations but he was advised by his union rep to make no comment. His suspension was confirmed in writing by MC, HT who confirmed that the suspension was "*necessary to facilitate an investigation into the following allegations –*

Allegation 1

On 20 December 2017 during your S1/S2 Hebrew class you demonstrated a lack of awareness and an inability to exercise appropriate professional judgement in the use of an animated film 'Waltz with Bashir.'

Allegation 2

On 20 December 2017 during your S1/S2 Hebrew class you exposed your class to material which was inappropriate for their age range and could have potentially caused harm, upset and emotional trauma

Allegation 3

On 20 December 2017 during your S1/S2 Hebrew class you exposed your class to material which had the potential to incite hatred and religious intolerance.

Allegation 4

You used your position as Teacher to provide the opportunity for your S1/S2 Hebrew class to have access to and view pornographic material.

Allegation 5

You failed to obtain parental consent or agreement from your Head Teacher to allow the pupils in question to view this 18 rated material."

36. The letter of suspension advised the Claimant that the purpose of his suspension was to facilitate an investigation. He was advised "Your precautionary suspension will be reviewed every 10 working days and you are under instruction not to make contact with colleagues, pupils or their

carers regarding this matter." He was advised only to contact the investigation officer, his own rep or a named HR officer regarding this matter and that breach of this instruction may be considered a conduct issue. The Claimant's suspension was reviewed regularly and he received regular updates regarding his suspension. The Claimant was aware that the investigation would take and was taking longer than 15 days. The Claimant did not object to the length of time taken to conduct the investigation.

37. On 15 January 2018 the Claimant wrote to MS, DO regarding the matter. He raised three points: 1. MC, HT does not have a procedure for parental complaints; 2. at no stage was he asked to explain himself; 3. "lastly and most importantly, [MC, HT] contacted my union local secretary, briefed him about the case, and obviously invited him to the meeting, all of this even before I was even informed of anything". At the end of the three-page email he concluded by noting that allegation 3 "is outrageous, the movie was universally acclaimed, and received a BAFTA among many other prizes. Of course all critics praise the movie for condemning unequivocally the absurdity of war. I do not understand the reason for making such an allegation and I can only hope it is not because of prejudice against my religious and ethnic background". The letter was considered as part of the disciplinary process but was not treated separately as a grievance.

38. JD, IO was appointed to conduct an investigation. JD, IO had not previously conducted a disciplinary investigation. JD, IO watched the film and read reviews of it. HR provided JD, IO with a list of witnesses to interview and that is who he interviewed. JD, IO interviewed: MC, HT; DS, HT; parents of Pupils 2, 4, 6, 8 and 14; Rabbi A Ruben (School Chaplain); Pupils 2, 4, 6, 10 and 14; and the Claimant. Permission to interview Pupil 8 was sought and declined. Those interviews took place in February and March 2018. Handwritten otes of the investigation meetings were taken by a note taker (and also by RB, HR). The investigation interviews were not recorded and the handwritten notes were inevitably not verbatim accounts. The handwritten notes were then typed up and sent to each witness for approval.

39. During the investigation JD, IO sought to understand: what did the Claimant know about the film prior to showing the extract; how and why had he chosen to use this film - what was the purpose of using this resource; what was the film about; what did exert of the film show; in what the context was the film presented; what was the impact on the children; did the children have sufficient information to access the full film online; what were the views of the parents and whether their permission had been sought. During their interviews the witnesses were asked some questions which were not materially relevant to the allegations (e.g. is he a good teacher?). JD, IO was trying to get a sense of his approach to teaching with a view to understanding why he might use this film exert.

40. On 8 February 2018 the Claimant was asked to attend an investigation meeting on 27 February 2018. At that investigation meeting the Claimant answered specific questions, and in addition the claimant read out a written submission including that: in relation to Allegation 3 “I can only hope it is not because of prejudice against my religious and ethnic background”; “This case handling is the culminating point of a campaign of harassment” with resources having not been provided and that “I feel discriminated as a male teacher, I am suspected of having the worst intentions just because I am a man” and noting that there are issues with the treatment of other staff.

41. Following his investigation meeting 20 pages of typed notes were provided to the Claimant for approval. These notes were based upon the handwritten notes of the note taker (and also RB, HR). The Respondent had not deliberately edited the typed notes. The Claimant had not taken contemporaneous notes during his investigation meeting. The Claimant refused to sign the notes “due to discrepancies”. The Claimant provided a 10-page document setting out additional comments and corrections regarding the notes which the Respondent then formally appended to the notes. In that document the Claimant asserted that MC, HT was accusing him of having a pro-Israeli bias because he was Jewish. Neither the note taker nor RB, HR had that reference in their handwritten notes of the meeting. JD, IO could not

recall clearly whether that reference had been made but he recalled the Claimant mentioning prejudice against his religion.

42. The Investigation Report prepared by JD, IO in April 2018 extended to 16 pages and contained a summary of evidence from the relevant witness interviews. The investigation report recommended either to progress the case to a disciplinary hearing or to take no further action.

