Case Number: V 2301212/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Mr C Wilby
Ms P Barratt

BETWEEN:

Mr A. Messamri **Claimant**

AND

Redriff Primary School (1)
City of London Academies Trust (2) **Respondents**

ON: **11 – 15 January 2021 and on 21 January and 2 February in Chambers**

Appearances:

For the Claimant: **In person**

For the Respondents: **Ms I Omambala QC, Counsel**

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Claimant's claim of direct discrimination because of sexual orientation under s13 Equality Act 2010 ("Equality Act") succeeds in part;
2. The Claimant's claim of indirect discrimination because of religion or belief under s19 Equality Act succeeds in part;
3. All other claims brought by the Claimant, including the claims of direct discrimination because of race and religion or belief, fail and are dismissed.

Reasons

Introduction

1. By a claim form presented on 5 May 2017 the Claimant presented claims of direct and indirect discrimination against the Respondents arising out of his employment by the First Respondent between September 2016 and February 2017. He relied on the protected characteristics of race, sexual orientation and religion or belief as a gay Muslim man of Moroccan descent. He had commenced ACAS early conciliation on 27 April 2017. His claims were resisted by the Respondents. Following a case management hearing on 24 July 2017 the Claimant filed further particulars of his claim on 18 August 2017 and the Respondents submitted an amended response on 18 September 2017.

2. There was second case management hearing on 21 October 2019. There was then unfortunately a considerable delay before the full hearing of the claims could take place, which was compounded by, but not wholly attributable to, the Covid-19 pandemic. The hearing eventually took place wholly remotely by CVP. It was listed for eight days, but in the event the Tribunal was able to deal with reading, the evidence and submissions over a four and a half day hearing (the Tribunal did not sit in the afternoon of Thursday 14 January) and it then reconvened in Chambers on 21 January and 2 February to consider the facts and reach its conclusions on the issues.

3. The Respondents' evidence was given by Charlotte Heath and Anna McFarlane, both teachers at Redriff Primary School at the time of the matters giving rise to the claim, Michael Kelly, head teacher at the time who made the decision to dismiss the Claimant and Jeremy Simons, who heard the Claimant's appeal against his dismissal. There was also a written statement from Richard Bannister, a school governor who also sat on the appeal panel, but as he did not give oral evidence the Tribunal gave it little weight.

4. The Claimant gave evidence on his own behalf and called as a witness his former colleague James Harrison, who had been a trainee teacher employed by the First Respondent at the same time as the Claimant. The Claimant also provided witness statements from two contemporaneous teaching assistants, Devon Johnson and from Olivia Osman, but as neither gave oral evidence at the hearing the Tribunal accorded these statements little weight.

5. There was an electronic bundle of documents consisting of 425 pages. References to page numbers in this bundle are references to page numbers in that bundle.

Relevant law

6. **Direct discrimination**: S 13 Equality Act prohibits direct discrimination. Under s 13(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The circumstances of the claimant and the chosen comparator must be the same or not materially different. S 4 Equality Act sets out the protected characteristics. These include race, sexual orientation and religion or belief.

7. **Indirect discrimination:** s19 Equality Act provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

   (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

   (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

   (c) it puts, or would put, B at that disadvantage, and

   (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

   The relevant protected characteristics include race, sexual orientation and religion or belief.

8. **Burden of proof**. It is also relevant to consider the law on the burden of proof which is set out in section 136 of the Equality Act. In summary, if there are facts from which the tribunal could decide in the absence of any other explanation that the Claimant has been discriminated against, then the tribunal must find that discrimination has occurred unless the Respondent shows the contrary. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen v Wong and others [2005] IRLR 258 confirmed by the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. In the latter case it was also confirmed, albeit applying the pre-Equality Act wording, that a simple difference in status (related to a protected characteristic) and a difference in treatment is not enough in itself to shift the burden of proof to the Respondent; something more is needed.

The agreed issues

9. The Claimant made a series of allegations against the First Respondent which are set out in the list of issues attached as the Appendix to this judgment. Tribunal has made findings that are relevant to those issues based on the evidence that it heard and the documents in the bundle. It has not therefore

addressed all of the matters that came to its attention during the evidence and has focused on those that are relevant to the agreed issues. It was mindful of the importance of not adhering slavishly to a list of issues when hearing a case but saw no reason in this case to depart from what the parties had agreed following case management, particularly as the Claimant accepted that he had had the benefit of some legal advice on preparing the case. That being the case we adhered to the agreed List of Issues though mindful of the fact that at times the Claimant had not pleaded his case in the most obvious or advantageous way, as we have noted further below.

Findings of fact

10. The Claimant was employed by the Second Respondent to work at the First Respondent from 5 September 2016 as an unqualified teacher under the Schools Direct training scheme, the purpose of which was to provide him with funded teacher training whilst he worked under the supervision of an experienced teacher. He was placed in the classroom of Ms McFarlane, working alongside her, observing her at work and undertaking the tasks she assigned to him. The children in the class were 8 and 9 years old.

11. On commencing employment the Claimant was not given an employment contract or statement of terms. However, on 6 September 2016 he signed the Second Respondent's Staff and Volunteer Acceptable Use Agreement (page 263-264), part of the Child Protection and Safeguarding e-safety policy, which contained a series of requirements as regards the handling and use of IT equipment in the school. Amongst other things the agreement prohibited the alteration of settings on IT equipment except in accordance with agreed procedures.

12. The Claimant's first allegation was that his workload was greater than that of other trainee teachers. The bundle contained a table (page 402) that showed the Claimant's working hours during November 2016. There was evidence that he was working hard. Mr Harrison gave evidence that he consistently found the Claimant working early and late when he himself had finished work. The statements of Ms Osman and Mr Johnson, though not tested, confirmed that the Claimant was working longer hours than they were. We did not hear evidence about the workload of other trainee teachers in the school and we did not see the clocking in records of anyone other than the Claimant, or for any other periods than November. The Respondents advanced no evidence to show that the Claimant's perception was mistaken. We find that the Claimant has shown on a balance of probabilities that he was working longer hours than at least some of his colleagues.

