Case Number: 3324619/2019

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Rev. Keith Walters **v** **The Active Learning Trust Ltd (1)**
Helen Davies (2)

Heard at: Cambridge Employment Tribunal

On: 17th – 21st January 2022

Before: Employment Judge King

Members: Mr G Page
Ms L Davies

Appearances

For the Claimant: Mr Philips (counsel)
For the Respondent: Mr Peacock (solicitor)

RESERVED JUDGMENT

1. The claimant's claim for direct discrimination is not well founded and is dismissed.
2. The claimant was subjected to indirect discrimination on the ground of religion or belief by being given a final written warning on 23rd July 2019.
3. The claimant's claim for unfair dismissal is not well founded and is dismissed.

REASONS

1. This is the judgment of the Tribunal in the above matter which was listed for 5 days on 17th – 21st January 2022. This hearing was held as a hybrid hearing. The Claimant and his representatives and some supporters attended in person with other interested parties including members of the

press. On some days these other interested parties attended via CVP. The Respondent's representatives and witnesses joined via CVP. The panel was also hybrid with Mr Page participating via CVP and Ms Davies and Employment Judge King at the hearing centre.

2. The claimant was represented by Mr Philips of Counsel. The first and second respondents were represented by Mr Peacock, solicitor. We heard evidence from the Claimant and he also relied on a written expert's report/statement from Dr Martin David Parsons. We did not hear evidence from Dr Parsons although we were told that he was available and took his statement as read since the respondent did not have any cross examination of the witness. It was agreed that any submissions could be made as to the report and the weight the Tribunal should attach to it. The report was helpful to the Tribunal to explain some of the Evangelical beliefs and deal with group disadvantage. The report at times went further than it needed to on matters such as the potential conflict between LGBTQ activists and evangelical Christians but we attached weight to the relevant parts of the report and were able to discount other matters.

3. On behalf of the respondent, we heard evidence from Laura Fielding who was the investigating officer and Deputy Head, Ms Helen Davies who was the disciplinary officer and Head Teacher and Ms Marion Lloyd who was the appeal officer and a Governor at the time.

4. We had helpful written and oral submissions from both sides. The parties had exchanged witness statements for all of the witnesses and prepared an agreed bundle to which we had regard in the hearing. There were some issues over additional documentation for the bundle but these were resolved by consent and added to the bundle. Some additional documents were requested by the Tribunal as they were referred to in evidence or considered relevant and we were made aware of their existence by the witnesses so ordered that they be produced including the complaints policy of the School as this was a central issue in the case.

5. At the outset of the hearing the claims were identified as unfair dismissal (constructive) and indirect and direct discrimination. The claimant relied on the protected characteristic of his religion and/or beliefs as set out below. The parties had agreed a list of issues in advance which was in the bundle.

The issues

6. The parties had agreed the issues which we revisited at the outset of the hearing and decided to deal with liability only at the hearing so have not considered the remedy issues identified by the parties on the agreed list of issues at this stage. In respect of the discrimination complaints the claimant relies on his religion and/or belief as a Christian and in particular as set out in paragraph 47 of the amended particulars of claim:

6.1 The Christian religion;
6.2 The belief in the literal truth of the Bible;
6.3 Belief that Christians ought to strive in accordance with the biblical truth;
6.4 Belief that sexual relationships are only appropriate within a heterosexual marriage as defined by the Bible;
6.5 Belief in the duty of Christians to proclaim the gospel to others;
6.6 Belief that Christians should encourage each other to live Godly lives and therefore avoid events and locations in which sin will or might be celebrated 1Thessalonians 5:21-22 Prove all things; hold fast that which is good. Abstain from all appearance of evil.

Direct discrimination

7. Whether because of the claimant's religion and belief set out above, the respondent treated the claimant less favourably than they treat or would have treated, others (hypothetical comparator) in the following ways:

7.1 The investigation;

7.2 Extending the remit of its investigation to include the claimant's church social media;

7.3 The decision that there was a disciplinary case to answer;

7.4 Imposing a sanction of a final written warning against the claimant;

7.5 Constructively dismissing the claimant

8. The claimant brought his direct discrimination complaints against both respondents.

Indirect discrimination

9. Whether the first respondent applied to the claimant the following PCPs as set out in paragraph 51 of the amended claim:

9.1 The interpretation of the first respondent's social media and e-safety acceptable use policy, code of conduct for adults and/or equal opportunities policy, whereby a polite criticism of a "Pride" event by an employee, made in a context unrelated to the School is seen as:

9.1.1 "homophobic, harassing or in any other way discriminatory or offensive" under s5.4 of the social media and e-safety acceptable use policy; and/or

9.1.2 "content or opinions deemed racist, sexist, homophobic or hateful" under s6.3 of the social media and e-safety acceptable use policy; and/or

9.1.3 "unprofessional comments which scapegoat, demean or humiliate or might be interpreted as such" under 4.3 of the code of conduct; and/or

9.1.4 "offensive, obscene or discriminatory material, criminal material or material which is liable to cause distress or embarrassment" under 17.1 of the code of conduct; and/or

9.1.5 Damaging the reputation of the school/Trust in breach of s5.2 and/or 6.1 and/or 6.3 of the social media and e-safety acceptable use policy and/or 8.4 of the code of conduct; and/or

9.1.6 Compromising the employee's position within the work setting, or bringing the school/Trust into disrepute, contrary to s4.1 of the code of conduct;

9.1.7 Not consistent with the professional image expected by the respondent contrary to 8.4 of the code of conduct; and/or

9.1.8 Otherwise in breach of the social media and e-safety acceptable use policy, code of conduct for adults and/or equal opportunities policy.

9.2 The practice of giving substantial weight, in a disciplinary investigation of a social media post by an employee, to the strong views expressed by third parties (in the media and/or in complaints to the first respondent) rather than a strictly objective assessment of the employee's conduct.

10. Whether the first respondent applied or would apply those PCP's to persons who do not share the claimant's religion and/or beliefs.

11. Whether these PCPS put or would put persons with whom the claimant shares the protected characteristic at a particular disadvantage compared to others.

12. Whether these PCP's put or would put the claimant to that disadvantage.

13. Whether the first respondent can show the PCP's to be a proportionate means of achieving a legitimate aim.

Unfair dismissal

14. Whether the claimant terminated the contract under which he was employed by the first respondent in circumstances in which he was entitled to terminate it without notice by reason of the first respondent's conduct; s95(1)(c) ERA 1996 and specifically as follows.

15. Whether the following acts or failure to act by the first respondent amounted to a repudiatory breach of the implied term of trust and confidence sufficiently serious to justify the claimant resigning:

15.1 Carrying out a disciplinary investigation in relation to the claimant's tweet;

15.2 The outcome of the disciplinary investigation;

15.3 Allowing details of the disciplinary proceedings against the claimant to leak to the wider school community before the claimant was himself aware;

15.4 Failing to take account, or any reasonable account of the claimant's declaration of his conflict of interest between employments;

15.5 Failing to support the claimant by removing him certain duties whilst retaining him in others thereby putting him into a compromised position;

16. If there was a repudiatory breach, whether the claimant affirmed the contract, or accepted the breach and treated the contract as at an end;

17. Whether the claimant resigned in response to a repudiatory breach or for some other reason

18. Whether the dismissal was discriminatory under s39 of the Equality Act 2010; i.e.

18.1 Whether the reason why the claimant was constructively dismissed because of his religion and/or beliefs;

18.2 Whether the claimant was constructively dismissed by an application of an indirectly discriminatory PCP.

The Law

19. The claimant relied on the Human Rights Act 1998 and that the Tribunal should apply the Equality Act 2010 in a manner consistent with the Human Rights Act and ECHR.

20. In particular, the claimant relied on Article 9 dealing with the freedom of thought, conscience and religion.

> ***ARTICLE 9: Freedom of thought, conscience and religion***
>
> *1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to*

manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

21. The claimant also relied on Article 10 dealing with the freedom of expression

ARTICLE 10: Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

22. The claimant also made reference to the Directive and EU legislation in respect of the interpretation of the Convention Rights including the Charter of Fundamental Rights but which we have not set out here. These were in any event the subject of many of the cases the Claimant referred to. We have also had regard to EHRC Code.

Unfair Dismissal

23. Dismissal under Section 95 of the Employment Rights Act 1996 is in dispute as this is a constructive unfair dismissal case. S95 states as follows:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
(a) the employer gives notice to the employee to terminate his contract of employment, and
(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;
and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

24. Under Section 94 of the Employment Rights Act (ERA) 1996;

(1) An employee has the right not to be unfairly dismissed by his employer.

25. Section 98 of the ERA states that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability of qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) *is that the employee was redundant, or*

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) *In subsection (2)(a)—*

(a) "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications" , in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

Discrimination

26. Religion is a protected characteristic under s10 of the Equality Act 2010.

27. Direct discrimination is dealt with under s13 of the Equality Act 2010 as follows:

(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.

(2) ……

28. Section 19 Equality Act 2010 (Indirect discrimination) states:

*"**19 Indirect discrimination***

(1) 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.

(2) For the purposes of subsection (1), 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.