43. Following the investigation, the investigation officer believed that the Claimant had previously identified the film as a potential resource because it was an acclaimed film in Hebrew and added a link to it to his list of resources. During the last class at the end of term the Claimant had made an impromptu decision to use that link and show an extract of that film for the last 20 minutes of class.

44. Having watched the film and read reviews the investigation officer believed that the film was a highly regarded, challenging and deep film. The investigation officer considered that the film exert shown contained some violence, nudity, and inappropriate language.

45. Following the investigation the investigation officer believed that the children did have sufficient information to access the full film online. The Claimant believed that he had advised the name of the film in Hebrew. The name of the film appears at the start of the film. One of the children had been passed details of an online link to the film.

46. The investigation report noted that when there were inappropriate parts in the film the Claimant stood in front of the screen. Parent of pupil 8 commented that “a normal teacher wouldn’t do that”. Some of the pupils thought he’d said “don’t tell your parents” and some thought he hadn’t. The pupils had varying reactions to the film exert – some reported being upset by it; others were bored.

47. Following the investigation, the investigation officer understood that the Claimant had not put the film into any context and that it was not part of a lesson plan. The investigation report noted that “at no point prior to the lesson, during the lesson or at the end of the lesson did [the Claimant] provide context

or balanced explanation regarding the historical and political background to the film and the relation of the content to the Arab-Israeli situation in this region in September 1982". The report also noted "the Claimant did not provide any historical or political content to the film and the relationship between the Arab-Israeli people in the area in September 1982. Nor did he discuss the central theme of the film which was the massacre of Muslim refugees in the Sabra and Shatila camps in Lebanon. Furthermore no evidence was presented that the claimant provided any form of unbiased account of the moral perspectives of the protagonists of the film - the Israeli Defence Force, Lebanese Phalangists or the Muslim refugees" (the 'unbiased account' sentence).

48. The investigation report stated "by his own testimony that he probably said some parts of the film are too harsh and they shouldn't watch it online or they would get in trouble if they did". The quote is inaccurate because it conflates the question and his answer during his investigation interview. In his interview the Claimant is asked "Did you say to the pupils that they would get in to trouble if they did watch it online?" The Claimant stated in answer "I don't remember. I probably said that some parts of the film are too harsh and they shouldn't watch it."

49. The investigation report noted that parents had not given their permission. Some parents felt that the Claimant had broken their trust and if the Claimant was to stay they would not return their children to class.

50. The investigation report did not include any positive or negative comments from the witness interviews where these did not relate directly to the allegations.

51. The investigation took about 3 ½ months to complete (the suspension meeting took place on 11 January 2018 and the investigation report was concluded on 30 April 2018). This was considered a complex investigation because it entailed taking statements from external witnesses (pupils and parents). The length of time taken was not unusual for such an investigation.

52. MS, DO was appointed to act as disciplinary officer. She had met the Claimant once previously. She had acted as a disciplinary officer once before. The

investigation report and its appendices were considered by her. She did not watch the film. Her consideration and reliance upon the investigating officer's report was consistent with other disciplinary procedures. She considered that there was a case to answer in respect of Allegations 1, 2, 4 and 5. She considered that there was no evidence in respect of Allegation 3. On 9 May 2018 the Claimant was invited to a disciplinary hearing on 31 May 2018. The Claimant had legal representation at the disciplinary hearing.

53. Having heard JD, IO's presentation at the disciplinary hearing, MS, DO concluded that there was no case to answer in respect of Allegation 3. The Claimant was advised that there was no evidence for Allegation 3 and that it was not being proceeded with. She did not think that the Claimant had exposed his class to material which had the potential to incite hatred or religious intolerance. Allegation 3 was not taken into account in reaching the decision to dismiss.

54. At the disciplinary hearing the Claimant objected to Allegation 3 being dropped. The disciplinary outcome letter notes that Allegation 3 was dropped "as agreed"; the Claimant objected to this description which ought to have said "as discussed".

55. During the disciplinary hearing the Claimant made a submission which was broadly the same as the submission made by him at the investigation meeting on 27 February 2018.

56. During the disciplinary hearing JD, DO presented his investigation report. That presentation was more strongly critical of the Claimant than the investigation report had been (e.g. at the disciplinary hearing JD, DO described the parents as being "aghast" and "disgust[ed]" and "having no confidence in him as a teacher". The investigation report itself conveys the parents has having mixed views.)