13. The Tribunal finds on a balance of probabilities that the Claimant did make an enquiry about prayer facilities on 20 October 2016. We consider that it is unlikely that he would have fabricated the incident although Ms McFarlane had no recollection of it. The evidence heard from Ms McFarlane and Mr Kelly suggested that there were no dedicated prayer facilities at the school and the

room they suggested would have been used – the special needs children's room – is one that the Claimant said would not have been suitable. The First Respondent did not provide evidence to refute that. We note also that the Claimant was the only Muslim teacher at the school and that the Muslim children would have been too young to be required to pray throughout the day. It is likely therefore that there were no dedicated prayer facilities and that Ms McFarlane could therefore, on a balance of probabilities, have made a remark to the effect that people did not routinely pray at the school or that prayer facilities were not available. We accept that the Claimant may have found that a dismissive response and it would be reasonable to feel upset by it. The Tribunal also finds as a fact that at the material time the First Respondent did operate a PCP of providing inadequate or unsuitable facilities for prayer at the school and that there was no evidence of any change to the PCP during the course of the Claimant's employment.

14. On his own admission the Claimant arrived at school on 1 November 2016 and told Ms McFarlane that he was still hungover after drinking the night before. The school day had not started and there were as yet no pupils in the classroom. The Claimant said that he made the remark in the context of an incident about a week earlier when Ms McFarlane had herself admitted to feeling hungover after having drunk two large gins the night before. She disputed that in cross examination. She also said in cross examination that the Claimant had admitted being under the influence of alcohol. In her witness statement she said that it was obvious to her that he was under the influence of alcohol and that he admitted to being still drunk from the night before. The Claimant's evidence was that he not said this and that he had merely said in jest that he was hungover. This was a difficult issue for the Tribunal to resolve, given the absence of corroborative evidence on either side although the evidence of Ms Heath tended to support Ms McFarlane's view. The Tribunal concluded that on a balance of probabilities the Claimant had given Ms McFarlane cause for concern with his conduct that morning and that she reasonably had formed a view that he was still under the influence of alcohol. In supplementary evidence she confirmed that she could smell alcohol and that his general demeanour and giddiness in conjunction with his comment were out of character for him. She therefore reported the matter to Charlotte Heath who then reported the incident to Michael Kelly and on Mr Kelly's instruction the Claimant was sent home for the day. The following day the Claimant met Mr Kelly who after discussion, issued him with a verbal warning

15. Shortly after that incident, in late November 2016, there was a residential school trip to Sayer's Croft. The Claimant attended the trip alongside with colleagues including Ms McFarlane, Ms Heath, Mr Harrison and a number of others. Mr Kelly joined on the evening of 29 November. It is not disputed that Mr Kelly brought alcohol with him (wine, cider and beer) to be consumed by members of staff once the children had gone to bed. The Claimant's evidence was that he was unhappy about this state of affairs and was concerned about teachers consuming alcohol when children were in their charge, a view also expressed by Mr Harrison in his evidence. The Claimant said that he was offered a drink several times but refused and was particularly concerned

about consuming alcohol after the incident on 1 November 2016. The Tribunal accepted that evidence. However there was no evidence that anyone asked the Claimant to take charge of the children because he had not been drinking. This may have been a conclusion he reached for himself, but the Tribunal does not find that he was "required" to do so in the sense of having been mandated by other members of staff. He did however feel a clear sense of obligation for the children on the trip.

16. The Claimant also alleged that during the trip Ms McFarlane suggested that he should move into the vicinity of the girls' dormitory in order to "stay with the girls". Ms McFarlane accepted that she had said something to the effect that the Claimant should stay and have a chat with three female teachers after he had been sent by Mr Kelly to inform them that there was alcohol available for them in the fridge. The Claimant's case was that Ms McFarlane had said that he should "stay with the girls" and that the remark had made him feel uncomfortable as he perceived it as a reference to his sexuality. Ms McFarlane maintained that she would have made the same remark to a heterosexual male such as Mr Harrison. The Tribunal concludes that Ms McFarlane made a remark of the nature alleged by the Claimant and that the Claimant was made uncomfortable by it.

17. The Tribunal also finds that during the trip to Sayer's Court Mr Kelly made the suggestion that the children could be served a pork roast on the last day of the trip and that when Ms Heath asked what would be served to the Muslim children, he replied that they could be told the meat was halal. Mr Kelly denied making this remark, but Mr Harrison's evidence, which the Tribunal found credible, corroborated the Claimant's recollection. This was a remark that the Claimant, a Muslim, would reasonably have found to have been offensive.

18. The Claimant alleges that Ms McFarlane made two explicitly homophobic remarks at the staff Christmas party on 9 December 2016. The context, according to the Claimant was that Ms McFarlane had been drinking and approached him for a private word in the smoking area. Once there he alleges that she called him a "kiss-arse" because of the praise he had lavished on a school production that had been directed by a friend of Ms McFarlane, Sarah Parabhu, and said that his behaviour was the reason she "hates gay people". He gave a fuller account of the incident to the disciplinary appeal hearing with the detailed statement at page 322. The Claimant maintained that the comment had been witnessed by Ms Parabhu. She provided a written statement to the Claimant's disciplinary appeal hearing (page 321) that did not support the Claimant's account although the Tribunal noted that it fell short of denying expressly that the remarks were made. Ms Parbhu did not provide a statement to the Tribunal. Ms McFarlane denied making the comments.

19. The Tribunal gave careful thought to this allegation and in particular to the detailed account the Claimant gave at the time of the disciplinary appeal hearing. The Tribunal considered that the account was credible and unlikely to have been fabricated. The Claimant's evidence at the time and to the Tribunal suggested that the relationship he had with Ms McFarlane had elements of familiarity about it – Ms McFarlane had for example disclosed early on to the

Claimant that her brother was gay. That being the case and given that the remarks were alleged to have been made at a party at which alcohol was available, the Tribunal considers that on a balance of probabilities Ms McFarlane made the remarks, potentially in a spirit of familiarity. At the time the two individuals appeared to have a friendly relationship and it was not until the Claimant was later being disciplined on the basis of allegations made by Ms McFarlane that he revisited the remarks and reconsidered what lay behind them, causing him to make the allegation of homophobia. This is confirmed by the account he gave to Mr Kelly during the disciplinary hearing (page 275).