29. The respondent provided helpful written submissions and made reference to a number of authorities as follows:

Gibbons v British Council ET/22000088/17
Chondol v Liverpool City Council UKEAT/0298/08
Ladele v London Borough of Islington [2009] ICR 387
Azmi v Kirklees Metropolitan Council UKEAT/0009/07
Higgs v Farmor's School ET/1401264/19
McClintock v Department of Constitutional Affairs [2008] IRLR 29

30. The claimant also provided a helpful skeleton argument and then additional written submissions which reference a large number of cases as follows:

X v Y [2004] EWCA Civ 662
Heinisch v Germany [2014] 58 EHRR31
Eweida v United Kingdom [2013] ECHR 37
Redfearn v United Kingdom [2012] ECHR 1878
Page v NHS Trust Development Authority [2021] EWCA Civ 2
Granger Plc v Nicolson [2010] 2 All ER
Forstater v Centre for Global Development Europe [2021] UK EAT 0105_20_1006
Harron v Chief Constable of Dorset Police [2016] IRLR 481
Henderson v General Municipal and Boilermakers Union [2016] EWCA Civ 1049
Maistry v BBC [2014] EWCA Civ 1116
R (Nigole) v University of Sheffield [2019] EWCA Civ 1127
In Re Sandown Free Presbyterian Church [2011] NIQB 26
Thorgeir Thorgeirson v Iceland [1992] 14 EHRR 843
Vajnai v Hungary [2010] 50 EHRR 44
R (Prolife Alliance) v BBC [2003] UKHL 23
R (Miller) v The College of Policing [2020] EWHC 225 (Admin)
Smith v Trafford Housing Trust [2012] EWHC 3221 (Ch)
Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin)
Bank Mellat v HM Treasury [2013] UKSC 39
Handyside v UK (application no 5493/72) 1 EHRR 377
Klein v Slovakia (Appl No 72208/01 of 31st October 2006)
Vogt v Germany [1996] 21 EHRR 205
Fuentes Bobo v Spain [2001] 31 EHRR 50
Redmond-Bate v DPP [1999] EWHC Admin 733
Chief Constable of West Midlands Police v Harrod [2015] ICR 1311
Bougnaoui v Micropole SA [C-188/15] EU:C:2016:553
Wasteney v East London NHS Foundation Trust [2016]
Onuoha v Croydon Health Services NHS Trust ET case 2300516/2019
Din v Carrington Viyella [1982] ICR 256
Stockton on Tees Borough Council v Aylott [2010] EWCA Civ 910
Nagarajan v London Regional Transport [1999] ICR 877 HL

Amnesty International v Ahmed [2009] UKEAT 0447_08_1308
James v Eastleigh Borough Council [1190] ICR 554
R (E) v JFS [2009] UKSC 15
Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants) [2018] UKSC 49
Mba v Mayor and Burgesses of the London Borough of Merton [2013] EWCA Civ 1562
Berriman v Delabole [1985] IRLR 305

The facts

31. The claimant is a Christian minister. In 2007, the claimant stated he had a calling from God to "plant a new church" in Ely. The claimant planted the New Connexions Free Church ("the Church") and became its minister. The claimant was the minister there throughout his employment with the first respondent.

32. The Church of the claimant was an evangelical church and one of two such churches within Ely. Dr Martin David Parsons described Evangelical Christians as " *holding to the Protestant Reformation emphasis on Sola Scriptura i.e. believing that the Bible is the inspired word of God and the sole ultimate source of authority."* He confirms that it was a requirement to preach to non-Christians and also spread the message to Christians to follow the Bible.

33. Dr Martin David Parsons outlines the structure of the Church and how the claimant is paid and that it is often necessary for Ministers to have outside employment and that there are other Christian Ministers who could be similarly disadvantaged by the application of the policies. We are also told that Evangelical Christians make up around 45% of Church goers. The statement establishes a group disadvantage if Christian Ministers who share the claimant's beliefs were prevented from preaching the Bible or the ideology in which they believe. The statement also deals with the

Evangelical Christian beliefs as to sexual relationships outside marriage and in particular the biblical definition of marriage.

34. The claimant also held what he described as secular jobs throughout his working life to maintain himself and his family. The claimant's role prior to his role with the respondent was estates manager at a College for 26 years. The claimant's evidence was that he gave this role up as it did not leave him with enough time for his commitments as the minister of the Church. The claimant applied for the role of caretaker with the Isle of Ely Primary School ("the School") which was a full time role for 37 hours a week for the full calendar year. It was not a part time or term time only role.

35. The School was one of approximately 20 schools within the first respondent, The Active Learning Trust Limited ("the Trust"). The School had approximately 400 pupils at the time and was a primary education setting.

36. The second respondent was Head Teacher at the School and was appointed in approximately April 2019. She had been in post a few months at the time of the incidents which formed the basis of this claim. Laura Fielding was the deputy head of the School at the relevant time. The School had appointed Governors and we heard from Marion Lloyd who was chair of the appeal panel in this case.

37. There was factual dispute between the parties as to the extent of the discussions during the recruitment process. Both sides agreed that the claimant's role as minister in his mind took precedence and that there may be times when he would need to be released from school duties to conduct ministerial duties such as funerals etc. In reality during Mrs Davies tenure this did not occur nor had it in reality been required to any great extent during his employment but it was accepted that the School would be flexible and that this had been agreed.

38. The claimant's evidence was that what was agreed went further to include an agreement that as long as he was there at the start and end of the day they had no issue with how he spent his time and further that he reserved his right to "*be unequivocal in publicly stating the Christian doctrine on various issues, some of which may be unpopular*". This is not accepted by the respondent. We did not hear from the former head in this regard.

39. The claimant's recruitment documentation makes no reference to these matters save that his role as a Christian Minister was acknowledged as an outside interest subject to the claimant disclosing any relevant conflict of interest arising from this. The claimant's contract was a full time contract and it was agreed he did more than simply greet and release at the start and end of each day. It was also not challenged that the Claimant did agree to the school policies and procedures upon recruitment. We accept that there was an agreement to be flexible but we do not accept that the claimant was either free to do what he wanted during work time or that he was given *carte blanche* to make public statements against the School policies. As a public body with budgets subject to scrutiny, if the claimant as caretaker was free to do what he wanted between the start and end of the day then there would not be a need for the claimant's role to be full time. We do however accept that his role as caretaker would have given him more free time outside working hours than the role of estates manager at a larger organisation where the demands may be greater.

40. At the outset of his employment, the claimant agreed to the Trust's policies and procedures. A helpful summary of these policies was highlighted to the Tribunal as agreed between the parties and this was relevant to the issues as follows:

41. The Code of Conduct is a policy which all staff adopt. This sets out as follows:

41.1 " section 1.4 any behaviour in breach of this Code by employees may result in action under the disciplinary procedure"

41.2 "section 2.1: All adults as appropriate to the role and/or job description of the individual, must:

- *model the characteristics they are trying to inspire in pupils, including enthusiasm for learning, spirit of inquiry, honesty, tolerance, social responsibility, patience and a genuine concern for other people.*
- *ensure that the same professional standards are always applied regardless of culture, disability, gender, language, racial origin, religious belief and/or sexual identity.*
- *Present themselves in a professional and appropriate manner. "*

41.3 "section 4.1: An Adult's behaviour or actions, either in or out of the workplace, must not compromise her/his position within the work setting, or bring the School/Trust into disrepute."

41.4 "section 4.3: Individuals should not make, or encourage others to make, unprofessional personal comments which scapegoat, demean or humiliate, or might be interpreted as such."

41.5 "section 8.4; Adults are personally responsible for what they communicate in social media and must bear in mind that what is published may be read by us, pupils, parents and carers, the general public, future employers and friends and family for a long time. Adults must ensure that their online profiles are consistent with the professional image expected by us and must not post material which damages the reputation of the School/Trust or which causes concern about their suitability to work with children and young people. Those who post material which may be considered as inappropriate could render themselves vulnerable to criticism or in the case of an employee, allegations of misconduct which may be dealt with under the disciplinary procedure. Even where it is made clear that the writer's views on this such topics do not represent those of the School/Trust such comments are appropriate."

41.6 "*section 17.1: This section should be read in conjunction with the Trust's ICT security and Internet, Social Media and E safety policies or*

procedures. Posting, creating, accessing, transmitting, downloading, uploading or storing any of the following material (unless it is part of an authorised investigation) is likely to amount to gross misconduct and result (where the adult is employed) in summary dismissal (this list is not exhaustive): any other type of offensive, obscene or discriminatory material common criminal material or material which is liable to cause distress or embarrassment to [the School/Academy] or others."

42. The Trust's Internet, Social Media and E-safety Acceptable Use Policy had a number of key provisions.

42.1 "section 5.2: Staff must use caution when posting information on the Internet and must not post material damaging the reputation of a school/Trust which could cause concern about their suitability to work with students;"

42.2 "section 5.3: staff posting material which could be considered inappropriate could render themselves vulnerable to criticism or allegations of misconduct."

42.3 "section 5.4 Employees must not deliberately view, copy or circulate any material that is homophobic, harassing or in any other way discriminatory or offensive;"

42.4 "section 6.1 Staff must use caution when posting information on social networking sites and blogs and must not post material damaging the reputation of a school/trust which could cause concern about their suitability to work with students;"

42.5 "section 6.2 employees posting material which could be considered inappropriate could render themselves vulnerable to criticism or allegations of misconduct."

42.6 *"section 6.3 Employees must not damage the schools reputation on social media at work or within their own time. This includes on their own or school owned technology, by criticising or insulting students, staff, parents, relevant third parties, figures in the community or the site; Employee must not Post content or opinions deemed racist, sexist, homophobic or hateful."*

42.7 *"section 6.5 social networking outside of hours in a non school setting is the personal choice of all school staff. Owing to the public nature of such websites, it is advisable for staff to consider the possible implications of participation."*

42.8 *"section 10.1 employees must use caution when posting information online including on social networking sites."*

42.9 "section 10.2 breaches of this policy may constitute gross misconduct and as such may lead to staff dismissal."

43. The Equal Opportunities Policy of the School was said by the investigation report to contain the following Public Sector Equality Duty as follows:

" - eliminate discrimination, harassment and victimisation and other conduct that is prohibited by the Equality Act;

- *advance equality of opportunity between people who share a protected characteristic and people who do not share it;*
- *foster good relations across all protected characteristics between people who share a protected characteristic and people who do not share it"*

44. The disciplinary procedure of the Trust set out as follows:

*"**Gross Misconduct***

1.10 A serious breach of our Code of Conduct

1.14 Making statements that are or could be damaging, slanderous, libellous whether verbally, written, in electric communication or by social media, which could be harmful to a pupil, an employee or other worker, governor, a member of the public or our reputation.