57. The letter of dismissal was dated 31 May 2018 because of an administrative error. The dismissal letter was prepared and issued by MS, DO on 1 June 2018. Allegations 1, 2, 4, and 5 were upheld. She found that he had exercised inappropriate professional judgment in showing an exert from an 18 rated film

to a class of S1/ S2 pupils; that the exert shown was inappropriate for their age range and he had attempted to censor scenes by standing in front of them; that the children were aware of the title of the film and this created a curiosity about the remainder of the film; that despite knowing that a parent had complained and withdrawn their child, he provided Pupil 14 with a link to the film but instructed her not to watch the last 2 minutes; that some parents felt their trust was broken and would not return their children to class; that he had shown little remorse and any apology he had given was qualified with excuses (that he had a shortage of resources; that he was suffering from stress; that it was a cartoon; that he had only show an exert which was equivalent to 12A rating; that he was evasive about whether he had intimated the title; that if MC, HT had intimated the original parental complaint this would have prevented his second mistake). He was summarily dismissed for gross misconduct but in view of his career and family circumstances this was commuted to dismissal with notice. MS, DO was aware that the Claimant had less than 2 years' service but she did not think that was relevant.

58. On 3 June 2018 the Claimant intimated his appeal. On 11 June 2018 the Respondent advised the Claimant that as the Council is nearing recess they would be unable to hear the appeal until August. The Claimant did not object to this. On 20 July 2018 the Respondent advised the Claimant that his appeal would be heard on 31 August 2018. The Claimant did not object to this.

59. The Claimant's appeal was initially heard on 30 August 2018 but required an additional day on 13 September 2018. The Claimant's appeal was heard by the Teaching Staff Appeals Committee which comprised Councilors Merrick (Chair), Lafferty and McLean. TM, ESM prepared an 18-page report on the disciplinary process (plus 26 appendices) which she presented to the Appeals Committee. During her summation of the evidence the Claimant asked questions about anti-Semitism and TM, ESM sought to clarify what he meant. She was however advised by council lawyers that under the disciplinary procedure she could only ask questions of the Claimant during his summation of the evidence. During his summation the Claimant did not raise issues of anti-Semitism. The Claimant instead raised anti-semitism during his closing

submissions which included references to Allegation 3 (which had been dropped) and included reading passages from the the International Holocaust Remembrance Alliance (IHRA)'s Working Definition of Anti-Semitism. TM, ESM interrupted to object because the Claimant had not raised this during his summation and she had not therefore had the opportunity to ask questions. The Appeals Committee allowed the Claimant to continue.

60. At the appeal hearing JD, IO intimated that children had stated that the Claimant told them not to tell their parents. When questioned by the Claimant, JD, IO confirmed that there were discrepancies and that 3 out of 4 children interviewed had stated that. At this point in the hearing it came to light that a relevant page of the investigation report was missing. This page was missing because of an administrative error during photocopying and was not deliberately omitted. Such administrative errors are not unusual.

61. At the appeal hearing MS, DO said "a parent said a normal teacher would not do that, and I agree with that". This was said in relation to the Claimant having stood in front of the screen to hide inappropriate scenes.

62. At the appeal hearing the Claimant produced recently obtained evidence which he asserted proved that the extract he had shown would have been rated 12a by the BBFC.

63. The Respondent is obliged to report dismissals of teachers to The General Teaching Council for Scotland ('GTCS'). During October 2018 the Respondent provided the GTCS with the disciplinary outcome letter and the investigation report. The matter was referred to the GTCS Fitness to Teach Panel to determine whether a Temporary Restriction Order ('TRO') ought to be imposed. If imposed this would have prevented him from working as a teacher at another local authority. The Panel concluded that it was neither necessary nor proportionate to impose a TRO.

64. Following the Claimant's dismissal the Respondent appointed a replacement Hebrew Teacher (namely the pupil's mother who had previously applied unsuccessfully).

Observations on the evidence

65. There was little if any dispute regarding the primary material facts. Any dispute pertained to inference from primary facts.

66. All of the witnesses (including the Claimant) gave their evidence in a credible and reliable manner. There was no hesitation or attempts to answer in a self-serving manner. The only minor exception was in cross examination when JD, IO was considering whether the Claimant mentioned "prejudice" at during the investigation meeting. At first he said yes, he did mention it, then on further questioning he said he wasn't sure, and then he wanted to check the notes of the meeting. Given the passage of time since the investigation meeting (which was 16 months ago) and given that there are two different references to "prejudice" (one from the Claimant's statement which is captured within the notes of the meeting, and a separate reference in the Claimant's addendum), his confusion was understandable. Accordingly no material inference was drawn from this exchange regarding his credibility or reliability.

67. We note for completeness that were not shown the relevant film exert and were instead reliant upon relevant witness testimony and documentary evidence.

68. The phrase "no evidence was presented that [the Claimant] provided any form of unbiased account of the more perspectives of the protagonists of the film…" requires to be considered in context. It is apparent from the report itself and the witness interviews notes being summarized, that JD, IO was stating that the Claimant ought to have given an unbiased account but instead gave no account at all. He was not stating that the Claimant gave a biased account.

Relevant Law

Direct Discrimination

69. Section 13(1) of the Equality Act 2010 ('EA 2010') provides: "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."

70. Direct discrimination requires consideration of whether the Claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.