20. The Claimant also alleged that at the same Christmas party Mr Kelly directed a remark at him that he experienced as homophobic. Mr Kelly had made a speech to those assembled and at the end everyone clapped and cheered and some people, including the Claimant, shouted out “We love you Mickey”. The Claimant alleges that Mr Kelly then said in a remark directed at him “I bet you say that to all the boys”. The Claimant’s account was firmly corroborated by Mr Harrison in cross examination, although Mr Kelly said that he had made the remark to the crowd in general and not the Claimant in particular. Mr Harrison, whose we evidence we found credible, said that the Claimant had called out in the loudest voice and it was quite clear that Mr Kelly had been responding specifically to the Claimant’s shouts. In his witness statement Mr Harrison described this comment as “totally unacceptable and inappropriate behaviour”. Having considered the totality of the witness evidence we preferred the Claimant’s account and find that the remark was directed at him.

21. We turn now to the matters leading to the Claimant’s dismissal. In the classroom in which the Claimant was working under Ms McFarlane’s supervision, there were a number of iPads used by the children during their learning activities and by class teachers for recording aspects of work in the classroom. The iPads contained filters that limited the children’s access to the internet as they would frequently use the iPads unsupervised. It was the Claimant’s job to upload classroom photos from the iPads onto the school server. Ms McFarlane’s evidence was that during his first term at the school she showed the Claimant how to upload photographs from the iPads by means of a USB cable. The Claimant however said that he was not confident performing the task in that way due to unfamiliarity with Apple products. It was his case that he asked Ms McFarlane if instead he could upload photographs of the children by transferring them via email. It was not his case that he specified that he would be using his personal email address, but rather that, initially at least, Ms McFarlane must have known that he meant a personal email address because she was responsible for obtaining a work email address for him and was chasing it up with Schools Direct. Mr Harrison confirmed that the work email addresses were not obtained until late October. Ms McFarlane denied giving the Claimant express permission to use a personal email address and the Claimant himself did not allege that he had been given express permission. It seemed to the Tribunal that he was in effect saying that the permission had been implied because of what Ms McFarlane knew to be the case at the time about his lack of access to a school email address. The Claimant also said that when he was allocated a work email

address he found it easier to continue to use his personal email address because he could remember the password.

22. The Tribunal finds that Ms McFarlane must have been aware that the Claimant was using a personal email address for some work purposes because she sent an email to him and his fellow trainees, using his personal email address, as late as 9 December 2016. But it also finds that the Claimant did not expressly explain to Ms McFarlane that he had been using his personal email account to upload photographs of the children he had taken in class onto the school's system. Nor do we find that Ms McFarlane encouraged him to log onto the school iPads using his personal email address, or expressly agreed that he should. We do find however that the Claimant believed that this was an appropriate course of action because he assumed that Ms McFarlane had in mind that he would be using a personal email address for the purpose. He may therefore have understood that he had Ms McFarlane's express agreement, but we find that that was not the case. It is more likely that Ms McFarlane simply did not address her mind to what the Claimant meant, or assumed that he was referring to a work email address.

23. The Tribunal also records at this point and finds as a fact that for the purposes of uploading photographs the Claimant had changed the settings on at least one of the classroom iPads in order to make his personal email an accessible email application. On page 268 there was a screenshot of the settings page, taken on one of the classroom iPads, showing that the default email account was now his personal Outlook page. It was clear from the terms of the school's Acceptable Use Agreement that changing the settings on school IT equipment without express permission or for a permitted purpose was a breach of that agreement.

24. The fact of the settings having been changed appears not to have come to light until 12 January 2017, when Ms McFarlane was looking at an iPad in the classroom and noticed an email notification. She was concerned because this was an iPad used unsupervised by the children and when she investigated, she discovered that the Claimant's personal email account was accessible and that there was at least one personal message exchange between the Claimant and his partner in the inbox. The Tribunal had some concerns about the time that it had taken for the matter to come to light and about whether the school's IT procedures were as robust as the school submitted that they were. However, that concern was not relevant to the issues before us, although they might have had relevance if the Claimant had been able to bring a claim under s98 Employment Rights Act 1996.

25. Ms McFarlane made a statement about her findings on 24 January 2017 for the purposes of the disciplinary proceedings which followed. This was at page 407 of the bundle and stated as follows:

On Thursday 12 January, I used one of the school iPads to take some photos of my class during their drama. When I opened the iPad, I noticed that there was an email application that had a number beside it to indicate that there were new messages. I clicked onto the app to see who had set up their email account on the iPad. It was

Kader's personal email account. When I opened the app, the list of emails was displayed down the left hand side of the screen (around one fifth of the screen) and an email was displayed on the rest of the screen. My attention was drawn to the email open. The email was a thread of emails between Kader and his partner. The content was about their current living situation and contained swear words as well as inappropriate content (ie 'looking forward to seeing you and giving you kisses and cuddles'). The content of the email was completely inappropriate for children to see.
I took the iPad and locked it away so that the children no longer had access to it. I subsequently checked the rest of the iPads in my classroom. There were two other iPads that also had Kader's personal email account set up on. These iPads were also locked away so that they were not used by the children until they had been cleared of the emails.
I reported what had happened to Charlotte Heath, Deputy Head, on Thursday, 12 January, as I am fully aware that logging on to personal email accounts on school iPads is a breach of the ICT Acceptable Use Code of Conduct. A meeting was scheduled for me to explain what I had discovered to Micky Kelly and Charlotte Heath on Monday, 16 January. After reporting this the iPads had been wiped of the email accounts by our ICT Department.
The advice that I gave Kader, and all the other students and teaching partners I have worked with in the past is as follows: when we take photos in class, they are uploaded onto the school system in order to then produce a photo sheet. During the first term of Kader's placement, there was a number of times when Kader observed me doing this. Photos are then on a school computer and saved appropriately in our shared area on the school systems. Every so often, I would delete photos from the Year 4 folder and on the iPad in order to free up space on the device.
I have never advised Kader to use the school iPads to log into his email accounts, personal or work, as I am fully aware that the children have daily access to the iPads. Having worked in the school for seven years and now as a member of the senior leadership team, I would never have advised Kader to use the iPads in this way. I have never used a school iPad to set up an email account, as like previously stated, I am aware that the children have access to the iPads every day. When in school, I only ever use school computers to log into my work email. I have never sent photographs of children in the school to my personal email as I am also aware that this is not acceptable.