1.18 Bringing the organisation into serious disrepute

Misconduct

2.5 Breaches of Policies"

45. The claimant's employment for the first 18 months or so passed without any issues. The claimant was a valued member of staff. He participated in school life outside the remits of his job description including leading services for certain celebrations and assisting with other matters. The School is a non-faith school and has no religious affiliation. It was widely known that the claimant was a Christian Minister and the School made use of these skills. The relationship worked well for both parties.

46. The claimant describes himself as an orthodox Christian. He believes in the truth of the Bible which he accepts is the primary source of authority on all matters of faith and morals. His expert described three sorts of Christians and described the claimant as an evangelical Christian. The claimant holds a number of beliefs as follows:

46.1 The Christian religion

46.2 The belief in the literal truth of the Bible

46.3 Belief that Christians ought to strive to live according to biblical truth

46.4 Belief that sexual relationships are only appropriate within heterosexual marriage within the Bible

46.5 Belief in the duty of Christians to proclaim the gospel to others

46.6 Belief that Christians should encourage each other to live godly lives and therefore avoid events and locations in which sin will or might be celebrated: and that is 1Thessalonians 5:21:22: *prove all things; hold fast that which is good. Abstain from all appearance of evil.*

47. The claimant also made reference to the Bible teachings on sexual ethics. Central to this was his belief that marriage is a lifelong union between one man and one woman. His evidence was that he felt it was best for children to be taught the truth about the fundamentals of life. Further that as a Christian minister, he had no doubt that children should be taught the Biblical teachings, and it is harmful for them to be taught a fundamentally

un-Biblical ideology. He also felt that it was self-evident that children need to be educated on matters of sex in a sensitive way and at an appropriate time.

48. In his role as Christian Minister he would deliver sermons which are posted on the Church website and he would from time to time post himself in this way. The claimant also had a Twitter account in his personal name which identified his role as Christian Minister and his Church but not his role at the School. The purpose of the account was said to be to "*help encourage Christians to be salt and light in obedience to Jesus Christ in the UK.*" The claimant said his Tweets were primarily aimed at Christians but his profile was an open account that could be viewed by any member of the public.

49. In June 2019, the first ever 'Pride' event was due to take place in Cambridge. The claimant considered that both he and the Church fundamentally disagreed with the Pride movement "*and everything it stands for*". The claimant believes that the aim of the "Pride" movement is to celebrate a variety of sexual lifestyles, none of which fall within either of the two alternative options to faithful Christians of celibacy or lifelong fidelity within a marriage between one man and one woman. The claimant believed Pride not to be exclusively for homosexuals but its attendees came from a range of society including heterosexuals.

50. The claimant felt that belief culture and ethics promoted by Pride are diametrically opposed to Christian sexual ethics. The claimant felt that they involved lewd conduct, nudity and inappropriateness regardless of sexual orientation. In the run up to the event there were discussions in Church about the issues and a decision was taken not to attend in order to protest and evangelise but the claimant and the Church equally said that they did not want to be seen to be condoning the "*Pride ideology*".

51. On 1 June 2019, the Claimant posted the following on his twitter account which he maintained in his capacity as a Christian pastor:

"A reminder that Christians should not support or attend the LGBTQ "pride month" events in June. They promote a culture and encourage activities that are contrary to Christian faith and morals. They are especially harmful for children."

52. The tweet attracted much attention and what is described as "backlash" from the local media and on social media, and the claimant suffered from abuse. The claimant's evidence was that his tweet was retweeted by the Ely Standard editor and subsequently appeared in the Ely Standard on the 3rd June 2019. After the retweet the claimant's evidence was that he was hounded by a journalist form the Cambridge Evening News. Much of the controversy was around the use of the words "they" in the tweet as some read this as being a reference to gay members of the public and thus felt that it was homophobic. It was about how the tweet was interpreted. The claimant's evidence was that he did not give the use of "they" much thought at the time but it was not his intention to refer to a section of the community; "they" was a reference to the event.

53. The claimant was not on Facebook but there was a Parents of the School Facebook Group which was an unofficial group not run by or connected officially to the School. The news articles were posted on the Facebook Group and there was an online debate about the matter. The post was then removed the following day due to concerns about the contents by a third party. We have not had the benefit of seeing the extent of the "backlash" on the social media account. It is accepted however that this is not part of the School's social media but something organised by a collective of the School's parents.

54. The claimant received hate mail to his home and the Church. The claimant describes this in his witness statement as a campaign of harassment and abuse against him, his family and his Church. He explained that he received a lot of hate mail at his own and the Church's

email addresses which he deleted without reading too carefully. At one point, funeral directors turned up at his home to arrange his funeral and estate agents to sell his house.

55. We heard evidence of informal complaints/concerns being raised with the head teacher at School and likewise that the claimant received messages of support from others. The School received three complaints in writing.

56. The first was in writing and said to be from a concerned local resident and parent. It was said that this complaint was from a non-parent as it made reference to contact from members around Ely expressing their concerns about the claimant and his views on homosexuality. It said "*the concerns range from allegations of previous child sex offences, inciting hatred against people of other faiths and calling for violence against people who support the Ely Pride festival."* It was accepted that these aspects of the complaint were not factually accurate. The complaint went on to state *"while everyone is free to their own views and diverse views should be encouraged. I am outraged that someone with such disgusting, hateful views should be employed in a setting with impressionable children. I would be grateful if you could look into this matter."*

57. The complaint was short and was not dated or named. The second complaint was undated and the name had been redacted. It was considerably longer than the first complaint and it was acknowledged by all that this was the most serious of the complaints as it was headed formal complaint. Under the School complaints policy this meant that the matter had to be investigated. It was also agreed that this complaint came from a parent at the school.

58. The complaint is too long to set out in detail but it made a number of key statements:

"We are writing to make a formal complaint regarding the recent anti-LGBTQ+ "tweet" that was posted by a member of staff".

"Firstly, we'd like to make it known how disappointed we are that a member of your staff holds such abhorrent views on such a huge community within out society. As members of this community, these are obviously not the views or values we hold and are not what we have brought up our children to hold or tolerate from others. Secondly, we are shocked at the fact that Mr Waters has seemingly not been suspended from duties, pending a full investigation into his disgusting outburst on a very public online platform."

"We sincerely hope that the school is taking this matter as seriously as it deserves to be. So far, we are not satisfied that it is, considering Mr Waters is back at work and it appears to be business as usual. We do not want our children attending a school where such bigotry and prejudice go unchallenged and unpunished. If we feel that our children are in any which way in contact with extremism or hatred, we will pull them out of school and this will go higher."

"We know that we are not alone in our views on this matter and sincerely hope that the school will be taking a much more rigorous line against intolerance and hate speech from their members of staff. This can be best demonstrated by removing Mr Waters from his current duties and addressing the parents of the school regarding the processes you are employing to deal with him."

59. The last complaint was emailed to the head teacher. The head teacher also confirmed that she had other people speak to her informally. This is supported by the third complaint which makes reference to the complainant's husband having been in touch earlier this week. The complainant's identity was redacted but it was clear that the complainant was a parent at the School and a friend of one of the Governors. It was dated 6th June 2019. The complaint is as follows:

"My husband got in touch earlier this week in regards to Mr Waters and the hateful tweet he put out on his Twitter account.
To see him standing smiling at the gates for the last two mornings has made me feel actually sick with anger and I really want a response to what action is being taken and to know why is at the gates greeting everyone whilst the supposed investigation is taking place. It's provocative and upsetting.
I am good friends with Stephen on the governor's who is a proud gay Christian and I would be interested to know what the governor's will be doing going forward.
If you look at Mr Water's church website you will see numerous homophobic tweets and anti abortion policies. It is so worrying that someone working in the same school as my daughter has these extremist views and it must be taken seriously immediately.
I know that people will not come to this school if they know someone like that is working there.
I absolutely love the Isle of Ely school and it almost brings me to tears knowing how this has been actioned and I'm just so surprised.
I want to hear what your plans are and happy to have a meeting."

60. The School had a legal obligation to have and publish a complaints procedure. During the course of the hearing, we were provided with a copy of the first respondent's complaints procedure and some Government guidance on the obligations and/or best practice for the School on these matters.

61. Both the head teacher and the deputy head were under the impression that once a formal complaint is received they must investigate the matter. On examining the policy during the hearing with the parties it is clear that complaints can be dealt with informally but when a complaint is labelled "formal complaint" it has to follow the formal procedure. The complaint should be acknowledged within 10 days and a written response within 30 days. This is an internal document expressing best practice. There was no legal obligation to investigate any complaint but as with other School

policies the School was obliged to follow it. The legal obligation only extends to having a complaints policy and publishing it.

62. The claimant received a letter dated 4th June 2019 informing him that he was to be investigated for allegations of misconduct/gross misconduct

" – making and circulation of comments which could be harmful to the reputation of the school and are a breach of the Code of Conduct for Adults and the Disciplinary rules of the Trust.

This allegation relates to recent reports of comments you have made in the public domain concerning the status and sexual identity of members of the local community."

63. The claimant felt that the school had breached his confidentiality because a parent informed him he was going to be investigated before he received the formal letter. The claimant was adamant the information was not from him and the head teacher was adamant that the "leak" did not come from her. We accept both their positions on this point. The head teacher was also sure that the limited staff who had knowledge would not have discussed the matter outside of school walls and that it was common place for the School to deal with confidential safeguarding issues, it was part of the role.

