EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR M APLIN	**V**	**THE GOVERNING BODY OF TYWYN PRIMARY SCHOOL**

HELD AT: **CARDIFF** **ON:** **HEARING**
24, 25, 26, 27 AND 28 APRIL 2017
CHAMBERS
20 JULY AND 11 AUGUST 2017

BEFORE: **EMPLOYMENT JUDGE W BEARD**
MEMBERS **MR P CHARLES**
MRS M HUMPHRIES

REPRESENTATION:
FOR THE CLAIMANT: **MRS J WATSON (REPRESENTATIVE)**
FOR THE RESPONDENT: **MR C HOWELLS (COUNSEL)**

JUDGMENT

The unanimous judgment of the Tribunal is:

(1) That the claimant's claim of unfair dismissal is well founded.
(2) That the claimant's claim of sexual orientation discrimination is well founded.
(3) That this claim shall be set down for a remedy hearing to consider the issues of compensation and contribution.
(4) The parties are to provide a time estimate and availability for a remedy hearing within fourteen days of the date of this judgment.

REASONS

Preliminaries

1. The claimant was represented by Mrs Watson a lay (but experienced) representative; the respondent by Mr Howells of counsel.

2. The tribunal heard oral evidence from the claimant on his own behalf and from Mr Geraint Davies the claimant's trade union representative. The respondent called oral evidence from Cllr. Edward Latham Chair of the respondent, Ms C Jeffs a Parent Governor who chaired the appeal panel, Mr Richard Gordon, a local authority employee, who conducted a

disciplinary investigation, Mr O'Dwyer who chaired the disciplinary panel and Mr Hodges, a local authority employed lawyer, who acted as legal adviser to the respondent during the disciplinary process.

3. We were provided with two bundles of documents (referred to as core and supplemental), running to a total of nearly 800 pages, we were taken to only a small proportion of those documents. Some of the documentation the tribunal had been obtained by the claimant under a freedom of information subject access request.

4. No application had been made by the Local Education Authority (hereafter LEA) to be joined as a party under the terms of the **Education (Modification of Enactments Relating to Employment) (Wales) Order 2006** clause 4(b). Neither had any party applied to the tribunal under either rule 31 or 34 of the Employment Tribunal Rules of Procedure 2013 for joinder of the LEA to these proceedings.

5. The following issues were identified by the parties.

   5.1. The claim of constructive unfair dismissal, the claimant alleges a breach of the implied term of trust and confidence which encompasses the following complaints:

      5.1.1. The manner in which the claimant was purportedly dismissed;

      5.1.2. That the respondent unreasonably accepted that allegations made against the claimant were substantial in nature;

      5.1.3. That the respondent carried out an inept and inappropriate investigation.

      5.1.4. That the respondent prepared an investigation report which was manipulative and inept;

      5.1.5. The way in general which the process was conducted leading up to the disciplinary hearing;

      5.1.6. The conduct of the disciplinary hearing itself;

      5.1.7. The claimant contends that the last straw was the manner in which the preparation for the appeal was handled. In particular he contends that there was manipulation of the appeal process so that a re-hearing was to take place instead of an examination of the claimant's grounds of appeal alone.

      5.1.8. In addition, the claimant complains that the respondent has reached its decisions by following an external agenda; that of the LEA.

         5.1.8.1. The claimant contends that the respondent went beyond taking advice and allowed LEA officers to influence the outcome of the disciplinary processes.

         5.1.8.2. He contends that the respondent's decision makers became subordinate to the LEA and its agenda and had abdicated their responsibilities by, without critical analysis, adopting LEA advice as an instruction.

         5.1.8.3. He contends that the LEA's agenda was to engineer his dismissal.

   5.2. The claimant's case on sexual orientation discrimination is that the entirety of the Local Authority child protection process and the disciplinary processes including the decisions that were reached

during those processes were influenced by the claimant's sexual orientation and amounted to direct discrimination.

5.3. The respondent, whilst accepting that there were flaws in the disciplinary process, argues nonetheless that its procedural approach overall was reasonable contending that:

5.3.1. The claimant was responsible for the acts relied upon as misconduct and the claimant had admitted the facts on which the allegations were based.

5.3.2. Despite this admission, there was a detailed investigation conducted by an independent investigator (the claimant disputes the investigator's independence).