26. The Tribunal notes that in fact a shorter version of this statement was subsequently submitted (page 265) for reasons that were not satisfactorily explained by the Respondents.

27. As reflected in the statement, after discovering that the Claimant's email account was accessible on the classroom iPad, Ms McFarlane did then speak to Ms Heath, who asked her to lock the iPads away and Ms Heath in turn spoke to Mr Kelly. Mr Kelly regarded the issue as one of safeguarding, as the Claimant's personal email account provided a potential gateway to the internet for children using the iPad, that would potentially bypass the protective filters the school had put in place. At his request Ms Heath then undertook an investigation by contacting the school's IT lead, the Schools Direct Programme and HR, from whom she sought advice and by speaking further to Ms McFarlane. Ms Heath also gathered the relevant documentation, including the Acceptable Use Agreement and the school's disciplinary policy.

28. On 17 January the Claimant was summoned to a meeting which he expected to be an investigation meeting. He was surprised to learn that a decision had been taken to suspend him. It was the First Respondent's case that he was told verbally at the meeting not to attend work the next day at Charles Dickens

School at which he had begun a placement on 12 December 2016. The Claimant accepted in cross examination that he had understood that he should not attend the school following the meeting on 17 January. Nevertheless, he did so the following day. His explanation was that he had gone there to retrieve his keys, which he had left behind when he attended the suspension meeting. He said he first tried to get a colleague to do this for him and that he tried to contact Ms Heath, but as he was unable to do so he had then gone to fetch his keys as he needed them. It was the First Respondent's case that the Claimant had breached the terms of his suspension by attending the school contrary to instruction. There was some dispute about why the Claimant had attended the school, but regardless of that it was clear that on the face of it he had breached the terms of the suspension by attending at Charles Dickens and the First Respondent added breach of the terms of the suspension to the list of disciplinary matters that would be dealt with at the subsequent disciplinary hearing. Whilst it did not send the suspension letter, that made the terms of the suspension clear, until 18 January and the Claimant did not receive it until 20 January, the Claimant told the Tribunal that he had known from what was said at the meeting that he should not go to the school the next day.

29. The Tribunal finds as a fact that Mr Kelly made a number of comments at the suspension meeting that reasonably gave the Claimant cause to believe that Mr Kelly had already made up his mind to dismiss him. Mr Kelly admitted to saying to the Claimant that he had the whole of his life before him and was still young. He denied that it was his intention to predetermine the outcome of the disciplinary hearing but accepted that he had made those comments.

30. The letter of 18 January also invited the Claimant to a disciplinary hearing. The allegations to be put to him were set out at page 224. It was suggested that the Claimant was facing serious allegations that could amount to gross misconduct and result in his failing to meet the standards necessary to complete his probationary period. The specific charge was that he had changed the settings of classroom iPads and added his personal email account, which represented a breach of the Acceptable Use Agreement and of the Teachers Standards Part 2, which deal with professional and personal misconduct. The letter also listed breach of the terms of the suspension as a further act of serious misconduct. He was warned that if substantiated the allegations could result in his dismissal for gross misconduct.

31. Whilst the letter referred to the Claimant's probation period, the Tribunal notes that at this stage of his employment he had still not received a contract of employment and was not therefore aware that he was subject to a probationary period. Secondly, the second paragraph on the second page of the letter referred to the hearing as a 'dismissal' hearing, thereby adding to the Claimant's impression, formed at the suspension meeting, that the outcome had been pre-determined. Despite these matters, the Tribunal was satisfied that the reasons the Claimant was invited to the disciplinary hearing were the reasons that were set out in the invitation letter. The Claimant considered that Ms McFarlane may have had other motives for reporting what she had discovered on the iPads, and submitted that she had realised that the

homophobic comments she had made at the Christmas party on 9 December could create difficulties for her and that she had therefore in effect manufactured allegations of breach of the Acceptable User Agreement in order to, deflect attention from them. The Tribunal considered that this allegation lacked credibility and was not supported by any evidence or indeed the chronology of events. We found no evidence that this was Ms McFarlane's real motivation.

32. The disciplinary hearing took place on 26 January. The Claimant was accompanied by his colleague Devon Johnson. The hearing was chaired by Mr Kelly and the management case was presented by Ms Heath, who had prepared the chronology of events at page 266-267. The Claimant had been supplied beforehand with the documents on which the First Respondent was relying. The minutes of the hearing were at pages 269-278. At the end of the meeting Mr Kelly communicated verbally his decision that the Claimant should be dismissed for serious misconduct. He would be paid for one week's notice, which he would not be required to work. The outcome was confirmed in the dismissal letter that followed the meeting and was at pages 279-282, confirming that his employment would end on 1 February 2017. The stated reasons for dismissal were that the matters that had been put to the Claimant in the letter inviting him to the disciplinary hearing were in Mr Kelly's view substantiated. He added that the school's trust in the Claimant had been undermined by his failure to adhere to the terms of the suspension and what was found to be his inconsistent explanation for that failure. The Tribunal was satisfied that those were the reasons that acted on the mind of the decision maker, Mr Kelly at the time of the dismissal.

33. The Tribunal considers that Mr Kelly had on a balance of probabilities made up his mind to dismiss the Claimant before the hearing. That was suggested by the remarks he made at the suspension hearing. The identification of the disciplinary issue as one involving safeguarding caused Mr Kelly to act in something of a knee jerk fashion, which, had the Claimant had the right to bring a claim of unfair dismissal under s98 Employment Rights Act, might potentially have rendered the dismissal unfair. But that was not an issue with which we were concerned in this case.

34. We note that the Claimant made the allegation during the disciplinary hearing that the Ms McFarlane was homophobic and he referred to the incident at the Christmas party. He was briefly questioned about that by the school's HR adviser, who was present at the meeting and the Claimant confirmed in answer to a question about whether his relationship with Ms McFarlane had been positive until the point of the disciplinary proceedings, that it had positive. There was no reference in the dismissal letter to the Claimant having raised this concern.