64. However, it transpired during the course of the evidence of the claimant that the extent of the "leak" was that there was simply an investigation ongoing. No details of a confidential nature were imparted from the parent who passed on this detail to the claimant. The Facebook page confirmed that a participant in the group had made a written complaint to the head teacher calling for his resignation and it was a legal obligation of the School to have and publish a complaints procedure.

65. We do not accept that there is any evidence of a leak by the first or second respondent. The information relied on by the claimant is simply that of an

investigation commencing, something that is clear from the published complaints policy freely available online, given that the Facebook entry informed parents that a written complaint had been made. It would or could have been public knowledge that a written complaint leads to an investigation or a common sense assumption as to the next stage. There was no detail given to suggest any information came from the first or second respondent to the parent which was not available in that forum. If the parent had known the allegations, how they were particularised and/or the times/dates of meetings the claimant had not yet been informed about we may have taken a different view. We find that there was no confidential information leaked and no evidence that any leak came from the first or second respondent in any event.

66. On the 6th of June 2019 Ms Davies conducted a risk assessment with the Trust HR Director and decided not to suspend the claimant in light of the allegations but instead to manage the risk by removing him from some of his parent facing duties namely direct contact with parents at gate times at the start and end of the day. This was to be effective from the 7th June 2019 but the claimant's evidence was that this did not come into effect until that afternoon. The thrust of the risk assessment was not to do with the external third party risks but the level of feelings from some of the parents and that there was a flashpoint with parents at drop off and pick up times at the school perimeter. The School has a duty to safeguard the children that attend and we can understand why the decision was taken to not place them in any danger by having the claimant at the gate when the children entered or left the school. The claimant was able to fulfil his other duties and remain at work as an alternative to suspension.

67. The claimant also gave evidence that he was told to lie to a colleague and "make something up" by his line manager to explain why he was not at the school gates and his colleague was being asked to perform that duty. After the claimant gave evidence it was apparent that there were emails on the matter. These had not formed part of disclosure on either side but were requested by the Tribunal as they were clearly relevant to the issues.

These emails were produced during the course of the hearing and the claimant did not wish to give further evidence on the issue as his position was unchanged. The contemporaneous emails from the time do not support the claimant's position on this matter.

68. After he was informed of the variation to his duties he raised concerns over several emails about that decision and it is clear the head teacher was not in school that afternoon. As such having seen the emails we do not share the claimant's surprise as to why the risk assessment was not implemented that day but after the matter had been raised with the head teacher.

69. It is clear from the emails that were produced that the claimant was told to tell his colleague that either to refer to his line manager Liz Wright or that he could tell him that he was busy with other duties. That this was not a lie as he was being asked to complete other duties and we do not accept that this put the claimant in a compromising position or with having to "make something up" or lie.

70. We accept the reasons for the risk assessment were to protect primarily the children albeit also of benefit to the claimant and the School and that this was a reasonable decision to take in the circumstances. Alternatives to suspension are usually preferrable as suspension should not be used as a knee-jerk reaction. The claimant was informed of the decision promptly and told it would be kept under review. He asked for and was sent the grievance policy and wellbeing policy promptly.

71. The claimant was invited to an investigation meeting with Ms Fielding on 10th of June 2019 by letter dated 4th June 2019 referred to above. The claimant attended the meeting with a companion from outside the School who was also not a union representative. The first respondent permitted this. Notes were made of the meeting but these were not verbatim. The claimant did however covertly record the meeting and a transcript was prepared and included in the bundle which we had the benefit of reviewing.

72. The claimant explained that the reason he had recorded the subsequent meetings was as he was concerned about the School's approach and that he was not permitted to have a companion of his choice so he needed to record the meetings so he could have a record as he was not able to take full notes and deal with matters. His explanation as to why he recorded the first meeting was so he could compare the recording to the notes since they were not verbatim in the hope that the notes would be sufficient to not have to take this action further. We do not accept that explanation as the claimant recorded the investigation meeting when those concerns were not yet established and when he had a companion of his choice. The claimant recorded all of the disciplinary meetings, investigation, disciplinary and appeal without consent. As set out below this was on occasions despite it having been made clear that he should not be doing so.

73. During the investigation meeting the claimant accepted that his tweets could have an impact on the School. The claimant's tweet was retweeted by his pastor. He did however not accept that his personal opinions would reflect those of the School or could be seen to be so. The claimant was also asked in his investigation whether there was anyone else that the deputy head should speak to as part of her investigation. The claimant replied to say that he could not think of anyone but expressed caution about the journalism on the subject. He then said "*I'd say that it's also if you're going to have a look around, have a really good look around our church website, you'll find that we are welcoming to absolutely everybody*."

74. Ms Fielding prepared an investigation report which without enclosures ran to 6 pages. She summarised the policies that are set out above on which the School and Trust relied. Her conclusions and recommendations were:

"It is my responsibility to decide whether or not there is a case to answer and whether a Disciplinary Hearing should be convened to consider the allegation. In accordance with the evidence set out above I have

determined that there is a case to answer in respect of the following allegation due to the following reasons:

1. *Keith Walters failed to comply with the policies on Code of conduct and the use of Social Media and that his actions could and have brought the school into disrepute*
2. *Keith Walters has failed to respect elements of the protected characteristics as set out in the Equality Act 2010 and the associated Public Sector Equalities Duty.*

I therefore conclude that the matter should be referred to a Disciplinary Hearing. Recommendations include:

Whilst I do believe that the social media comments made are discriminatory and can be viewed as having brought the school into potential disrepute, I would recommend that as part of the disciplinary hearing the hearer should consider KW's stated position as a member of a religious organisation and the impact that may have had on his position in making the social media comments that he has. "

75. The matter was then referred to the next stage. The claimant was invited by letter dated 17th June 2019 to attend a disciplinary hearing on the 25th June 2019 with the head teacher to discuss the same allegations as set out in the investigation invitation. The allegations remained unchanged.

76. On the 18th June 2019 the claimant told the head teacher that he was finding his position untenable and that he would not be attending the school until the matter had been concluded. The head teacher did not raise an issue with this and the claimant from this point did not carry out any further duties for the School. This was his last day at work in School although at that stage he remained an employee and had not resigned.

77. On the 24th June 2019 the claimant resigned from his employment with one month's notice. The resignation stated that

"I was employed by the Isle of Ely Primary School in the full knowledge that I am an Ordained Christian Minister and as such will publically preach on, teach and expound biblical truth and ethics by way of any medium open to me; I did this prior to my appointment and have continued to do so to date.

You can therefore appreciate my alarm at your suggestion that this is suddenly unacceptable, and in your estimation may bring the school into disrepute. Not only that, but the attitude and approach of your team since that allegation has been clearly uncaring and negative. I appreciate you have an inexperienced manager at the helm of the process and that as a nascent team you will be finding your feet. However, it has become absolutely clear to me that whatever your decision in respect of the proceedings you have launched against me, the Active Learning Trust (ALT) and ergo the school, will no longer countenance freedom of expression, freedom of faith and freedom of speech for any of its employees. That being the case, I have no choice but to leave your employ to ensure that my church and I are protected from being silenced."

78. The claimant confirmed he would serve his contractual notice period but stated "*I appreciate you may have other plans and I will therefore await the outcome of your meeting on the afternoon of Tuesday June 25th 2019."* The claimant also made reference to needing to protect the confidentiality of an accused member of staff as the School's approach left him with pupils parents and staff all asking him what was going on and why he not been involved in school life.

79. By email dated 25th June 2019 the Trust's HR advisor replied to the claimant's resignation stating that they were unsure whether from his resignation it was his intention to attend the scheduled disciplinary hearing later that day. An alternative option was put forward given that he had chosen to leave the School, the Trust was willing to stand down the hearing procedure that afternoon and instead accept his resignation with

effect from when it was given and arrange to pay him one month contractual notice in lieu. It also stated that it could be seen that he had considered his position long and hard prior to submitting his resignation and he did so in the full knowledge that the outcome of any disciplinary is not predetermined but noting that he had reflected on the impact of his two roles and possible ongoing conflict prior to reaching his decision.

80. By email dated 25th June 2019 the claimant replied to confirm but he had little time before the scheduled meeting to properly assess his options. His view was that the situation the School had put him in was incredibly serious in respect of his own freedom of expression, reputation and unexpected financial loss but he would attempt to get hold of his team, discuss and pray and revert back to her as soon as possible.

81. The emails did not come to anything and the claimant had a period of leave. The disciplinary hearing was postponed to allow the claimant more time to prepare. The claimant attended the disciplinary hearing on 19th July 2019. The meeting was held by Helen Davies and also in attendance was a note taker and a HR adviser from the Trust. The deputy head was in attendance to present the investigation and the claimant attended without a representative. The claimant was not permitted to have his companion from outside the School on this occasion. Again, the claimant covertly recorded this meeting.

82. We have both the respondent's notes of the disciplinary hearing and the fuller transcript from the claimant's covert recording. It is clear from reading the transcript that the claimant was unhappy that the meeting was going ahead and spent the outset of the meeting being obstructive and argumentative with those in attendance. When the meeting did get underway properly to discuss the issues the claimant stated that the tweet was about the event not a group of people or a person. The reference to "they promote" was a reference to the event which the claimant considered to be lewd crude celebrations of every possible sexuality that could be conceived. The claimant also raised his freedom of expression and his

ability to carry out his role as a church Minister. He raised concerns that he "*may have said things which are possibly, almost certainly, weekly, that there will be something that somebody takes offence at. I think we're all in that situation whether we realise it or not. People will be offended by us, it's just humanity.*"

83. Also during the disciplinary hearing, the claimant stated that he did not doubt the head teacher's confidentiality but that saying nothing fuelled speculation. The other point was that the School's actions in clearly responding to the parents not liking him smiling at the school gates and whisking him away so suddenly meant that people asked questions. The head teacher confirmed that she "absolutely recognised and support your right to have personal opinions and religious opinions about things. The rights or wrongs of those opinions I don't think is what's in question. I think it's whether it has broken the codes of conduct and the school policies." The claimant read out a passage in the book of Romans, Chapter 1 verse 18 in the disciplinary hearing to illustrate his point that if he wrote those verses on Twitter then, notwithstanding it was from the book of Romans this could also be a breach of the school policies. He maintained that there is no way that what he tweeted could or should bring the School into any kind of dispute because it's about an event not a group of people, protective person or groups.