5.3.3. The disciplinary panel's refusal to adjourn for the claimant to obtain further documents was reasonable in all the circumstances;

5.3.4. The appeal process was fair and reasonable, and therefore could not amount to a straw sufficient to allow the claimant to contend that it along with previous actions amounted to a breach of contract.

5.3.5. On that basis, the respondent denies there was a dismissal.

5.4. The respondent argues that if there was a dismissal the decision to dismiss was procedurally and substantively fair, or that the claimant would have been dismissed in any event.

5.4.1. It was reasonable for the respondent to consider that the claimant's actions were significant failings in someone designated as the school's Head teacher.

5.4.2. In those circumstances, it would have been within the range of reasonable responses to dismiss the claimant.

6. In preparing this judgment we have had in mind the words of Schieman LJ in ***HM Customs & Excise & Anr. V. MCA & Anr. [2003] 2 WLR 210: "****judges should bear in mind that the primary function of a first instance judgment is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way".* On that basis, despite the wide-ranging matters raised at hearing, we are going to confine our judgment to those matters which we consider important to our decision.

The Facts

7. "A" list of individuals significant to the facts apart from the witnesses:

Name	**Position**
DS Stokes	Investigating police officer
Matthew Crowley	Governor
Carla Davies	LEA HR Officer
Huw Roberts	LEA Safeguarding Officer
Dianne Hopkins	LEA HR Officer
Andrew Thomas	Deputy Director of Education

Mr Cole	Barrister instructed by respondent to present Appeal
Ms Sinclair	Chair of PASM panel

8. The claimant had been appointed Head Teacher at Tywyn Primary School after a period of acting up in that role. The governing body of the school, the respondent, is his deemed employer under the provisions of the **Education (Modification of Enactments Relating to Employment) (Wales) Order 2006**. The LEA is his actual employer. The LEA is a function of the Neath Port Talbot Council Local Authority, which also has other functions, including social services child protection. The school takes pupils up to the age of 11 and has a special educational needs unit. The claimant was to take up his new role on 1 September 2015 and he had previously been Deputy Head Teacher at the School since January 2009. However, the claimant had been a teacher for 19 years by the time of these events.

9. In August 2015, the claimant, who self describes as gay (and had been open with the respondent about his sexuality prior to these events), had contacted two males, who will be referred to in this judgement as A and B, via "*Grindr*" which is a geosocial networking application (or app) geared towards gay and bisexual men, designed to help them meet other men in their area. That app requires individuals who join to certify that they are 18 years of age. A and B were, however, only 17 years of age at the relevant time. The claimant arranged to meet with A and B on three occasions. The first two of these occasions were entirely social however, on the third occasion all three of them engaged in sexual activity. We make it clear that it is now acknowledged that the sexual activity was entirely lawful and A and B were capable of and gave appropriate consent. A PASM (Professional Abuse Strategy Meeting) held when these matters came to light did not result in any criminal action being taken against the claimant nor was there any recommendation for action under section 47 of the children act 1989 (local authorities enquire whether there is harm to a child).

10. Some form of dispute developed between A and B, for reasons unknown to the tribunal, this dispute led to the involvement of social services.
    10.1. There was some concern that B could be categorised as vulnerable (which might vitiate consent), and the police became involved.
    10.2. Information was gathered about the meetings between the claimant, A and B this information included the sexual activity between all three.
    10.3. In consequence of this, a PASM was arranged for 28 August, 2015 to consider the claimant's conduct with A and B. Mr Latham, as chairman of the governing body, was invited to attend this meeting.
    10.4. Mr Latham was told at the meeting that the police had concerns about both A and B's ability to consent to the sexual activity.

10.5. Following the meeting, a decision was made that the claimant should be suspended from work, although Mr Latham implemented that decision, in our judgement, from the evidence he gave, he was simply following an instruction from the Local Authority officers. This is amplified in his witness statement when he says *"it was decided at this meeting the police investigation into the allegations would proceed. Upon this decision being made, I was informed that it would be necessary to suspend Mr Aplin"*.

10.6. However, the claimant accepted in evidence that, on the then available information, it was appropriate to suspend him from work at the school premises.

11. On 1 September, 2015, Mr Latham along with Mr Huw Roberts and Carla Davies told the claimant, upon his arrival at the school, that he was suspended and should go home.

11.1. The claimant was given no further information about the reason for his suspension other than it was a child protection matter.

11.2. No further information was given to the claimant until police attended his home on 25 September, 2015. On that occasion the police questioned the claimant about his involvement with A and B.