35. The list of issues also contains the Claimant's complaint that Ms McFarlane had accessed his personal emails. Tribunal finds that while examining the classroom iPads Ms McFarlane did access the Claimant's emails, but only once, on 12 January, when she noticed the email notification and opened one email to ascertain its origin. There was no evidence that she accessed his

personal emails any further than that and the evidence suggests that she handed the relevant iPads to IT promptly after making the discovery. Ms McFarlane produced a statement for the purposes of the disciplinary hearing (page 265) which confirmed that she opened the email app, saw a list of emails displayed down the left hand side and saw a specific email displayed on the rest of the screen. She said that her attention was drawn to the open email and that it contained what she described as “swear words” although she was unable to recall for the disciplinary hearing or the Tribunal what those words were. She said that the content of the email was “inappropriate for children to see”. Ms Heath also read this email when shown it by Ms McFarlane but she too was unable to remember what “swear words” had been used (disciplinary minutes page 269). There was limited discussion of the issue at the disciplinary hearing. However the Tribunal finds as a fact that Ms McFarlane did read one of the Claimant’s personal emails and reported it as containing “inappropriate content”. She had also prepared the longer statement prior to the disciplinary hearing that was not in fact produced at the hearing itself (set out above at paragraph 25). This contained a longer description of what she had seen on the iPad but was retracted for reasons that, as we have noted, were not satisfactorily explained.

36. The Tribunal concludes from this evidence that Ms McFarlane read one of the Claimant’s emails and reported it as inappropriate to Ms Heath. The contemporaneous evidence and the responses of Ms Heath and Ms McFarlane in cross examination also suggest that there was at the time a discussion between them that involved an allegation that the emails on the iPad contained swear words. However by the time of the disciplinary hearing neither of them could remember what the alleged swear words were (the disciplinary minutes at page 274 record that Ms Heath could not recall the words alleged to have been used). There was no evidence of swear words in the documents produced at the hearing and Ms McFarlane’s evidence in cross examination on this point was not entirely satisfactory. The Claimant pointed out that she was able to remember an entire sentence containing the words “kisses and cuddles” and it was therefore not credible that she would have forgotten individual swear words. The issue the Tribunal was asked to determine was whether Ms McFarlane had lied about this issue. We consider that on a balance of probabilities she saw language in the emails that concerned her, that she considered was unsuitable to be seen by children and that she reported this to Ms Heath. We do not think that she lied about this and were unable to understand what her motive for doing so would have been. At its highest that Claimant’s case was that she did lie, or at the very least exaggerated her concerns in order to show him in a bad light. We do not think that is what happened and that she used the term “swear words” in an imprecise way to connote language that concerned her.

37. Ms McFarlane did however refer to the Claimant having sent an email containing the sentence “cannot wait to see [him] later and give [him] kisses and cuddles” in the longer statement at page 407 and it appears from the surrounding evidence that the Claimant was aware of that fact by the time of the disciplinary hearing, so that even if Ms McFarlane had not said it to him

directly, she had made him aware that she had seen and read a message to this effect.

38. A further issue concerned whether or not Ms McFarlane sent the WhatsApp message (page 303) to the Claimant on 1 February saying "Just give up". The Tribunal finds that on a balance of probabilities Ms McFarlane did send it. The Tribunal found it unlikely that the Claimant could have fabricated the message or created a fabricated paper screen shot. Had the Claimant wished to fabricate such a message in order to paint Ms McFarlane in a bad light we also consider that he would have gone further than the rather cryptic message "Just give up", the meaning of which is unclear.

Submissions

39. The Tribunal heard detailed and helpful submissions from Ms Omambala and the Claimant at the end of the hearing and was grateful for the assistance the submissions provided during its deliberations.

Conclusions

40. The Claimant advanced his case on a relatively narrow basis, relying only on sections 13 and 19 Equality Act. He did not seek to argue that any of the matters he complained of constituted unlawful harassment under s26 Equality Act, which might have been a better way to frame his argument in relation to some of his complaints. As noted, the list of issues had been agreed at the time when the Claimant had had legal advice and the Tribunal therefore saw no reason to depart from it. This means that the Claimant has not succeeded in relation to some of his complaints even though the Tribunal has accepted his account of the facts in relation to a number of the matters about which he complained.

Race discrimination – s13

41. The Claimant satisfied the Tribunal of the following factual allegations made in connection with his complaint of direct race discrimination. The remainder of the matters he complained of were not made out on the facts:

    a. that he had a greater workload than at least some of his colleagues;
    b. that he attended work under the influence of alcohol on 1 November 2016, was sent to the headteacher and was sent home for the day;
    c. that he was invited to a disciplinary hearing on 26 January 2017;
    d. that Ms McFarlane accessed the Claimant's personal email during the disciplinary process and read one of his personal communications with his partner;
    e. that a decision to dismiss the Claimant was made before the disciplinary meeting;
    f. that Ms McFarlane send a WhatsApp message to the Claimant in February 2017 stating "just give up!!!".

42. The Tribunal found no evidence that any these matters amounted to actions taken because of his race. The Claimant advanced very little evidence concerning his race and did not prove any facts from which it would have been possible to infer that race was the reason in relation to any of the matters listed in paragraph 41. The Claimant did not therefore shift the burden of proof to the Respondents on any of the matters on which he relies. Furthermore, as regards the reasons the Claimant was invited to a disciplinary hearing and dismissed at the end of it, the Tribunal was satisfied that these were the matters that were set out in the disciplinary invitation letter and the disciplinary outcome letter. The Tribunal was not invited to consider in detail who the Claimant's comparators were for the purposes of his complaint of direct race discrimination but we were satisfied that a hypothetical comparator of a different race would have been treated in the same way. There was no evidence before us that suggested that that would not have been the case.

43. Accordingly all of the complaints of direct race discrimination fail and are dismissed.

Discrimination because of religion or belief - s13

44. The Claimant satisfied the Tribunal of the factual matters set out at paragraph 42 above and of the following additional matters, relied on in his claim of direct discrimination because of religion or belief:

    a. that he approached Ms McFarlane on one occasion in October 2016 to ask where he could observe prayers during the course of the day and Ms McFarlane responded by telling the Claimant that prayer facilities were not available;
    b. that on the school trip to Sayers Croft Mr Kelly suggested that the Muslim children on the residential trip could be served roast pork for lunch and told that "it is Halal".