84. By letter dated the 23rd July 2019 the claimant was given a final written warning to last for twelve months. The outcome letter confirmed:

"*It was alleged that you had failed to follow the Trust's Internet, Social Media and E safety Acceptable Use Policy when you posted information on the Internet that was damaging to your employer's reputation: that was homophobic; harassing, discriminatory and offensive. I found all alleged breaches of this policy to be proven.*

Mrs Fielding alleged that you had also failed to follow the Trust's Code of Conduct for Adults by posting discriminatory material that is liable to cause

distress or embarrassment to the employer or others. Again, I found your conduct to be in breach of this policy.

The expectation in the Trust's Equal Opportunities Policy is in line with the Public Sector Equality Duty that sets out the expectation in terms of inclusivity, tolerance and equality. I concluded that your actions in posting the tweet also resulted in new breaching this policy.

Whilst I concluded that your comments had been discriminatory and had subsequently brought the school into disrepute, I did take into account your position as a member of a religious organisation.

You refuted that the tweet should cause offence to an individual. During the hearing, you advised on several occasions that your tweet was focused on the event and the inappropriate activities that take place at such events. This was opposed to focusing or commenting negatively on LGBTQ. I noted that you had not provided this explanation during the investigation nor taken the opportunity via the newspaper media or on social media to set the record straight when such offence had become apparent to you. You explained that you have homosexuals in your church and that you support them."

85. Further the head teacher noted there was no evidence of the flexibility the claimant referred to at the recruitment stage but that "*I certainly do not read that letter to confirm the employer is accepting of behaviours which are intolerant of members of society with protected characteristics and does not give immunity to the making of discriminatory and offensive comments. As such, whilst noted, this context did not dissuade me from my conclusion that your tweet was highly inappropriate and offensive."*

86. The claimant did not return to School as he was at the end of his notice period in any event.

87. By letter dated 29th July 2019 the claimant appealed against the decision. The claimant set out that he did not discriminate against anybody. He set out that he was careful to restrict his comment to the events (the pride March) and to avoid criticism of any individual and/or members of the LGBTQ community generally. He stated he did not intend, nor did he act in a homophobic manner. In his capacity as pastor of a local church he expressed that it was entirely reasonable to state what he considered to be a Christian view on the pride March and to express that it did not consider attendance compatible with a biblical world view. Further that there was nothing in the tweet that linked him to the Trust. The stories had been blown out of all proportion by journalists. Finally, in choosing to make his tweet a disciplinary matter he believed the Trust contravened his rights under Articles Nine and Ten of the European Convention on Human Rights. Whilst he accepted that those rights are not absolute, he did not believe his actions came anywhere near the threshold to interfere and that the decision to commence disciplinary proceedings was unreasonable.

88. Whilst none of the issues in this case turn on the appeal for completeness this is covered briefly. The first respondent by letter dated 29th August 2019 invited the claimant to an appeal hearing on 5th September 2019. A panel of Governors had been put together which included three governors including the Governor that was referenced a being a close friend of one of the complainants and from the LGBTQ community himself. The claimant raised an issue with the constitution of the panel but the panel proceeded as originally envisaged and the appeal meeting was rearranged for 23rd September 2019.

89. The claimant attended the appeal meeting again and was permitted to take a companion from outside the School who was not a union member. The claimant again covertly recorded the meeting despite the initial discussion in the appeal meeting that the School would not be expecting anyone to be recording the meeting. The claimant produced additional evidence in the form photographs for the appeal showing what he felt was indicative of typical Pride events. These were provided to the Tribunal too.

90. The claimant received a written outcome to his appeal dated 25th September 2019. His appeal was dismissed and the panel dealt with the points of his appeal. The committee found that the claimant was subject to the same policies as any other employee of the School and that being employed as a Pastor would not provide him with immunity from the School's policies in particular the Statement on Equality, Staff Code of Conduct or the Internet, Social Media E-safety Acceptable Use Policy. Further, the committee found that the claimant crossed the thresholds of the Human Rights Act and of the School's policies and procedures and that he had not considered the reputation of the School when making his tweet public. They stated that the article rights make it clear that the protection of the reputation rights and freedoms of others should be taken into account and stated that the claimant failed to do so. This exhausted the Trust's internal disciplinary process and there was no further right of appeal. By the time the appeal was heard the claimant was no longer an employee.

91. The claimant commenced ACAS Early conciliation on 24th September 2019 for one day so the certificate is dated the same day. The claimant submitted his claim to the Tribunal on 24th October 2019 bringing claims of unfair dismissal (constructive) and direct and indirect discrimination as set out above.

Conclusions

92. In respect of the discrimination complaints the claimant relies on his religion and/or belief as a Christian and in particular as set out in paragraph 47 of the amended particulars of claim:

92.1 The Christian religion;

92.2 The belief in the literal truth of the Bible;

92.3 Belief that Christians ought to strive in accordance with the biblical truth;

92.4 Belief that sexual relationships are only appropriate within a heterosexual marriage as defined by the Bible;

92.5 Belief in the duty of Christians to proclaim the gospel to others;

92.6 Belief that Christians should encourage each other to live Godly lives and therefore avoid events and locations in which sin will or might be celebrated 1Thessalonians 5:21-22 Prove all things; hold fast that which is good. Abstain from all appearance of evil.

93. The parties agree that the claimant's religion as a Christian met the threshold for religion under the Equality Act 2010. The tribunal agrees that the claimant's religion as a Christian is a protected characteristic under the Equality Act.

94. Within the definition of s10(1) of the Equality Act 2010 "religion" means "any religion". The explanatory notes to the Equality Act 2010 envisage that this is "a broad definition in line with the freedom of thought, conscience and religion guaranteed by Article 9 of the *European Convention on Human Rights*" (ECHR). Christianity for the purposes of Article 9 of the ECHR has a clear structure and belief system in accordance with *X v UK [1977]*. That same explanatory note and paragraph 2.53 of the EHRC Code (*paragraph 2.53*) site Christianity, as a religion for the purposes of section 10(1) Equality Act 2010.

95. That said not all Christians will hold the same beliefs as the Claimant. On his own evidence he has members of his own Church who are homosexual and as such whilst they may share some of his beliefs they may not share the view that sexual relationships are only appropriate in heterosexual marriage. Indeed some members of society may share that view for non religious regions or indeed share that view because they have other religious beliefs.

96. The respondent accepts that the beliefs relied on by the claimant as set out above are covered by the "religion or belief" protected characteristic

within the Equality Act 2010. The tribunal accepts that the claimant had these beliefs.

97. We accept the respondent's submission that belief is subjective, so may vary from person to person within the same religion. A person could, for example, "be part of the mainstream Christian religion but hold additional beliefs which are not widely shared by other Christians" *Eweida v British Airways Plc [2009]*.

98. The case of *Grainger plc and others v Nicholson [2010]* is the leading authority for the types of belief covered by the then Religion or Belief Regulations (and now *section 10* of the Equality Act 2010). Whilst it related to philosophical beliefs it can apply equally to religious beliefs as many of the cases cited are religious belief cases. In order to be a belief capable of being protected:

98.1 The belief must be genuinely held.
98.2 It must be a belief, not an opinion or viewpoint based on the present state of information available.
98.3 It must be a belief as to a weighty and substantial aspect of human life and behaviour.
98.4 It must attain a certain level of cogency, seriousness, cohesion and importance.
98.5 It must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

99. We discussed the claimant's beliefs and we were satisfied that the claimant genuinely held these beliefs and that they formed a considerable part of how he lived his life as a Christian minister for his Church. To the claimant they were cogent, serious and of the upmost importance. We spent more time considering the last of the Grainger requirements and whether all of the claimant's beliefs are worthy of respect in a democratic society and in particular his views on sexual relationships being only within

heterosexual marriage as these may be said to conflict with the fundamental rights of others. However, it is clear that the same could be said about some other aspects of Christianity which could conflict with other religions. This does not mean that they are not capable of being respected. Whilst a majority may not share those views, the claimant is entitled to hold them. This is of course different to how those beliefs manifest themselves and to the specific issues in this case.

100. The EAT in *Forstater v Centre for Global Development Europe [2021] UK* is authority for the notion that assessing whether a person's rights under Article 9 or 10 had been infringed, there is a preliminary question as to whether the person falls outside the scope of protection by virtue of Article 17, which prohibits the abuse of Convention rights to engage in any activity aimed at the destruction of the rights and freedoms of others. The EAT in *Forstater* held that only beliefs that would be excluded from ECHR protection by Article 17 would fail to be "worthy of respect in a democratic society". This would be limited to "beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms". Beliefs which are offensive, shocking or even disturbing to others can still be protected.

101. In *Forstater* the EAT held that the claimant's gender critical beliefs (including a belief that sex is immutable and should not be conflated with gender identity, and that trans women are men) were "worthy of respect in a democratic society". The beliefs were widely shared in society and did not seek to destroy the rights of trans persons. The popularity of a belief does not insulate it from being one that undermines the rights of others. However, a widely shared belief demands particular care before it can be condemned as being not worthy of respect in a democratic society. This is an example which has direct parallels with the claimant's views on sexual relationships outside of a heterosexual marriage. There are others that will not share this view as to sexual relationships outside marriage or whether marriage can be anything other than between heterosexuals but that does

not mean this view is one which is excluded from the Convention Rights under Article 17.