11.3. It is clear that it was at this stage the claimant became aware that the child protection matter involved A and B and his sexual relationship with them.

12. On 20 October, 2015 a further PASM was held.

12.1. The minutes of that meeting (p. 74 core bundle) indicate that the purpose of the meeting was in order to establish:

12.1.1. Whether there was harm or potential harm to a child.

12.1.2. Whether there was the possibility of a criminal offence related to a child having been committed.

12.1.3. Whether there had been behaviour towards a child which indicated that the claimant was unsuitable to work with children.

12.2. The minutes also indicate that the meeting should consider:

12.2.1. The possibility of a police investigation being undertaken.

12.2.2. Whether a section 47 enquiry by social services in respect of a child protection issue was necessary

12.2.3. Whether the school should give consideration to disciplinary action against the claimant.

12.3. The decisions taken at that the meeting ruled out:

12.3.1. That there had been any harm to a child

12.3.2. That there had been no criminal offence which could be prosecuted.

12.4. There was no specific reference to a decision about a section 47 (Children's Act 1989) statutory investigation. From that it seems a reasonable conclusion that the meeting considered that there was no behaviour on the part of the claimant which would warrant such an investigation.

12.5. However, the PASM did recommend that the school consider disciplinary action.

12.6. Ms Sinclair (who called and chaired the meeting) records that the *"professionals agreed with Ms Sinclair that the allegations were*

substantiated." This appears curious because it is only the fact that the claimant had consensual sex with two 17-year-olds which appears to be "substantiated. Whilst, on the face of it none of the stated objectives of the meeting appeared to have been substantiated.

12.7. However, on this basis, the PASM recommended that the school take disciplinary action.

12.8. On 20 October 2015, the claimant was informed by Mr Latham that his conduct was to be investigated as a disciplinary matter.

12.9. Whilst the claimant would have been aware this investigation was in relation to his relationship with A and B, he was not aware of any of the details of the PASM, in terms of the objectives set or the conclusions drawn at the meeting.

13. The claimant alleges that everyone on the governing body would have become aware of the disciplinary investigation and its purpose.

13.1. The claimant bases this on his understanding of the community of the school and the way the governing body works. The claimant has no direct evidence of this.

13.2. The minutes of the governors meeting of 21 October, 2015 indicate that the governors were informed that the claimant's absence was due to compassionate leave.

13.3. Mr Latham told us that this was the approach taken throughout because it was recognised that it was important to maintain confidentiality.

13.4. It does not appear that information about this situation came into the public domain at all, the claimant indicated as much as part of his arguments in the disciplinary and appeal hearings.

13.5. In our judgement, there is no evidence to support the speculation by the claimant that this confidentiality was breached.

14. Mr Latham wrote to the LEA, with whom the school had an arrangement in respect of human resources services, for an independent investigation to be carried out. Mr Gordon was appointed to carry out an investigation.

14.1. The allegations to be investigated were formulated by the LEA, Mr Latham had no input.

14.2. In cross examination, it emerged that Mr Latham's particular concerns as to the claimant's conduct related the fact that the claimant had engaged in sexual activity with the two 17-year-olds, one of whom was thought to have special educational needs. He considered this to impact upon the claimant's ability to protect children in the school; in particular, in the special needs section.

14.3. The actual allegations and the terms of reference for the investigation were: *"to investigate whether Mr Aplin's course of conduct (a) constitutes behaviour which brings, or would bring if more publicly known, the reputation of Tywyn primary school into disrepute; (b) impacts upon his ability, perceived or otherwise, to undertake his role as head teacher; (c) demonstrates so gross an error of judgement as to seriously undermine the trust and confidence necessary for a school to repose in him as head teacher and, therefore, call into question his continuation in that role."* The course of conduct is not described in the terms of reference. Mr Hodges was concerned in

drawing up the terms of reference with the likely impact that a headmaster having a sexual relationship with two seventeen year olds would have on reputation if more widely known and the claimant's ability to understand and act upon that potential for reputational damage.

14.4. Mr Gordon was asked in cross examination what he understood the course of conduct to be, his response was *"the conduct of Mr Aplin with the two young people. I was asked to investigate this in those terms of reference"*. When asked further he denied that the conduct in question was having sex with males, also that it was having sex with two persons. He contended the conduct did not relate to having sex with males at home, nor to having sex with a younger person. He said that the conduct was having sex with individuals, no matter what sex, who were under the age of 18. He went on to say that he considered that it involved the judgement of the claimant, expanding on this that it was the claimant taking part in a relationship with two young people of 17 years of age both of whom were vulnerable and immature.