45. Dealing with those additional matters first, Ms McFarlane's comment about prayer facilities was not in our judgment capable of amounting to direct discrimination. To succeed as a matter of direct discrimination the Claimant would have had to prove facts that showed that persons of a different religion (or none) were treated more favourably in relation to the provision of prayer facilities or space for non-religious reflection. No such case was put forward and the matter fits more obviously within the claim of indirect discrimination to which we return later in these reasons.

46. As regards the comment about serving a pork roast to the children and presenting it as halal meat, whilst it is clear that the Claimant found this offensive and justifiably so, it was not a remark directed at the Claimant - rather it was said in his presence to an assembled group of teachers. Had he brought a complaint under s26 Equality Act in relation to this remark it is likely that it would have succeeded. However it cannot in our judgment succeed as a claim of direct discrimination under s13 because it was not directed at him.

47. Turning to the matters listed at paragraph 41 above, in contrast to his claim of direct race discrimination, where the burden of proof did not shift to the Respondents, as regards the claim of direct discrimination because of religion, the Claimant has established that on at least one occasion a remark was made by the head teacher of the school (the "halal meat" comment) that indicated that there was a possibility that unconscious religious discrimination could affect his decision making. That being the case we consider that the burden of proof did pass to the Respondent to prove that in relation to the other factual matters the Claimant has established, where Mr Kelly was the decision maker, there was a reason for the treatment that was not in any way influenced by the Claimant's Muslim faith. The relevant matters are at paragraph 41 (b), (c) and (d).

48. Having considered the facts of the case the Tribunal was satisfied that the reason Mr Kelly acted as he did on each occasion was not affected by the Claimant's Muslim religion. When he was sent home for the day on 1 November 2016 it was because Mr Kelly shared the belief of his colleagues that the Claimant was still under the influence of alcohol. The decision to dismiss the Claimant, which we have found was effectively made before the disciplinary hearing, was, we conclude, attributable solely to Mr Kelly's great sensitivity to matters that touched on the safeguarding of the children in the school. We considered that the Claimant's religion played no part in the decision making. There was no evidence in relation to either the decision itself or the fact that it was pre-determined that a person of a different religion (or none) would have been treated differently.

49. Accordingly all of the Claimant's complaints of direct discrimination because of religion or belief fail and are dismissed.

Direct discrimination because of sexual orientation – s13

50. The Claimant satisfied the Tribunal of the factual matters set out at paragraph 41 above and of the following additional matters, relied on in his claim of direct discrimination because of sexual orientation;

    a. Ms McFarlane suggested to the Claimant that he should "stay with the girls" during the school trip to Sayer's Croft;
    b. Ms McFarlane called the Claimant a "kiss-arse" at the work Christmas party in December 2016 and at the same party told the Claimant that his behaviour was the reason she "hates gay people";
    c. Mr Kelly made the remark "I bet you say that to all the boys" in a manner that made it clear that the remark was directed at the Claimant, when the Claimant shouted "we love you Mickey" at the same Christmas party;
    d. Ms McFarlane reported the content of one of the Claimant's personal emails to his partner to Ms Heath as "inappropriate content"?
    e. Ms McFarlane told the Claimant that she saw an email to his partner which read "cannot wait to see [him] later and give [him] kisses and cuddles"?

51. Dealing first with these additional matters, the remark referred to at paragraph 50(a) was not sufficiently explicit or directed at the Claimant's sexual orientation to amount to direct sexual orientation discrimination. The Claimant might have succeeded had he brought that part of his claim under s26 Equality Act, as noted in paragraph 40 above, but he did not do so.

52. By contrast the remarks set out at paragraph 50(b) were plainly directed at the Claimant because of his sexual orientation and as such amounted to direct sexual orientation discrimination under s13. We reach the same conclusion in relation to Mr Kelly's remark at paragraph 50(c) which, in our judgment was directed at the Claimant specifically because of his sexual orientation. The remarks were in each case unfavourable because they caused the Claimant hurt and embarrassment, the more so because they came from his managers, on whom he was reliant at the start of his career in teaching.

53. Giving these conclusions, namely that both Ms McFarlane and Mr Kelly made remarks that indicated that their decision making as regards the Claimant could have been tainted by sexual orientation discrimination, we consider that the burden of proof passes to the Respondent as regards the remaining matters relied on by the Claimant, where we have made findings of fact in his favour and either Mr Kelly or Ms McFarlane was the decision maker.

54. As regards Ms McFarlane's reporting the content of one of the Claimant's personal emails to his partner to Ms Heath as "inappropriate content", the Tribunal concludes on the basis of Ms McFarlane's evidence and the contemporaneous documents that the reason she did so was that the email was a personal email about the Claimant's private life that should not have been visible to the children. She would have had the same concern irrespective of the sexual orientation of the individual concern. We conclude that the word "inappropriate" referred to the fact that the email concerned an intimate personal relationship, not that it concerned a same sex relationship. It was not therefore directly discriminatory because of sexual orientation. In the same context Ms McFarlane made the Claimant aware that she had seen the content of the email to his partner described at paragraph 50(e). However we conclude that she drew attention to this not because it was an expression of affection from one member of a same sex couple to another, but because it was information about the Claimant's private life that it was inappropriate for children at the school to see, for reasons related to the school's safeguarding duties towards its pupils. This disclosure to Ms Heath was not therefore an act of direct sexual orientation discrimination.