71. The Tribunal may consider firstly whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds.

72. However, and especially where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why issue*. "*It will often be meaningless to ask who is the appropriate comparator, and how they would have been treated, without asking the reason why" *(Shamoon v The Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337*)*

Less favourable treatment

73. The Claimant must have been treated less favourably than a real or hypothetical comparator. If there is no less favourable treatment there is no requirement to consider the reason why.

74. Under Section 23 of EA 2010 there must be no material differences between the relevant circumstances of the Clamant and their comparator. The comparison must be like with like (*Shamoon*).

75. The tribunal may consider how an actual real person has been treated in the same circumstances or, if necessary, consider how a hypothetical person would have been treated in those circumstances. In determining how a hypothetical comparator would have been treated, it is legitimate to draw inferences from how an actual comparator in non-identical but not wholly dissimilar cases has been treated.

The reason why

76. The reason for the treatment need not be the sole reason but it must be an effective cause or have a significant influence on the outcome. In "reason why" cases the matter is dispositive upon determination of the alleged

discriminator's state of mind. In "criterion cases" there is no need to consider the alleged discriminator's state of mind when the treatment complained of is caused by the application of a criterion, which is inherently or indissociably discriminatory (*R (E) v Governing Body of JFS* [2010] 2AC 728, SC)

77. Direct discrimination may be intentional or it may be subconscious (based upon stereotypical assumptions). The tribunal must consider the conscious or subconscious mental processes which caused the employer to act. This is not a necessarily a question of motive or purpose and is not restricted to considering 'but for' the protected characteristic would the treatment have occurred (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).

Protected characteristic

78. "religion or belief" are both protected characteristics listed in Section 4 of the EA 2010.

Standard of Proof

79. Proof of facts is on balance of probabilities. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

Burden of Proof

80. Section 136(2) of EA 2010 provides that "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".

81. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).

82. The burden of proof is considered in two stages. If the Claimant does not satisfy the burden of Stage 1 their claim will fail. If the Respondent does not satisfy the burden of Stage 2, if required, the claim will succeed (*Igen v Wong* [2005] ICR 935)

Stage 1 – prima facie case

83. It is for the Claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has treated the Claimant less favourably because of a protected characteristic ('Stage 1' *prima facie* case).

84. Having a protected characteristic and there being a difference in treatment is not sufficient (*Madarassy v Nomura International Plc* [2007] ICR 867). The claimant must also prove a Stage 1 prima facie case regarding the reason for difference in treatment by way of "something more".

85. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (*Nagarajan v London Regional Transport* [1999] 4 All ER 65). Evidence of the reason for the treatment will ordinary be by reasonable inference from primary facts.

86. At Stage 1 proof is of a prima facie case and requires relevant facts from which the tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; inconsistent or inadequate explanations for the treatment (*Madarassy*).

87. Assessment of Stage 1 is based upon all the evidence adduced by both the Claimant and the Respondent (*Madarassy*) but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (*Laing v Manchester City Council* [2006] ICR 1519). All relevant facts should be considered but not the Respondent's explanation. "In considering what

inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts" *(Igen)*.

Stage 2 – rebutting inference

88. If the Claimant satisfies Stage 1, it is then for the Respondent to prove that the Respondent has not treated the Claimant less favourably because of a protected characteristic (Stage 2).

89. The employer must seek to rebut the inference of discrimination by explaining why he has acted as he has (*Laing v Manchester City Council* [2006] ICR 1519). The treatment must be "in no sense whatsoever" because of the protected characteristic (*Barton v Investect 2003 IRC 1205 EAT*). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry* 2006 IRLR 865).

90. The tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the less favourable treatment is fully adequate and cogent (*Laing*).

<u>Time Limit</u>

91. Under Section 123 a complaint of direct discrimination may not be after the end of the period of 3 months starting with the date of the act or such period as the tribunal thinks just and equitable. The three-month time limit may be subject to an extension of time to facilitate ACAS Early Conciliation.

92. Factors which may be relevant to a just and equitable extension include: the Claimant's knowledge of the act and the promptness of seeking advice and raising proceedings; the length and reasons for the delay; whether the cogency of evidence will be materially affected; prejudice to the Respondent; medical conditions preventing or inhibiting the claim.

93. Conduct extending over a period is to be treated as done at the end of the period. "That the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of

affairs covered by the concept of 'an act extending over a period'." (*Hendricks v Metropolitan Police Comr [2003] IRLR 96*, *[2003] ICR 530*, *[2003] 1 All ER 653. CA)* In deciding whether a particular situation gives rise to an act extending over time it will also be appropriate to have regard to the nature and conduct of the discriminatory conduct of which complaint is made, and the status or position of the person responsible for it.

94. Failure to do something is treated as occurring when the person in question decides upon it (i.e. in the absence of evidence to the contrary, when they do an inconsistent act, failing which, on the expiry of the period in which they might reasonably have been expected to act).