14.5. Whatever Mr Gordon's view of the meaning of conduct within the terms of reference, his understanding was never communicated to the claimant directly.

15. Mr Gordon produced an investigation report which referred to witness evidence and documents.

15.1. Mr Gordon interviewed the claimant and DS Stokes; no other individuals were interviewed.

15.2. Mr Gordon made reference to the school disciplinary policies and ethos documents.

15.3. The tribunal found Mr Gordon's evidence confusing.

15.3.1. In his witness statement, he said. "*My investigation drew upon, but did not rely wholly upon, the earlier police and professional abuse investigation.*" However, later in the same statement, he also states "*permission to release the notes of the PASM of 21st of October 2015, was not available to me, therefore I could not, and did not, make use of the notes is evidence*."

15.3.2. In his oral evidence, Mr Gordon told us that he had relied on the PASM conclusions as far as the claimant's conduct was concerned but maintained he was only investigating the impact of the claimant's conduct on the school.

15.3.3. In our judgement, Mr Gordon clearly had access to the PASM minutes and obviously relied upon them as evidence in his investigation and beyond this based some of his views on the conclusion set out in the minutes that the claimant's conduct had been established.

15.4. In addition to this Mr Gordon had available to him the police "niche notes" which related to police discussions with the claimant.

15.4.1. Mr Gordon made use of the information in the niche notes in preparing his report but was selective in his use of the "niche notes".

15.4.2. An example of this selectivity is that he did not include a note recording that one of two 17-year-olds was shown not to have a statement of special educational needs but had been

receiving special needs education because he had been previously home schooled. Whereas he did include opinion based material from the investigating officer that one of the youths did not appear to be particularly mature.

15.4.3. Given that the respondent was concerned, in part, as to the vulnerability of A and B the tribunal consider this to be a notable omission.

15.5. Mr Gordon fully understood that the policy of the school required his investigation report to report facts and draw no conclusions or judgements from the evidence he obtained.

15.5.1. It is obvious to anyone reading the report that it is laden with conclusions and value judgements. The tribunal note that in his report at pages 175 through to 179 Mr Gordon is virtually entirely negative towards the claimant and draws specific conclusions as to the claimant's suitability to be head teacher. Whilst paying lip service to the concept that this was the governing Body's decision this was a document demonstrating advocacy not an objective report.

15.5.2. In cross examination, Mr Gordon, could not accept this to be the case. The tribunal did not consider him to be dishonest. We came to the conclusion that Mr Gordon was simply unable to see what he had written was in complete opposition to the policy.

15.6. This causes the tribunal to have considerable doubts as to Mr Gordon's subconscious objectivity in preparing this report.

15.6.1. To these concerns, we must add the omissions in recording from the niche notes referred to above.

15.6.2. In addition, Mr Gordon's answered that he had accepted, without qualification, the conclusions recorded by Ms Sinclair in the PASM on 20 October, 2015. This is despite the obvious ambiguity brought about by the disjuncture between the stated aims of the meeting and the conclusions drawn.

15.6.3. Mr Gordon is clearly an intelligent and experienced council officer. It is therefore difficult to understand his lack of objectivity.

15.6.4. In our judgement, subconsciously, something was interfering with Mr Gordon's ability to approach this matter, objectively.

16. On the 18 March 2016 Mr Latham and a fellow governor Mr Crowley discussed the investigation report supported and advised by HR officers. Minutes recording their decision show that Mr Gordon was also present at this meeting.

16.1. The HR support advised that there were three options available to the Governors:

16.1.1. To consider the matter closed because of the absence of evidence on the alleged conduct.

16.1.2. To consider that the alleged conduct did not amount to gross misconduct but lesser misconduct (for which a different procedure was prescribed).

16.1.3. To conclude that the alleged conduct did amount to gross misconduct and should be referred to a staff disciplinary and dismissal hearing.

16.2. The minutes' record that the decision made was to follow the third course, however no detailed reasoning is recorded.

16.3. It was suggested to Mr Latham that this meeting had decided that the claimant **was** guilty of gross misconduct. Mr Latham answered by saying that it was his personal opinion that the claimant was guilty of gross misconduct, but that the disciplinary panel could come to different conclusion and if they did, he would have to live with it.