102. We are therefore satisfied that the claimant's religious beliefs as set out above do qualify as religious beliefs within the Equality Act 2010. We do however, accept the respondent's submission that the claimant's opinion on Pride and what goes on there which he expressed as "lewdity, nudity and foul language" or his viewpoint that "it is especially harmful for children" to be exposed to Pride are not necessarily a religious or philosophical belief. It is one that many parents of young children irrespective of religion or belief may share as the respondent's own witnesses acknowledged. There are some who do not agree with Pride or would not go to the events as they feel it is not appropriate, even members of the communities that the event seeks to promote may take this view. These views could be said to be a religion-neutral belief.

Direct discrimination

103. The first issue is whether because of the claimant's religion and belief set out above, the respondent treated the claimant less favourably than they treat or would have treated, others (hypothetical comparator) in the following ways:

103.1 The investigation;
103.2 Extending the remit of its investigation to include the claimant's church social media;
103.3 The decision that there was a disciplinary case to answer;
103.4 Imposing a sanction of a final written warning against the claimant;
103.5 Constructively dismissing the claimant

104. The claimant brought his direct discrimination complaints against both respondents. With the exception of the last example of less favourable treatment (constructively dismissing the claimant), this case is unusual as the allegations of fact are not in dispute.

105. For direct religion or belief discrimination to occur, less favourable treatment must be because of religion or belief. We need to consider the reason why the claimant was treated less favourably and this can include an examination of the employer's (or decision maker's) conscious or subconscious reason for the treatment in accordance with *Nagarajan v London Regional Transport and others [1999].* Here we were in the fortunate position of having heard evidence from the person who decided to investigate, the person who carried out the investigation which included the decision to extend the remit the investigation to include the claimant's church social media and the decision maker who imposed the final written warning. Both of these witnesses were cross examined at length and in our judgement were both credible and impressive witnesses in professional roles.

106. A distinction has been drawn in case law between a claimant holding a religion or belief and the inappropriate manifestation of that religion or belief, as is illustrated by the case of in *Chondol v Liverpool City Council.* In this case the EAT upheld a tribunal's decision that an employee was not directly discriminated against by being dismissed for gross misconduct because his employer believed that he had been inappropriately promoting Christianity to its service users. The employee had not been treated less favourably because of his religion, but because of his employer's view that he was "improperly foisting" his religion on its service users. The current case can be distinguished as the claimant was not preaching his views at work but outside of work. It was not done in the course of his employment with the Trust so cannot be said to have been improperly foisting his religion on his colleagues or pupils. This makes the line as to what took place more blurred as employers should be more cautious of imposing restrictions on employees' conduct outside work when Articles 9 and 10 are engaged.

107. What the claimant will need to show is that he has been treated less favourably than the comparator whose circumstances are not materially

different to his. The claimant relies on the hypothetical comparator. The respondent submits that the appropriate comparator this case is an employee who did not share the claimant's religion or belief but who also published a tweet which resulted in the same reaction and backlash and, in particular, the formal complaints from offended parents.

108. In *Ladele v London Borough of Islington*, (the case of the Christian registrar who refused to carry out civil partnership duties on behalf of Islington Council on the basis that same-sex relationships were against her religious beliefs), the EAT held that the correct comparator was another registrar who refused to carry out civil partnership duties due to antipathy to the concept of same sex relationships unconnected to any religious belief.

109. In this case, if a hypothetical employee had published a tweet that read

"A reminder that people should not support or attend the LGBTQ pride month events in June. They promote a culture and encourage activities that are contrary to morals. They are especially harmful for children. "

This would make no reference to religion and would be religion neutral. However, it is clear from the complaints that the complainants did not take issue with the reference to the Christian faith but more the avoidance of the events by the LGBTQ community and that they are particularly harmful to children which was seen by some as a homophobic tweet. The person making the tweet in the form identified above without reference to religion would most likely have received backlash and complaints had they also worked at the School. We therefore accept the respondent's submission as to the correct comparator in this case.

110. Taking each of the matters relied on by the claimant individually our conclusions are as follows:

Investigation

111. It is not in dispute that the respondent subjected the claimant to an investigation. This was not disciplinary action but an investigation into whether disciplinary action was warranted. It was the second respondent who decided to launch an investigation but she was not the person who carried out the investigation.

112. It is clear from the school complaints policy that it was the receipt of a formal complaint that triggered an investigation. Both School witnesses believed that they had a legal obligation to investigate a complaint. It was agreed between the parties and we have found as a matter of fact above that there was a legal requirement to have a complaints policy and publish this but not that there was a legal requirement to investigate all complaints even if this was the impression the witnesses had.

113. We conclude that the reason why the claimant was subject to an investigation was because a parent had made a formal complaint which triggered the investigation under the respondent's policy. This was the reason why the claimant was subject to an investigation and this was not because of the claimant's religion or belief.

114. It was not the tweet itself (leaving aside whether this was a manifestation of the claimant's beliefs or because of the belief itself) which led to the investigation. Once a formal complaint is received it must be investigated otherwise the School runs the risk of being seen to fail to investigate something which was formally brought to its attention. If the comparator had held similar beliefs for non-religious reasons and made the tweet, they too would have been at risk of complaints.

115. We therefore find that the claimant was not less favourably treated because of his religion or belief by being subject to an investigation rather this was because there had been a formal complaint.

Extending the remit of the investigation

116. Turning now to whether the claimant was less favourably treated because of his religion or belief by extending the remit of the investigation to include the claimant's church social media, this was understood to be a reference to the Church's own website and social media accounts rather than those of the claimant in a personal capacity.

117. Again, it is not in dispute that the School did extend the remit of the investigation to look at the Church website and social media accounts. In fact, the claimant invited the investigator to *"have a really good look around"* the church website during the investigation meeting. The claimant did so as he felt this would be evidence that the Church had an inclusive policy. Further, one of the complaints specifically made reference to the claimants *"church website and numerous homophobic tweets and anti abortion policies."*

118. When we consider the reason why the investigation was extended in this way, the evidence was quite clear having heard from the investigator herself, that the claimant invited her to take a look and further, the complaint specifically references the Church website and other tweets. It is clear that the reason why the remit of the investigation was extended to include the Church's website and other social media was not because of religion or belief but because it was referenced in a complaint and because the claimant himself invited the investigator to have a good look around.

119. We therefore find that the claimant was not less favourably treated because of his religion or belief by the investigation remit being extended to include the Church website. It follows that the claimant has not suffered direct discrimination in this regard. Further, even if this had not been our conclusion, we are not satisfied that extending the remit of the investigation could in any event amount to less favourable treatment given the allegations remain unchanged and the purpose of investigation is to explore all avenues in relation to the issue. It is not a disciplinary action

and no allegations arose from the contents of the Church website or the social media accounts, this matter focused on the claimant's own personal tweet. If anything, the fact the School found nothing else of concern supported the claimant at the investigation/disciplinary stage.

Being subject to disciplinary action

120. Turning now to whether the claimant was less favourably treated by the first respondent's decision that there was a disciplinary case to answer, again it is not in dispute that as a matter of fact this occurred. It is clear from the disciplinary policy that breaches of the Trust/School policy would lead to disciplinary action. The first respondent considered that the claimant's tweet was in breach of its Internet Social Media and E-Safety Acceptable Use Policy in a number of ways as set out in the investigation.

121. When examining the reason why the claimant was subject to disciplinary action it is clear that it was not because of his religion or belief but because of the tweet that he wrote. When compared with the hypothetical comparator posting a similar tweet without the religious belief as set out above they too would be subject to disciplinary action for failing to adhere to the Trust/School Internet Social Media and E-Safety Acceptable Use Policy. Disciplinary action arises for failing to follow the policies and as such we do not consider that the claimant was subject to disciplinary action because of his religion or belief as a comparator without that religion or belief making a similar tweet would also be subject to disciplinary action.

The sanction

122. Turning now to whether the claimant was less favourably treated by the imposition of a final written warning as a sanction of the disciplinary process, again as a matter of fact this is not in dispute. The disciplinary rules provide that a serious breach of the Code of Conduct or making statements that are or could be damaging to the school/Trust reputation amount to gross misconduct. Gross misconduct was established in this

case by the respondent. Under the terms of the policy gross misconduct could either warrant a final written warning or dismissal. The final written warning was the lesser of the two sanctions open to the first/second respondent once it found gross misconduct.

123. In considering whether the claimant was less favourably treated when considering his comparator as an employee who makes a similar tweet without the religious beliefs they too would be found guilty of gross misconduct and subject to a disciplinary outcome of either a final written warning or the more serious sanction of dismissal. Both outcomes are within the range of reasonable responses in gross misconduct cases. We therefore conclude that the claimant was not less favourably treated in giving the sanction of a final written warning because of his religion or belief but because he was found guilty of gross misconduct and any employee who is found guilty of gross misconduct would have received the same outcome as the claimant.

Constructive dismissal

124. Turning now to whether the claimant was constructively dismissed and whether this was an act of direct discrimination, this is covered below under the constructive dismissal section as this is in the parties' list of issues there. We cannot conclude either way without examining first whether the claimant was constructively dismissed.

125. The claimant submits that once it is established that the interference with the claimant's convention rights was not justified, this is tantamount to a detriment because of his belief itself and thus direct discrimination. We have had regard to *Wasteney* and *Page* in this regard.