Breach of contract

95. With certain exceptions a claim for damages for breach of contract may be made under the Industrial Tribunals Extension of Jurisdiction (Scotland) Order 1994. The claim must arise or be outstanding on the termination of the Claimant's employment

96. The claim must be presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within that period, within such further period as the tribunal considers reasonable. The three-month time limit may be subject to an ACAS Early Conciliation extension of time.

Submissions

97. The Claimant's submissions were in summary as follows –

Breach of Contract

a. The time take to undertake the investigation was more than 15 days. The date of notification of the appeal hearing was more than 20 days from receipt of notice of appeal. The Claimant never agreed to any extension of time.

Direct Discrimination

b. IHRA's working definition of Anti-Semitism offers a guide. In particular:

"Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations"

"Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions".

c. The Claimant did not agree either to the investigation being extended or to the late notification of appeal

d. The sanction was disproportionate to his conduct

e. There are blurs and inaccuracies throughout the disciplinary process

f. The Claimant was demonized by false claims that he told pupils 'don't tell your parents' and by saying he showed no genuine remorse.

g. The Respondent accepted a parent's complaint at face value when the parent had ulterior motives

h. The Respondent removed or ignored evidence favourable to him

i. The drafting of allegation 3 was because he was Jewish and it was assumed he was doing pro-Israeli propaganda. TM, ESM relied upon film reviews from unreliable sources.

j. Allegation 3 was the most serious and set tone for the investigation. Although Allegation 3 was officially dropped it tainted the rest of the procedure.

k. JD, IO's investigation report portrayed him as dishonest, devious, greedy, scheming and corrupting children. These are anti-Semitic clichés. The unbiased account sentence in the report is convoluted and subtly indicates that JD, IO suspected him of having given a biased account. He was accusing him of engaging in propaganda with children.

l. The Claimant's reference to anti-Semitism in the investigation meeting was deliberately omitted from the notes of the meeting in order to silence him.

m. MS, DO only dropped allegation 3 to silence allegations of anti-Semitism. MS, DO's explanation was that there was no evidence to support allegation 3. However she did not find him not guilty of allegation 3 and it can therefore be inferred that there was still a doubt in her mind that he was engaged in pro-Israeli propaganda which influenced her decision.

n. MS, DO was not consciously or subconsciously anti-Semitic. However she accepted JD, IO's negative portrayal of him which was tainted with anti-Semitism. MS, DO judged him as a person and rather than his conduct when she dismissed him.

o. The Appeal panel and TM, ESM interrupted him and tried to prevent him talking about discrimination.

98. The Respondent's submissions were in summary as follows –

<u>Direct Discrimination</u>

a. The Claimant has not established a prima facie case of direct discrimination. In respect of each allegation of less favourable treatment -

(i). There was no evidence that allegations are cross checked with an employee prior to suspension. Further there was no

requirement to cross check because the Claimant admitted showing an exert of the 18 rated film to his class.

(ii). There was no evidence that TM, ESM's did not normally forewarn a union rep. Indeed there was evidence that it was her practice to do so.

(iii). The film reviews suggest Israel may have forgotten its part in the massacres and may be blaming Lebanese Christian Phalangists. The film was banned in Lebanon. According to a parental complaint the film required a sensitized contextualized understanding. It was not clear what context had been given to the film. Mrs Morton did not know the Claimant was Jewish.

(iv). There was no evidence that decisions to drop an allegation are ordinarily made and communicated in advance of the disciplinary hearing. Indeed the evidence was that such decisions are made and communicated at the disciplinary hearing where there is a case to answer in respect of other related allegations.

(v). There was no evidence that the Respondent deliberately delayed the investigation or that the investigation was longer than would normally be in such a case. The investigation was longer than 15 days because of the number of external witnesses. Further the Claimant asserted that the reason the Respondent used this tactic was to avoid any employment tribunal claim (and not just religious discrimination).

(vi). The investigation report did not contain anti-semitic clichés and was not antisemitic. The unbiased account sentence in the investigation report conveyed that the claimant had not provided any explanation of the moral perspectives. Both the positive and the negative comments in the witness interviews which did not directly relate to the allegations were not included in the report because they were not materially relevant. The

error in the Claimant quote arose because of a mistake. There was no evidence that JD, IO did not make such mistakes or that such a mistake was linked in any way to the Claimant's religion.

(vii). There was no evidence that the Respondent deliberately removed the discussion about anti-semitism from the notes of investigation interview. The evidence was that the Claimant had not talked at length about anti-semitism and that any discussion about anti-semitism was not in the original handwritten notes of either note taker.

(viii). There was no evidence that JD, IO told the appeal committee that all pupils had said that the Claimant told them not to tell their parents. Instead JD, IO had conveyed to the appeal committee that 3 out of 4 children had conveyed this.

(ix). MS, DO dismissed him because he had shown an exert of an 18 rated film to pupils aged 12 and provided a link to the film to a pupil age 18, some parents had lost of trust and confidence in him, the mitigating circumstances were insufficient, and his remorse was qualified. There was no evidence that any other person who had acted in this way would not have been dismissed. There was no evidence that her decision was in any way tainted by bias.