17. Both Mr Latham and Mr Gordon based their approach on the premise that the claimant presented a child protection problem. However, it must be recognised, that this was not the way in which the terms of reference for the investigation and the charges laid against the claimant were drawn up. In particular Mr Hodges in his evidence indicated that the charges were drawn up specifically avoiding child protection because of the PASM findings on that issue.

18. Arrangements were put in place for the claimant to attend a disciplinary hearing.

18.1. The respondent wrote to the claimant in letter dated 24 March 20 indicating to him that he was required to attend a disciplinary hearing on Tuesday 26th of April 2016.

18.2. The claimant was informed that the members of the disciplinary panel were to be Mr O'Dwyer, Mrs M Evans and Mrs K Evans.

18.3. He was also informed that Mrs Karen Holt, as HR manager, would also be present an adviser to the panel and it was set out that Mr Gordon would present the management Case.

18.4. The letter indicated that the allegations of misconduct were:

18.4.1. Behaviour which brings a school into disrepute

18.4.2. Conduct which is incompatible with the role of the head teacher

18.4.3. Behaviour which seriously undermines the trust and confidence of the school in its head teacher.

18.5. The letter warned that if this was found to be proven that it could lead to a termination of the claimant's employment on the grounds of gross misconduct.

18.6. The letter informed the claimant that he was entitled to be represented either by trade union representative or work colleague but that he needed to make his own arrangements for the representative to attend.

18.7. The letter enclosed the documentation that was to be relied upon at the disciplinary hearing and informed the claimant that there was no intention to call witnesses.

18.8. Claimant was permitted to present written evidence or documents at the hearing but he was required to submit a copy of documentation and the names and statements of any witnesses in advance of the hearing.

19. The claimant made a number of requests prior to the hearing for the respondent to provide documents from the PASM and the police niche

logs. This was an obvious step as the documents were referred to in Mr Gordon's report.

19.1. There was a significant problem in disclosing these documents. Miss Sinclair, as chair of the PASM committee refused permission for the minutes to be disclosed to the claimant. To the tribunal this appears an odd approach given that disciplinary action was recommended by PASM on the basis of its discussions and that MR Gordon had already had sight of the minutes. Mr Gordon had relied, in part, on those minutes in reaching his conclusions.

19.2. The local authority, undertaking its social services function, was, in the person of Ms Sinclair, refusing the claimant access to the documents. The tribunal recognises that the LEAis not the respondent, let alone the local authority exercising its other functions.

19.3. The claimant took the view that there was deliberate obstruction by the respondent which was placed in the way of the claimant to hamper his defence.

19.3.1. There was some correspondence between the claimant and the respondent about a postponement of the disciplinary hearing because the claimant had not seen these documents. The postponement was only agreed a day before the hearing was due to take place.

19.3.2. There was a rearranged date for hearing, the claimant used the intervening period to make a subject access request under the data protection legislation. The claimant considers that an email which points to an officer of the local authority questioning whether the documentation requested should be delayed so that it would be delivered to the claimant after the date of the hearing indicates an agenda to dismiss him by the authority.

19.3.3. The tribunal recognise that the LEA has had a significant involvement in the preparation for and direction taken in the claimant's disciplinary process. In particular, the respondent, used the services of the LEA HR function in advising it as to how to carry out the disciplinary process.

19.3.4. In our judgement, in those circumstances, the HR support was under the direction and control of the respondent. Consequently, the respondent is vicariously liable for any actions of those officers whilst they acted under its direction and control.

19.3.5. In our judgement, whilst the members of the disciplinary panel would not necessarily have been aware of these matters, they had handed the administrative responsibility to ensure a fair process and relied entirely on the LEA officers to administer a fair process.

19.3.6. This is the respondent's process and any failings must fall at their door.

19.4. In any event, despite the postponement when the claimant attended the hearing, eventually held on the 17 May 2016, those documents had still not been provided to the claimant.

20. The disciplinary hearing took place on 17 May 2016 and Mr Gordon acted as the presenting officer.

20.1. The claimant via his representative objected to Mr Gordon conducting the presentation on the basis that under the school's policies the investigating officer should not present a management case at the disciplinary hearing. Under the school's procedures the presenting officer was, in effect, a witness, and a different person should be appointed to present the management case.