55. As regards the matters listed at paragraph 41(a)-(f) we conclude:

    a. That the Claimant had a greater workload than at least some of his colleagues, as the Respondent did not put forward any evidence that this was not the case and we have accepted the Claimant's limited evidence. Therefore, we are bound under s136 Equality Act to infer that the Claimant's sexual orientation played a part in the fact that he was treated differently from his colleagues. We reach that conclusion

with some reluctance given the overall lack of evidence in support of this claim, but we consider it to be the correct application of the burden of proof provisions on the facts of this case as presented to us.

b. As regards the fact that the Claimant attended work under the influence of alcohol on 1 November 2016, was sent to the headteacher and was sent home for the day, we accept the Respondent's explanation that the reason the Claimant was treated in this way was that he had attended work under the influence of alcohol. His sexual orientation played no part in the decision taken by Ms McFarlane or Mr Kelly.
c. Similarly, the reason that he was invited to a disciplinary hearing on 26 January 2017 was the discovery that he had changed the settings on the classroom iPads and left his personal emails accessible by the children in the class. His sexual orientation played no part in the disciplinary decisions taken by Ms McFarlane, Ms Heath or Mr Kelly. As observed previously, we considered and rejected the Claimant's contention that the disciplinary concerns were fabricated by Ms McFarlane because she was concerned that her homophobic comments would cause difficulties for her if they came to light.
d. The reason that Ms McFarlane accessed the Claimant's personal email during the disciplinary process and read one of his personal communications with his partner was that she had discovered an external email account on the classroom iPad and was investigating why there was an email app open on the iPad. The Claimant's sexual orientation played no part in her actions;
e. As set out in paragraph 48 above the decision to dismiss the Claimant, which we have found was effectively made before the disciplinary hearing, was attributable solely to Mr Kelly's great sensitivity to matters that touched on the safeguarding of the children in the school. We considered that the Claimant's sexual orientation played no part in the decision making. There was no evidence in relation to the decision or the fact that it was pre-determined that a person of a different sexual orientation would have been treated differently;
f. As regards our finding that Ms McFarlane sent a WhatsApp message to the Claimant in February 2017 stating "just give up!!!", we did not have enough evidence of the meaning of the message or the context surrounding it to conclude that it was capable of amounting to less favourable treatment of the Claimant because of any of the protected characteristics on which he relied.

Indirect discrimination

56. The Claimant relied on two PCPs:

    a. That religious prayers could not be observed at the school; and
    b. The school's 'Acceptable User Agreement'?

57. The Tribunal finds that both PCPs were applied to the Claimant. As regards the second PCP however the Claimant failed to show how it put persons of the same race, religion or sexual orientation as him at a particular

disadvantage compared to those who did not share those characteristics. This aspect of his claim therefore failed at the first hurdle.

58. However he did demonstrate that there was a lack of prayer facilities at the school and it was self-evident that this would place Muslim members of staff at a disadvantage compared to colleagues who were not required to pray during the day. The First Respondent did not argue that the lack of facilities constituted a proportionate means of achieving a legitimate aim. Its submission was that there were in fact suitable facilities available for prayer at the school. We have accepted the Claimant's evidence that that was not the case and in the absence of submissions that the PCP was objectively justified the Claimant's claim of indirect discrimination because of religion succeeds.

Jurisdiction

59. ACAS was contacted on 27 April 2017, which was within three months of the Claimant's effective date of dismissal (1 February 2017). The claim itself was submitted the same day that the ACAS certificate was issued (5 May 2017).

60. There is therefore no issue of jurisdiction in relation to the successful complaint of indirect discrimination. The PCP on which the Claimant relied was still being applied at the effective date of dismissal and as ACAS was contacted within three months of that date and the claim presented on the same day that the certificate was issued, the claim is in time.

61. The matters in respect of which we have upheld the Claimant's claim of direct sexual orientation discrimination occurred outside the statutory three-month time limit, as extended by ACAS early conciliation. Two of the complaints of direct sexual orientation discrimination that the Tribunal has upheld occurred on 9 December 2016. The third, relating to the Claimant's workload was an ongoing state of affairs that continued until the same date when the Claimant left the school to begin a placement at Charles Dickens School. The time limit for contacting ACAS therefore expired on 8 March 2017.

62. The Tribunal must therefore consider whether it would be just and equitable to extend time to allow judgment and remedy in respect of those two matters.

63. Although represented at certain points in these proceedings the Claimant presented his own case at the Tribunal and prepared his own submissions.. The starting point for the Tribunal is that ordinarily time limits should be adhered to and there should be a coherent reason for time to be extended. The Claimant did not advance clear arguments in support of an extension of time during his submissions and although he alluded to mental ill health and other difficulties in his personal life, there was insufficient evidence of those matters for the application to extend time to succeed on that basis.

64. However at several points in his evidence it was put to the Claimant that he could and should have complained about these comments at the time, and/or commenced proceedings in respect of them earlier than he did. His response in what he alluded to as a "pattern of behaviour" was that he did not complain

at the time because he was trying to establish his career and did not expect matters to take the turn that they did. He was a trainee teacher who was entirely dependent on the patronage of his mentor and the other senior leadership team members at the school to complete the training that would enable him to start a career in teaching. The Tribunal found it entirely understandable that he would not have wished to jeopardise his position by raising complaints about his workload, or remarks that were discriminatory, upsetting or hurtful. Although the Claimant did not expressly make this point in submissions, it was clear enough from his evidence that he did not complain because he wanted to qualify as a teacher and did not want to rock the boat. It is entirely understandable that a very junior employee would take that view.

65. That being the case the Tribunal concludes that it would be just and equitable to extend time in this case and that a trainee teacher, at the most vulnerable point in his career would not have considered it a sensible course of action to formally complain about his workload or individual discriminatory comments, let alone begin proceedings in respect of them. Once he had been dismissed these considerations fell away and he acted promptly thereafter to assert his rights. The overall extension of time involved is furthermore a matter only of weeks – the period between 8 March and 27 April and entails no material prejudice to the Respondent.

66. The Claimant having succeeded in some of his complaints, remedy must be determined. The parties are invited to consider and, if possible, resolve the issue of remedy between them. Should they be unable to do so, either party may apply for a remedy hearing to be fixed.

_____

Employment Judge Morton
Date: 1 March 2021

Appendix

List of issues (as agreed by the parties 3 September 2018)

1. The Claimant relies on the following protected characteristics for his claims pursuant to the Equality Act 2010:
a. Race: the Claimant describes himself as 'Non-white'
b. Religion or belief: the Claimant describes himself as Muslim
c. Sexual Orientation: the Claimant describes himself as a gay man.

2. The Claimant brings claims of unlawful direct discrimination because of his race, religion and/or sexual orientation pursuant to section 13(1) of the Equality Act 2010.

3. The Claimant brings claims of unlawful indirect discrimination in relation to his religion pursuant to section 19 of the Equality Act 2010.