(x). There was no evidence that the length of time taken to set a date for the appeal hearing was longer than normal. There was no evidence that the time taken was because of his religion and indeed the Claimant accepted that it was not because of his religion.

(xi). There was no evidence that a page was deliberately excluded from the appeal papers. There was evidence that the page was missing because of an administrative error.

(xii). There was no evidence that TM, ESM had not interrupted others during their appeal hearing. TM, ESM interrupted him the Claimant because he had raised religious discrimination in his closing submissions which he had not raised in his summation of his case and she had not therefore been given an opportunity to respond.

(xiii). During some inappropriate parts in the film exert the Claimant had stood in front of the screen. MS, DO quoted the parent of pupil 8 who stated "a normal teacher wouldn't do that" and added "and I agree". There was no evidence that she would not have made the same comment about another teacher who had done that. Her focus was on his behavior and not on him.

(xiv). A tribunal must be brought within 3 months of the discriminatory act. All acts of less favourable treatment arising prior to the disciplinary hearing on 31 May 2018 are time barred.

Breach of Contract

(xv). There was no contractual duty to cross check

(xvi). There was no contractual duty to complete the investigation within 15 days and in any event extension can be agreed in each case

Discussion and decision

Direct Discrimination

99. Considering each of the allegations of less favourable treatment in chronological order -

Failure to cross-check

100. The Respondent did not fail to cross-check the initial complaint prior to suspension and investigation. The initial complaint was that the Claimant had shown an 18 rated film to his class of s1/s2 children. The Claimant had

admitted that. Accordingly the Respondent had sufficient information to proceed to suspension and investigation. The Claimant was not less favourably that the Respondent has treated or would treat others in similar circumstances. The Claimant was treated consistently with others. Further there was no basis upon which it could reasonably be inferred that the reason for his treatment was because of his religion.

Informing the union rep

101. It was customary to inform a union rep of a member's suspension meeting and reason for the meeting. The Claimant was not treated less favourably than the Respondent has treated or would or treat others. The Claimant was treated consistently with others. Further there was no basis upon which it could reasonably be inferred that the reason for his treatment was because of his religion.

Inclusion of allegation 3

102. The Claimant showed an extract of an 18 rated film about the 1982 Lebanese war to his s1/s2 Hebrew class. According to the Guardian newspaper, in that war Israeli forces allowed Christian Phalangist militia into Palestinian refugee camps to slaughter civilians. The newspaper article questions whether Israel has forgotten its part in that war. Also according to that newspaper, the film stresses that the massacre was committed by Lebanese Christian Phalangists and not by the Israeli soldiers. The film was banned in Lebanon. According to the original parental complaint, which prompted the disciplinary process, the film required a sensitized contextualized understanding. This was potentially a controversial film about a controversial war. The film was not course material and it was not clear why that film was chosen for that class. TS, ESM drafted the allegations for investigation. She had never met the Claimant before. Allegation 3 stated: *On 20 December 2017 during your S1/S2 Hebrew class you exposed your class to material which had the potential to incite hatred and religious intolerance.*

103. Having regard to all the facts it could not reasonably be inferred that the reason for the drafting and inclusion of allegation 3 was because of his

religion. The Claimant has not proven facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has treated the Claimant less favourably because of a protected characteristic ('Stage 1' *prima facie* case). Contrary to the Claimant's assertion, it could not be inferred in the circumstances that 'she had assumed that because he was Jewish he must be doing pro-Israeli propaganda'.

104. In any event, even if there was a Stage 1 prima facie case, the Respondent has provided a sufficiently adequate and cogent explanation as to the reason for the inclusion of allegation 3 as an issue for investigation. TS, ESM was concerned why the film had been chosen for that class. In light of the parental complaint she was concerned to understand the context in which the film had been presented. In light of the newspaper reviews she was concerned that the film amounted to "*material which had the potential to incite hatred and religious intolerance."* She did not assume that 'because he was Jewish he must be doing pro-Israeli propaganda'.

105. The reason for her concerns was not that the Claimant was Jewish. Indeed TM, ESM was not aware that the Claimant was Jewish when she framed the allegations for investigation. She was however aware that he was a Hebrew Teacher but this was not relevant to her concerns which were about the showing of that film to that class. If a non-Jewish teacher had shown that film to that class the same concerns would have arisen. The Respondent has proven that it has not treated the Claimant less favourably than it would treat others because of his religion ('Stage 2').

Dropping of allegation 3

106. Following the investigation, the Disciplinary Officer concluded that there was no evidence to support allegation 3. The decision to drop that allegation was made and communicated at the disciplinary hearing. That was in line with the Respondent's usual practice where there was a case to answer in respect of other related allegations. The Claimant was not treated less favourably than the Respondent has treated or would treat others in similar circumstances. Further, there was no basis upon which it could reasonably be inferred that

the Disciplinary Officer dropped allegation and in that manner because of his religion.