20.2. The claimant was already concerned that Mr Gordon as a local authority officer had carried out the investigation.

20.2.1. This is because the Welsh Government guidance (p.593) provides that the investigator should be external and refers to a "suitable independent person" referring to the possibility of obtaining an officer from another authority to carry out the investigation.

20.2.2. The same guidance (p.603) indicates that the presenting officer arrangements should be agreed by all parties. They were not.

20.3. Given our previous findings about Mr Gordon and his approach to the investigation, we accept the claimant's evidence that his presentation at this disciplinary hearing was far from objective and again he acted as a "prosecuting" advocate.

20.4. Mr O'Dwyer, chairman of the disciplinary panel, was questioned about the disciplinary panels experience of disciplinary hearings. He told the tribunal that none of the panel were qualified, experienced or had any training in serious disciplinary matters.

20.5. When it was suggested to him that the panel relied on the LEA officers his response was "yes, they are the experts."

20.6. Having heard from Mr Gordon and from the claimant the panel decided to dismiss the claimant.

20.7. The tribunal had serious concerns about the process by which the decision to dismiss the claimant was taken.

20.7.1. Mr Hodges and Mrs Holt remained with the panel after evidence and submissions. However, the claimant and his representative were required to leave.

20.7.2. Mr Hodges wrote the outcome letter indicating that the panel were seeking to dismiss the claimant.

20.7.3. The evidence as to how the reasoning of the disciplinary panel was communicated to Mr Hodges was less than satisfactory.

20.7.4. Mr O'Dwyer gave evidence that the panel was simply receiving advice on legal matters from Mr Hodges and Mrs Holt, and then went on to make the decision themselves having asked the two to leave. In this explanation, there appeared to be no time when the reasoning of the panel was communicated to Mr Hodges.

20.7.5. Mr Hodges recollection contradicts that of Mr O'Dwyer, his position was that he advised and remained to listen to the reasons for dismissal. This evidence however, also contradicts the minutes.

20.7.6. When cross examined Mr O'Dwyer had no real understanding about the contents of the outcome letter and

specifically denied that parts of it represented the panel's discussions.

20.7.7. Once again, the tribunal are convinced that the real decision-making was being made by the LEA officers and not by the panel at least in terms of the detailed reasoning as set out in the outcome letter. Whilst we have no doubt that dismissal was the decision of the panel we have no real basis for understanding how this decision was rationalised.

20.8. What is clear is that the panel were not prepared (taking the advice of Mr Hodges) to postpone the disciplinary hearing because of the absence of the PASM minutes and the niche logs.

20.9. Further, the panel were not concerned with the complaints about the claimant's ability to prepare his defence for the hearing. Neither were they prepared to accept the claimant's submission that Mr Gordon should not present the case because it was in breach of the Welsh government guidance.

20.10. Mr Hodges had made the panel aware that Mr Gordon's report was not objective. His suggested approach was that the panel could simply ignore those elements and could reach a decision unaffected by the contents of the report. Following that advice, the panel decided that they were able, in dealing with the disciplinary hearing, to put from their minds those elements of the report that were lacking in objectivity.

20.11. Mr O'Dwyer, during the course of his evidence, was unable to when asked to distinguish those elements of the report that were objective reporting of evidence and those that were subjectively reached conclusions within the report.

20.12. Given this inability to distinguish between reported fact and opinion, the lack of experience of the panel and the influence being exercised by the local education officers, we consider that it was impossible for the panel members to exclude those subjective elements of the report from their consideration.

20.13. During the course of the disciplinary hearing the claimant was asked why he considered that the approach taken during the investigations was homophobic, he referred to the unfairness of the report in that it was "totally biased".

20.14. The disciplinary panel at the end of their discussions brought the claimant back before them and announced, without giving reasons, that the found gross misconduct established and the claimant was dismissed. Mr Gordon reacted in a very unusual manner by putting both hands on his head and leaning forward.

21. The outcome letter set out that the claimant was dismissed with immediate effect.

21.1. In fact, the claimant's employment contract meant that no dismissal could take place until after an appeal was held should the employee seek to appeal. Further, whilst the governing body was to make the decision as to whether the claimant should be dismissed, the actual dismissal is carried out by the local education authority.

21.2. The outcome letter told the claimant that he should return any equipment belonging to the school, and that he should indicate to the school any personal items of his he needed to collect.

21.3. It was put to the witnesses that the outcome of dismissal and the request to return equipment was made because it was considered that any appeal would be futile. The witnesses denied that this was the case.