126. As we have set out above, the claimant's view that Pride events are especially harmful for children and do not promote Christian beliefs and morals is not one unique to the claimant's religious beliefs. It is a question of interpretation of his tweet and the need to balance his article 9 rights

against those of others. In our judgement, the tweet in question cannot be read to be because of his belief exclusively and thus any actions which flow from it cannot be said to be because of his religion or belief. Consideration of whether the tweet was an inappropriate manifestation of that belief depends on what is inappropriate by reference to Article 9. Our views as a panel are not critical here as we can see how the tweet can be read both ways. The key issue is that the claimant used "they" and had he used "these events" it would be harder to see how offence could be caused. "they" was taken to be a reference to the LGBTQ community by some who read it and that conclusion is not unreasonable.

Unfair dismissal

127. The claimant brings a claim for unfair dismissal as a constructive dismissal against the first respondent only. Whether the claimant terminated the contract under which he was employed by the first respondent in circumstances in which he was entitled to terminate it without notice by reason of the first respondent's conduct; s95(1)(c) ERA 1996 and specifically.

128. The first issue is whether the following acts or failure to act by the first respondent amounted to a repudiatory breach of the implied term of trust and confidence sufficiently serious to justify the claimant resigning:

129. In order to be a breach of the implied term of trust and confidence the respondent must act without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage its relationship with the claimant. The test of whether there is a dismissal is an objective one as to whether the respondent acted in repudiatory breach of contract entitling the claimant to resign.

Carrying out a disciplinary investigation in relation to the claimant's tweet;

130. Again, is not in dispute that as a matter of fact the respondent did carry out a disciplinary investigation in relation to the claimant's tweet. We do not accept that the respondent was in breach the implied term of confidence by doing so. It received three complaints including the formal complaint necessitating an investigation. There was no suggestion that the school was aware of the tweet other then having brought it to its attention through those complaints.

131. For the reasons set out above we do not accept that the claimant was a victim of a discriminatory campaign of hatred because of his belief and that there was a breach of the implied term of trust and confidence by the first respondent effectively taking "his abusers side and betraying him". Whilst we have accepted the claimant's explanation for what he intended to write, we can also see how those that complained may perceive the tweet in a different way. The claimant chose to use the word "they " and had he used the words "these events" as he says he intended the term to mean there is no certainty as to whether the complainants would disagree with the claimant or perceive the tweet as homophobic in the same way or indeed whether the same backlash would have occurred. A parent made a complaint about what they perceived to be bigoted and homophobic tweet's and the School was obliged to investigate as a result.

132. Had the complaint been a false complaint and in fact no such tweet existed then there would be no need for the matter to proceed further. In this case the first respondent found evidence of the tweet and drew conclusions about whether this met the standards of the school/Trust and whether this breached policies. We do not find that commencing an investigation was a breach of the implied term of trust and confidence in these circumstances. These matters had been brought to the door of the School and the School needed to and had a right to investigate any serious allegations made. The School had a reasonable and proper cause for investigating the matter.

<u>The outcome of the disciplinary investigation;</u>

133. Again, it is not in dispute factually that Ms Fielding decided that there was a case to answer and the claimant should be invited to a disciplinary hearing.

134. We do not find proceeding to a disciplinary hearing (the outcome of which was not pre determined) was a breach of the implied term of trust and confidence. The investigation had found a case to answer and on that basis invited the claimant to attend a disciplinary hearing to discuss the matter further. The School had a reasonable and proper cause for inviting the claimant to attend a disciplinary hearing to discuss the matter. In particular, for the disciplinary to further examine the tweet in light of the claimant's role as Christian Minister.

Allowing details of the disciplinary proceedings against the claimant to leak to the wider school community before the claimant was himself aware;

135. As we have set out above we have not found as a fact that the first respondent allowed details of the disciplinary proceedings against the claimant to leak to the wider school community before the claimant was himself aware so this does not need to be explored further.

Failing to take account, or any reasonable account of the claimant's declaration of his conflict of interest between employments;

136. We do not accept that there was an agreement at the outset of the relationship that the claimant would be allowed to give priority to his duties as a Pastor which might include expressing unpopular beliefs and the School will accommodate this as we have not found as a matter of fact that this occurred. Whilst the claimant declared his conflict of interest and would be allowed turn flexibility to conduct church matters such as funerals during School working hours there is no agreement that the claimant would not be bound by the school's policies or that he would have *carte blanche* to do or say as he wished.

137. The School was supportive of his role as Christian Minister and had used his skills in school setting for the benefit of the school. There had no issues with the arrangement historically and the school recruited the claimant with the full knowledge of his religion or belief as a Christian minister.

138. It is clear that both the investigating officer and the disciplinary officer took into account his work as a Christian minister. The investigating officer made the recommendation that the matter proceed to disciplinary hearing where the potential conflict between his two forms of employment be further examined. At the disciplinary hearing as referenced in the outcome letter, the second respondent confirmed expressly that she did take into account the claimant's role as a Christian minister but that it did not give immunity to the making of discriminatory and offensive comments.

139. We do not accept therefore so matter of fact that the respondent failed to take into account the claimants declaration of this conflict of interest between employments. The question then remains whether it took any reasonable account of such matters.

140. The School as with any employer faced with this situation has a balancing exercise to conduct concerning the claimant's beliefs come on his human rights and the freedom of expression and the rights of others who may be offended by the way the claimant expresses himself. The employer is not only a public body but one which in an education setting must be seen to promote diversity and inclusion in line with the public sector duties under the Equality Act, arguably more so than other public sector organisations given that the School educates children on diversity and inclusion.

141. The School is entitled in our judgement to not believe that the claimant's rights and freedom expression give him *carte blanche* to say what he likes. The School clearly took a reasonable account of those conflicting positions but as put by the respondent's witness, it was the claimant's choice already holding the position of Christian Minister to accept a position at the

School knowing that it had such policies and that the claimant would have to adhere to them since he signed up to the same.

Failing to support the claimant by removing him from certain duties whilst retaining him in others thereby putting him into a compromised position;

142. The claimant in this case complains that effectively by not suspending the claimant but removing him from the school gates and then keeping him in work doing other duties put him in a compromised position. As we have set out in the findings of fact above, we do not accept the claimant's case that he was in a compromised position or forced to lie about why he was removed from school gates.

143. The head teacher gave evidence but there was a risk assessment carried out about removing the claimant from the school gates as part of its consideration as to whether to suspend the claimant instead. The decision to remove the claimant from the school gates was in fact made to support him and prevent him being suspended in the short term. The head teacher explained this was done for safety reasons given the feeling from the parents as to these issues. Rightly or wrongly, the extent of the feeling can clearly be seen in the complaints the school received. This was done to support the claimant and to avoid suspension. The claimant himself acknowledged that he had received a number of threats and the School were aware of this at a high level.

144. It is quite often the case that claimants will complain about being suspended and that their employers took the course of action as a knee jerk reaction to a situation that had occurred. This was not the case here and the School took steps to support the claimant and to keep him at work. We do not accept that by removing him from certain duties this put him in a compromised position for the reasons set out above and therefore we cannot accept that this is a breach of the implied term of trust and confidence. The respondent had a reasonable and proper cause to be concerned and take the action that it did so this cannot be a breach of the

implied term of trust and confidence. The first respondent had a reasonable and proper cause to remove the claimant from his gate duties.

145. Had the claimant resigned when the final written warning was imposed, the claimant may have had a case for constructive dismissal if it was found that the imposition of the final written warning was either discriminatory directly or indirectly. In this case the claimant jumped too soon. He had resigned when the decision was taken to proceed to the disciplinary situation and therefore nothing that occurred after this time is relevant to the reasons why the claimant resigned and whether the claimant can establish that the respondent breached the implied term of trust and confidence.

146. Given that we have found that there was no breach of the implied term of trust and confidence, there can be no repudiatory breach of contract entitling the claimant to resign and thus no dismissal at law. We therefore do not need to go on to consider the affirmation of the contract since the claimant's claim fails in this regard.

147. Since there has been no dismissal as a matter of law then the claimant claims for direct and indirect discrimination in respect of the dismissal contrary to section 39 of the Equality Act 2010 must fail.

Indirect discrimination

148. The claimant brings this claim against the first respondent only.

149. We considered whether the matters relied on by the claimant are capable of amounting to PCP's. There is an argument that the matters relied on in this case were a one-off discretionary management decision since the claimant relies on the interpretation taken in this case. A one-off or discretionary decision could still be a "provision". A one-off decision could amount to a PCP, but not all one-off acts would amount to a PCP. For a PCP to be established, there must be some form of continuum in the

sense of how things generally are or will be done by the employer. No PCP can be established in relation to a one-off act where there is no indication that the decision would apply in future. In this case we believe (and it is clear from the claimant's resignation that he believed) that the School would take the same stance in respect of interpretation of the policy in the future.

150. The School policy concerns the interpretation of social media posts and whether a third party would deem them offensive or whether they cause distress. This is not dissimilar to harassment cases where the conduct is judged in the eyes of the recipient. Here posts are judged in the eyes of the reader. Had no one complained about the post then the matter would have been under the School's radar. Since any post written by the claimant or indeed any employee of the School could result in a complaint we find that the School would apply the policy in the same way going forward. Indeed this is why we considered that the claimant's claims for direct discrimination failed as it was not because of the religion or belief but the universal application of the policy to all and that those that wrote a similar post for non-religious reasons would be subject to the same treatment. The nub of the issue in this case as it is the balance of the claimant's Article rights against the rights of others.