107. The Claimant asserted that although Allegation 3 was officially dropped it set tone for the investigation and tainted the rest of the procedure. According to the Claimant this can be inferred from the failure to find him not guilty of Allegation 3. A positive "not guilty" finding could only arise where an allegation was proceeded with i.e. had not been dropped. It was the Claimant who did not want Allegation 3 dropped and instead sought to rely upon it to taint the entire procedure as anti-Semitic.

The length of time taken to investigate

108. The investigation took about 3 ½ months to complete. This was a complex investigation because it entailed taking statements from external witnesses (pupils and parents). The length of time taken was not unusual for such an investigation. The Claimant was not treated less favourably that the Respondent has treated or would or treat others. The Claimant was treated consistently with others. Further there was no basis upon which it could reasonably be inferred that the reason for his treatment was because of his religion.

The production of a biased and tainted investigation report

109. The investigation report contained a summary of evidence from the relevant witness interviews, from watching the film and from reading reviews. The report was not biased, dishonest or tainted with anti-semitism. The report was fair and balanced. Any criticism of the Claimant which can be inferred was firmly rooted in the underlying evidence. The investigation report recommended either to progress the case to a disciplinary hearing or to take no further action. The report contained an inaccuracy where it conflated the question and answer. There was no evidence that other reports did not contain such an inaccuracy. The Claimant was not treated less favourably than the Respondent has treated or would treat others in similar circumstances. Further, there was no basis upon which it could reasonably be inferred that the content of the report was influenced by his religion.

Removal of reference to anti-Semitism from interview notes

110. The typed notes of the investigation interview were based upon the handwritten notes of the note taker (and also RB, HR). The Respondent had not deliberately edited the typed notes. The Claimant had not taken contemporaneous notes during his investigation meeting. The Claimant refused to sign the notes "due to discrepancies". The Claimant provided a 10-page document setting out additional comments and corrections regarding the notes which the Respondent then appended to the notes. In that document the Claimant asserted that MC, HT was accusing him of having a pro-Israeli bias because he was Jewish. Neither the note taker nor RB, HR had that reference in their handwritten notes of the meeting. Any discussion of anti-Semitism there may have been was not deliberately removed from the Claimant's investigation interview notes. Investigation interviews are not recorded and the handwritten notes are inevitably not verbatim accounts. The Claimant was not treated less favourably that the Respondent has treated or would or treat others. The Claimant was treated consistently with others. Further there was no basis upon which it could reasonably be inferred that the reason for his treatment was because of his religion.

The decision to dismiss the Claimant

111. The Claimant was not asserting that MS, DO was consciously or subconsciously anti-Semitic or biased because of his religion. He was instead asserting that she accepted JD, IO's negative portrayal of him which was tainted with anti-Semitism. Her consideration and reliance upon the investigating officers report was appropriate and consistent with other disciplinary procedures. The Claimant was not treated less favourably that the Claimant has treated or would or treat others in these circumstances.

112. The Claimant asserted that MS, DO judged him as a person and rather than his conduct when she dismissed him. The decision to dismiss was based solely upon his conduct. The only arguable consideration of him as a person arose when commuting the summary dismissal to dismissal with notice

(because of his career and family circumstances). This was favourable rather than less favourable treatment.

113. The Claimant made two errors of judgement for which he paid a high price. However the decision to dismiss was not wholly disproportionate in the circumstances given the serious nature of those errors - the Claimant had shown an exert of an 18 rated film to a class 12 year olds and had then provided a 16 year old with a link to that film despite knowledge of parental concerns. Nevertheless, and as reflected in the decision by the GTCS not to impose a TRO, we would not expect those errors to prevent the Claimant from ultimately continuing in his chosen career in which he has shown great potential.

The length of time taken to fix appeal

114. On 3 June 2018 the Claimant intimated his appeal. On 11 June 2018 the Respondent advised the Claimant that as the Council is nearing recess they would be unable to hear the appeal until August. On 20 July 2018 the Respondent advised the Claimant that his appeal would be heard on 31 August 2018. There was no evidence that the length of time taken to fix the appeal was unusual where the Council is nearing summer recess. There was no basis upon which it could reasonably be inferred that the Respondent was treated less favourably than it treats others. Further there was no basis upon which it could reasonably be inferred that the reason for his treatment was because of his religion.

Investigation office falsely advising the appeal committee

115. At the appeal hearing JD, IO intimated that children had stated that the Claimant told them not to tell their parents. When questioned by the Claimant, JD, IO confirmed that there were discrepancies and that 3 out of 4 children interviewed had stated that. The investigation office did not state that <u>all</u> children had said that and did not therefore falsely advise the appeal committee. The Claimant was not treated less favourably than the Respondent has treated or would treat others in similar circumstances.

Further, there was no basis upon which it could reasonably be inferred that the treatment was because of his religion.