21.4. Mr Hodges told us that he simply was not aware of the correct procedure because he had no experience in education law.

21.4.1. He told us that he was covering for a colleague absent due to illness and was learning on the job. He told us he was unfamiliar with the policies of the school and those of the Welsh Government related to education.

21.4.2. In our judgement, Mr Hodges, who was the lead legal adviser in the case was unaware of the correct approach to take under the policies at the time when the disciplinary hearing took place. His lack of experience meant that he did not have to hand the knowledge about the detailed terms which applied to teachers and their employment.

21.4.3. This is demonstrated by Mr Hodges' attempts to retrieve matters by the time of the appeal hearing (see below). The tribunal considered that the approach he adopted was very similar to that that applies to ordinary local authority employees when dismissal takes place.

21.4.4. In those circumstances, we do not consider that there was any malice in the way that these arrangements were made.

21.5. The tribunal consider that the process did not follow the respondent's own procedures in the following ways:

21.5.1. The unbalanced approach to the investigation and the resulting report lacking objectivity;

21.5.2. The presentation of the management case at the disciplinary hearing by Mr Gordon.

21.6. The tribunal consider that there was a level of control exercised by the LEAwhich meant that the officers were in effect decision makers in the disciplinary hearing.

21.7. The upshot is that at these stages of the process there was a failure to follow the Welsh Government Guidance which had been adopted by the school and had failed to follow general expectations as to fairness.

22. The claimant appealed the disciplinary decision with detailed grounds of appeal contained in a letter dated the 25 May 2016 from Gareth Davies (the claimant's trade union representative). The following issues were raised.

22.1. That the dismissal letter referred to the conduct of the claimant outside school, an issue that was not contained within the investigation terms of reference.

22.2. That the investigation report contained matters of opinion and conclusions which it should not have under the Welsh government guidance.

22.3. That both that the decision maker sending the matter to the disciplinary panel and the disciplinary panel would have been unfairly influenced by the report.

22.4. That the report should, by agreement, be redacted for the purposes of the appeal hearing.

22.5. That there was a failure to disclose the PASM minutes and the niche logs and in the circumstances the disciplinary panel did not have direct access to those documents to make their own decision. This meant that the investigating officer had made decisions as to what was relevant in preparing his report, whereas that should have been a matter of judgement for the panel.

22.6. The claimant complains that in the absence of disclosure of those documents that part of the report that referred to them should not have been put before the panel. The complaint is that the panel would be unduly prejudiced by the inclusion of this information in the report and could not properly ignore it.

22.7. There is reference to the dismissal letter including an indication as to vulnerability of children. The appeal contends that if the claimant's conduct amounted to a child protection matter, then it should have been investigated in a different manner under Welsh Government Guidance.

22.8. There is further reference to the Welsh Government Guidance that the investigating officer should not have acted as the presenting officer at the disciplinary hearing.

22.9. There is a specific complaint along with the more generalised complaint about bias in the preparation of the report the investigation officer. The claimant complains that he had been informed that he had until 16 March, 2016 to suggest any amendments to the report but Mr Gordon had produced the report on 11 March, 2016 before that deadline.

22.10. The complaint is made that the hearing has been driven by homophobic beliefs, on the basis that the claimant had been disciplined because he had a consensual homosexual relationship with two young men able to consent.

22.11. The appeal also set out that the report was in contravention of data protection by including matters discussed between Mr Aplin and the police.

22.12. It was asserted that given that there was no suggestion that either A or B lacked capacity to consent there could be no justification for dismissing the claimant.

22.13. The appeal maintained that the claimant's conduct was part of his private life and contends, on that basis, it should not have been the subject of investigation.

22.14. The appeal letter suggested that the incidents did not involve child protection, that there was no evidence that either A or B attended special schools, that comments to that effect were based on opinions not facts as was the whole investigation.

22.15. The letter complains that the respondent indicating that it balanced the age and economic power of A and B as against the claimant in dismissing the claimant (a reason relied upon in the

outcome letter) had no impact on whether there was a legal relationship between the claimant and A and B.

22.16. Finally the letter sets out that the outcome letter was incorrect in suggesting that A and B had been contacted via a website, whereas the claimant had made contact through an APP which required every user to declare they were over the age of 18.