Questions of Fact to be determined:
Direct Race Discrimination

4.
a. Did the Claimant have a greater workload than other unqualified teachers who started at the same time as he did?
b. Did the Claimant attend work on 1 November 2016 and say that he was hungover? (ii) If so was he sent to see the Head teacher? (iii) Was he sent home?
c. On or about 29 November 2016 was the Claimant required to look after children on a residential trip whilst his work colleagues consumed alcohol?
d. Had the Claimant explained to Ms McFarlane that he had been using his personal email account to upload photographs he had taken onto the school's hard drive?
e. Did Ms McFarlane encourage the Claimant to log on to his personal email account on a classroom iPad?
f. Did Ms McFarlane agree that the Claimant should log onto his personal email address on the school iPad in order to undertake work related tasks?
g. Was the Claimant invited to a disciplinary hearing?
h. What were the reasons that the Claimant was invited to a disciplinary hearing?
i. Did Ms McFarlane access the Claimant's personal email during the disciplinary process and read his personal communications with his partner?
j. Was a decision to dismiss the Claimant made before the disciplinary meeting on 26 January 2017?
k. What was the reason for the decision to dismiss the Claimant
l. Did Ms McFarlane send a WhatsApp message to the Claimant in February 2017 stating "just give up!!!"?

Questions of Law
5. Do any of the facts found proved at paragraph 4(a) - (l) above amount to less favourable treatment of the Claimant?

6. If so what was the reason for the less favourable treatment? Was the Claimant treated less favourably because of his race?

Direct Discrimination because of Religion
Questions of Fact to be determined:

7.
a. Did the Claimant have a greater workload than other unqualified teachers who started at the same time as he did?
b. Did the Claimant approach Ms McFarlane on one occasion in October 2016 and ask where he could observe prayers during the course of the day?
c. Did Ms McFarlane respond by telling the Claimant that "the school don't do this here"?
d. Did the Claimant attend work on 1 November 2016 and say that he was hungover? (ii) If so was he sent to see the Head teacher? (iii) Was he sent home?
e. On or about 29 November 2016 was the Claimant required to look after children on a residential trip whilst his work colleagues consumed alcohol?
f. Did Mr Kelly suggest that the Muslim children on the residential trip could be served roast pork for lunch and told that "it is Halal"?
g. Had the Claimant explained to Ms McFarlane that he had been using his personal email account to upload photographs he had taken onto the school's hard drive?
h. Did Ms McFarlane encourage the Claimant to log on to his personal email account on a classroom iPad?
i. Did Ms McFarlane agree that the Claimant should log onto his personal email address on the school iPad in order to undertake work related tasks?
j. Did Ms McFarlane access the Claimant's personal email during the disciplinary process and read his personal communications with his partner?
k. Was a decision to dismiss the Claimant made before the disciplinary meeting on 26 January 2017?
l. What was the reason for the decision to dismiss the Claimant
m. Did Ms McFarlane send a WhatsApp message to the Claimant in February 2017 stating "just give up!!!"?

Questions of Law

8. Do any of the facts found proved at paragraph 7(a) - (m) above amount to less favourable treatment of the Claimant?

9. If so, what was the reason for the less favourable treatment? Was the Claimant treated less favourably because of his religion?

Direct Discrimination because of Sexual Orientation
Questions of Fact to be determined:

10.
a. Did the Claimant have a greater workload than other unqualified teachers who started at the same time as he did?
b. Did the Claimant attend work on 1 November 2016 and say that he was hungover? (ii) If so was he sent to see the Head teacher? (iii) Was he sent home?
c. On or about 29 November 2016 was the Claimant required to look after children on a residential trip whilst his work colleagues consumed alcohol?
d. On the same night did Ms McFarlane say to the Claimant that he should "stay with the girls"?

e. Did Ms McFarlane call the Claimant a 'kiss-arse' at the work Christmas party?
f. Did Ms McFarlane tell the Claimant at the same party that his behaviour was the reason she "hates gay people.'?
g. Did the head teacher say to the Claimant "I bet you say that to all the boys" when the Claimant shouted "we love you Mickey" at the same Christmas party after the head teacher made a speech?
h. Had the Claimant explained to Ms McFarlane that he had been using his personal email account to upload photographs he had taken onto the school's hard drive?
i. Did Ms McFarlane encourage the Claimant to log on to his personal email account on a classroom iPad?
j. Did Ms McFarlane agree that the Claimant should log onto his personal email address on the school iPad in order to undertake work related tasks?
k. Did Ms McFarlane access the Claimant's personal email during the disciplinary process and read his personal communications with his partner?
l. Did Ms McFarlane report the content of the Claimant's personal emails to his partner to Ms Heath as 'inappropriate content'?
m. Did Ms McFarlane lie when she told Ms Heath that she had seen swear words in the Claimant's personal email correspondence with his partner sent on 12 January 2017?
n. Did Ms McFarlane tell the Claimant that she saw an email to his partner which read "cannot wait to see [him] later and give [him] kisses and cuddles"?
o. Was a decision to dismiss the Claimant made before the disciplinary meeting on 26 January 2017?
p. What was the reason for the decision to dismiss the Claimant
q. Did Ms McFarlane send a WhatsApp message to the Claimant in February 2017 stating "just give up!!!"?

Questions of Law

11. Do any of the facts found proved at paragraph 10(a) - (o) above amount to less favourable treatment of the Claimant?

12. If so, what was the reason for the less favourable treatment? Was the Claimant treated less favourably because of his sexual orientation?

Indirect Discrimination

13. Did the Respondent apply the following provision criteria and/or practice ("PCP") to the Claimant:

(i) Religious prayers cannot be observed at the Respondent school?
(ii) The Respondent school's 'Acceptable User Agreement'?

14. Did the application of a PCP at 13 above place the Claimant at a substantial disadvantage when compared to persons who do not share the relevant protected characteristic?

The Claimant relies on the protected characteristic of his Muslim religion in respect of 13(i) and his race, religion and sexual orientation in respect of 13(ii).

15. Can the Respondent show that the application of the PCP is a proportionate means to achieving a legitimate aim?

Jurisdiction

16. Has the Claimant brought his complaints in time? If not is it just and equitable to extend the primary time limit in all the circumstances of this case?

17. Should the Claimant be granted the remedy he seeks, or any other remedy?