151. We turn then to whether the first respondent applied to the claimant the following PCPs as set out in paragraph 51 of the amended claim:

151.1 The interpretation of the first respondent's social media and e-safety acceptable use policy, code of conduct for adults and/or equal opportunities policy, whereby a polite criticism of a "Pride" event by an employee, made in a context unrelated to the School is seen as:

151.1.1 "homophobic, harassing or in any other way discriminatory or offensive" under s5.4 of the social media and e-safety acceptable use policy; and/or

151.1.2 "content or opinions deemed racist, sexist, homophobic or hateful" under s6.3 of the social media and e-safety acceptable use policy; and/or

151.1.3 "unprofessional comments which scapegoat, demean or humiliate or might be interpreted as such" under 4.3 of the code of conduct; and/or

151.1.4 "offensive, obscene or discriminatory material, criminal material or material which is liable to cause distress or embarrassment" under 17.1 of the code of conduct; and/or

151.1.5 Damaging the reputation of the school/Trust in breach of s5.2 and/or 6.1 and/or 6.3 of the social media and e-safety acceptable use policy and/or 8.4 of the code of conduct; and/or

151.1.6 Compromising the employee's position within the work setting, or bringing the school/Trust into disrepute, contrary to s4.1 of the code of conduct;

151.1.7 Not consistent with the professional image expected by the respondent contrary to 8.4 of the code of conduct; and/or

151.1.8 Otherwise in breach of the social media and e-safety acceptable use policy, code of conduct for adults and/or equal opportunities policy.

151.2 The practice of giving substantial weight, in a disciplinary investigation of a social media post by an employee, to the strong views expressed by third parties (in the media and/or in complaints to the first respondent) rather than a strictly objective assessment of the employee's conduct.

152. It is not in dispute that the respondent had those policies and applied those specific policies to the claimant in this case. It is clear that the School concluded that the policies were breached. The issue is how they were interpreted and the balance between the claimant's article 9 rights in particular (article 10 also being relevant) and those of the School and third parties.

153. In our view the fact that the claimant made the tweet outside of work on his personal account as part of his role as a Christian Minister is highly relevant. It is one thing to have rules that apply during work and something else to extend those to one's private life outside of work. Of course the

distinction is not always clear cut and there are instances where conduct out of work can impact on work. The School had complaints it needed to investigate. However, the balance favours the claimant's Article 9 rights in these circumstances when done outside of employment in his religious role. This case is distinguishable from the scenario where an employee preaches at colleagues at work, seeks to preach at members of the public attending the workplace or refuses to carry out a reasonable management instruction because of their beliefs.

154. To curtail the claimant's freedom of speech outside of work which is an important part of his role as a Christian minister and thus part of freedom to practice his religion must be done with some exercise of caution and only in the clearest cases where the rights of others are being damaged should the School intervene to prevent the claimant from preaching. Had the claimant expressed a strong view for example that directly criticised member of the gay community for example "homosexual couples should not have children as they harm them" it is easier to see that this is homophobic and a belief not capable of a place in modern society. In those circumstances intervention may be warranted.

155. Here some have taken offence to what was said but it is a question of interpretation. The claimant made reference to his Christian morals and beliefs and the tweet was aimed at Christians from their minister. This created the backlash and the complaints.

156. We do not agree with the claimant's views and his comments but that is not the test. In our judgement, the claimant could be subject to disciplinary sanctions including dismissal for having expressed his religious beliefs. The claimant gave an example in the disciplinary hearing of a passage from the Bible that some may find offensive. The policies emphasis is on whether the reader finds them offensive or how they are interpreted. The issue is that someone may well take offense at anything but the question is whether that is reasonable in all the circumstances.

157. The respondent did give significant weight to the views of those that complained rather than looking objectively at what the claimant had written particularly in the context of the fact it was outside work and part of his religions and beliefs.

158. We accept the claimant's submission that the respondent has conflated the protected characteristic of homosexuality and certain aspects of Pride which includes LGBTQ culture and homosexuality but not exclusively and therefore it is not necessarily protected as per *Asher's Bakery*.

159. As such we do find that the respondent had the PCP's relied upon and that they were applied to the claimant.

Whether the first respondent applied or would apply those PCP's to persons who do not share the claimant's religion and/or beliefs.

160. It is clear that the policy would be applied to all, indeed the respondent was at pains to illustrate that it applied to all staff and any employee expressing their views on social media in a personal capacity could fall foul of the policies if they were

Whether these PCPS put or would put persons with whom the claimant shares the protected characteristic at a particular disadvantage compared to others?

161. In religion or belief cases, group disadvantage should be considered notwithstanding that protection of freedom of religion under Article 9 of the ECHR does not require a claimant to establish group disadvantage despite the European Court of Human Rights' decision in *Eweida v United Kingdom [2013].*

162. In accordance with *Mba v Mayor and Burgesses of the London Borough of Merton [2013]* it is not necessary to say that all Christians would be disadvantaged provided some individuals of the claimant's religion are

disadvantaged by the relevant PCP. There is no requirement to show that a significant number of people are affected but we cannot ignore the hurdle.

163. In this case we had the benefit of a report from Dr Martin David Parsons who described himself as an expert witness but whose evidence we considered was limited to that of the claimant's faith and group disadvantage. The claimant's beliefs may not be beliefs that others within society would share but it is clear that they are beliefs of Evangelical Christians and that there is a percentage of those going to church who would share those beliefs.

164. There are other Christian Ministers with secular employment and it is a requirement that they preach the gospel to others. The respondent submitted that there is no evidence that any of the respondent's other employees either shared the same belief or that they suffered a disadvantage because of it. We cannot accept that as we had no evidence of the religious beliefs of the respondent's other employees as none was led. The policy we agree would apply to all but others would be disadvantaged by the PCP in the same way as the claimant if they hold the same beliefs as the claimant and then preach those beliefs and that resulted in a complaint to the School.

165. One has to look back at the pleaded case to find the claimants assertion as to what the particular disadvantage was. The claimant asserts that the disadvantage was that he (and others sharing his religious beliefs) were at a greater risk of receiving a disciplinary sanction for expressing their beliefs or opinions on social media.

166. It is clear to us that evangelical Christian ministers will have views not necessarily shared by everyone in Society but that is part of their duty as a Christian minister to preach those beliefs. In today's modern society social media is one medium in which these beliefs are preached which is good for spreading the word but puts the word in the public forum more and

more accessibly. The claimant gave evidence that his sermons are also recorded and placed on the Church website and that there may well be content in those sermons preaching the gospel as he saw it, that others would find offensive and this could have triggered a breach in the respondent's policy. Indeed, a member of the public could have attended his church (although less likely as by attending they may hold the same views) and take offence such that anytime an evangelical Christian minister carried out his role he was at risk of a disciplinary sanction.

167. Taking all of this into account we find that these PCPS put or would put persons with whom the claimant shares the same religion or belief at a particular disadvantage compared to others.

Whether these PCP's put or would put the claimant to that disadvantage.

168. It is clear that the claimant was put to that disadvantage in this case as he received a disciplinary sanction on 23rd July 2019. The giving of the final written warning which was the act of alleged indirect discrimination in this case arising from the respondent's application of the PCP's set out above.

169. There is a clear conflict between the claimant's religious belief and his work as a Christian minister in preaching those beliefs and his employment with the first respondent as a caretaker which required him to agree to the respondent's policies which applied to all staff including teaching staff. It is not in dispute that a final written warning was given for breach of the respondent's policies.

Whether the First Respondent can show the PCP's to be a proportionate means of achieving a legitimate aim.

170. The respondent relied on the legitimate aims of protecting the school and the trust, eliminating offence by its employees caused to others, preventing social conflict and upholding its legal equality obligation and duty.

171. The respondent argued that investigating the parental and other complaints in the circumstances would be a proportionate means of achieving a legitimate aim. The way the claimant had expressed his views which the respondent argues is distinct from holding those views and was seen by many to be offensive. There was unnecessary attention for the School which in part focused on the legitimacy of the way the School conducted its investigation. As such, taking disciplinary action was a proportionate means of achieving the legitimate aim of preserving the respondent's reputation. Further that it is a proportionate response to have policies prohibiting behaviour which could cause offence even if that is expression of a strongly held religious belief.

172. This is really where the balance of the respondent's duties in its role as a public sector employer and the claimant's European Convention rights particularly in respect of Article 9 need to be carefully balanced. The respondent's interpretation of their policies needs to be proportionate means of achieving those legitimate aims. We can understand both positions and the aims the respondent seeks to rely on as legitimate. Certainly, the last three aims are legitimate ones for the respondent to have: of course the respondent needs to protect the School and the Trust but this could be said to be the same for any employer.

173. Further, that it was not proportionate to act in the way the respondent did given that the views expressed were done so as part of the claimant's religious beliefs outside of work. The claimant relies on the risk of getting a disciplinary sanction as being the act of indirect discrimination. We accept that it was a proportionate means of achieving a legitimate aim for the claimant to be investigated and called to a disciplinary meeting to explore further the relationship between the tweet and his roles but we do not accept that giving the claimant a final written warning for his tweet in this context was a proportionate means of achieving the legitimate aims. Giving the claimant a final written warning did not protect the School or the Trust as it would have been confidential and not in the public domain so as

far as parents were concerned the claimant would have still been employed had he not resigned.

174. The giving of a final written warning cannot eliminate the offence caused to others. The claimant's representative makes a good point that someone somewhere may be offended by anything one says. Likewise, the giving of the warning cannot prevent social conflict or comply with the duty of equality only by serving as a warning not to repeat that behaviour. As the claimant submitted there were lesser options open to the School such as issuing a statement at an early stage to say that as a non-religious school the claimant is entitled to have those views and practice his religion but that those views are not the views of the School and they take equal opportunities seriously. This may have prevented the complaints and the action that followed. We will never know this for certain.

175. We have found that the claimant's claim for direct discrimination was not well founded and is dismissed. We have found that there was no dismissal so this cannot be directly or indirectly discriminatory. We have upheld the claimant's claim of indirect discrimination in the imposition of the disciplinary sanction but this post dates the resignation so cannot be the reason why the claimant resigned.

176. The Tribunal will write to the parties separately concerning the listing for a remedy hearing and directions to prepare for the same.

_____
Employment Judge King

Date: ……21.04.22……..

Sent to the parties on: 22 April 2022

For the Tribunal Office