Missing page of the investigation report

116. During the appeal hearing it came to light that a relevant page of the investigation report was missing. This page was missing because of an administrative error during photocopying and was not deliberately omitted. Such administrative errors are not unusual. The Claimant was not treated less favourably than the Respondent has treated or would treat others in similar circumstances. Further, there was no basis upon which it could reasonably be inferred that the administrative error arose because of his religion.

Interruption of the Claimant discussing anti-Semitism

117. TM, ESM's prepared a report on the disciplinary process which she presented to the Appeals Committee. During her summation of the evidence the Claimant asked questions about anti-semitism and TM, ESM sought to clarify what he meant. She was however advised by council lawyers that under the disciplinary procedure she could only ask questions of the Claimant during his summation of the evidence. However during his summation the Claimant did not raise issues of anti-Semitism. The Claimant instead raised anti-semitism during his closing submissions. TM, ESM interrupted to object because the Claimant had not raised this during his summation and she had not therefore had the opportunity to ask questions. The reason for the interruption of the Claimant discussing anti-Semitism by TM, ESM at the appeal hearing was because the Claimant had not raised anti-Semitism during his summation. There was no basis upon which it could reasonably be inferred that she was interrupting him (and therefore trying to silence him) because of his religion.

Agreeing "a normal teacher would not do that"

118. The investigation report noted that when there were inappropriate parts in the film the Claimant stood in front of the screen. Parent of pupil 8 commented that "a normal teacher wouldn't do that". At the appeal hearing MS, DO said "a parent said a normal teacher would not do that, and I agree with that". This

was said in relation to the Claimant having sought to censor the film by standing in front of the screen to hide inappropriate scenes. The reason for her comments was not that the Claimant was Jewish. If a non-Jewish teacher had sought to censor in that way she would have made the same comments. There was no basis upon which it could reasonably be inferred that the reason for her comments was because of his religion. The Claimant was not treated less favourably than the Respondent would treat others because of his religion.

Breach of contract

119. The applicable disciplinary procedure is a locally agreed collective agreement which is incorporated into the Claimant's contract of employment. The disciplinary procedure provides at Section 5.4: *"The investigatory process should be conducted as speedily as possible, consistent with the principles of fairness and natural justice. In most cases the investigation should take no longer than 15 working days. Where delay occurs, communication will take place with all those parties involved to advise the reason for the delay and revised timeframe".* Section 10 of that procedure provides: that the time take to undertake an investigation shall be 15 days; that the date of notification of appeal hearing shall be no later than 20 days from receipt of notice of appeal; and that in each case, "these time limits could be shorter or longer by agreement in individual cases".

Failure to cross check the allegations

120. The disciplinary procedure does not specify a requirement to 'cross-check' the initial complaint with the Claimant prior to suspension and investigation. There was no evidence of a consistent practice which may have allowed inference of an implied term. In any event the Respondent did not fail to cross-check the initial complaint prior to suspension and investigation. The initial complaint was that the Claimant had shown an 18 rated film to his class of s1/s2 children. The Claimant had admitted that. Accordingly the Respondent had sufficient information to proceed to suspension and investigation. Further, at the suspension meeting the Claimant was asked for his comment on the

allegations and he was advised by his union rep to make no comment. There was accordingly no breach of contract in respect of cross-checking.

The length of time taken to investigate

121. The disciplinary procedure did not specify a requirement to investigate within 15 days – that period was aspirational rather than mandatory. The investigation took about 3 ½ months to complete. This was a complex investigation because it entailed taking statements from external witnesses (pupils and parents). The length of time taken was not unusual for such an investigation. The length of time taken to investigate did not amount to a breach of contract. In any event the Claimant was on paid suspension. He did not suffer any financial loss as a consequence of the length of time taken to investigate and accordingly he has no entitlement to damages.

Length of time taken to notify a date for the appeal

122. The disciplinary procedure provides that the date of notification of appeal hearing shall be no later than 20 days from receipt of notice of appeal and this time limit could be extended by agreement.

123. On 3 June 2018 the Claimant intimated his appeal and this was understood to be the date of notification of appeal. On 11 June 2018 the Respondent advised the Claimant that as the Council is nearing recess they would be unable to hear the appeal until August. Accordingly the Claimant was advised that his appeal hearing would be held in August and he was advised of this no later than 20 days after receipt of the notice of appeal.

124. On 20 July 2018 the Respondent advised the Claimant that his appeal would be heard on 31 August 2018. Accordingly the Claimant was advised of the specific date in August more than 20 days after receipt of notice of the appeal. However the Claimant did not object to the approach to notification being taken by the Respondent and continued to participate in the appeal process. Accordingly his agreement to extend any such time limit may thereby be inferred.

125. Further the Claimant did not suffer any financial loss as a consequence of the length of time taken to notify a date for the appeal and accordingly he has no entitlement to damages.

Employment Judge: Michelle Sutherland
Date of Judgment: 24 July 2019
Date sent to parties: 29 July 2019