23. The respondent arranged an appeal hearing.
    23.1. In preparation for that appeal hearing the claimant was expecting that only his grounds of appeal would be dealt with.
    23.2. However, the respondent suggested that a rehearing was necessary. This was because by this stage the respondent had accepted that there were significant flaws in the original disciplinary process.
    23.3. The claimant was unhappy with this approach, he argued that his grounds of appeal should form the framework of the appeal. His complaint was that the respondent should not have a second bite of the cherry at running the disciplinary process correctly.
    23.4. The appeal process under the Welsh government guidance permits a rehearing in appropriate circumstances.
    23.5. The tribunal consider that, in the circumstances that we describe, where the process before appeal had been so fundamentally flawed, it was appropriate for a rehearing to be considered as the correct vehicle for conducting the appeal. This is particularly so in circumstances where the bulk of the claimant's complaints about the disciplinary process were procedural as opposed to substantive complaints.
    23.6. However, it is clear from the evidence we heard that this decision was not taken by the respondent. The decision was made prior to the appointment of a chair of the appeal panel and although the eventual chair approved this, in our judgment this was simply a case of agreeing to a decision that had already been taken by LEA officers. There was no real determination on the part of the respondent.

24. The parties agreed redactions to Mr Gordon's report along with a level of agreement about preparation for the appeal hearing which was arranged to take place on 28 June, 2016.
    24.1. On 27 June, 2016 by an email sent at 5:20 PM the respondent informed the claimant was informed that the management case at the appeal would be presented by a barrister. The claimant was greatly distressed by this as he had neither the opportunity nor the means to employ a barrister to conduct the appeal hearing on his behalf.
    24.2. As it turned out the former issue was not as significant as on 28 June 2016 the barrister engaged informed the appeal panel that an adjournment was necessary. This was because he had documentation that he could not make available to the claimant.
    24.3. The claimant complains that in all correspondence sent to him by the respondent he was informed only of the statutory entitlement to be accompanied by a trade union representative or work colleague. The claimant told us that he believed in those circumstances that he

was not entitled to have legal representation. Therefore, the claimant saw this as a further unfair approach by the respondent because there would be no equality of arms.

24.4. The claimant's trade union representative told us that in 18 years of experience in the role, prior to the claimant's appeal, he had never known the respondent to engage the services of a lawyer from outside of the local authority. He accepted in cross examination that this had happened since, but never before.

24.5. The tribunal accept that in light of the correspondence that had been sent to the claimant and the experience of his trade union representative at that time, that the claimant thought that he was not allowed to engage a legal representative to attend the hearing. Until 29 July 2017 the respondent did not inform the claimant that he could seek his own legal representation.

25. The tribunal seen correspondence between the claimant and the respondent in respect of preparation for a resumed appeal hearing.

25.1. The claimant continued to complain that it was not fair that his grounds of appeal were not to be dealt with but a rehearing was to take place.

25.2. He also complained that even by late July he had not received the documents which were the reason the original hearing had been adjourned.

25.3. On 4 August, 2016 the claimant was informed that the minutes from PASM and the niche logs were to be released to him.

25.4. The appeal hearing had been rearranged for 8 September, 2016 a date agreed at the adjourned hearing. The claimant complains that this date was changed to 21 September 2016 without any input from him or from his trade union representative.

25.5. The claimant considered that this was a tactic on the part of the LEA which the claimant believed had stage-managed his dismissal and manipulated the governing body.

25.6. The claimant set an employment tribunal process in train on 13 August 2016 by contacting ACAS.

25.7. The claimant sent his letter of resignation to the school on 27 August, 2016, it was received by the school on 30 August, 2016. The resignation letter complains that there was a totally inept and unfair investigation which had influenced the disciplinary panel. He set out that he had lodged an appeal on particularised grounds, which were deliberately ignored, and that he was now intent on pursuing claims before the employment tribunal.

26. After the end of the claimant's employment school governors and the local authority were involved in the following actions.

26.1. The claimant was entitled to attend the school buildings in another capacity unrelated to the school.

26.2. The chairman of school governors Mr Latham prevented him attending in that capacity excluding him from the building. When asked about this in cross examination Mr Latham's answers related to child protection matters.

26.3. The local authority wrote to the disclosure and barring service asking for advice as to whether it was required to make disclosure to them about the claimant, this is despite the decision taken in the PASM. The advice that came back was that there was probably nothing to report.

26.4. Once again the tribunal consider that this demonstrates that, despite the terms of reference used to discipline the claimant, the local authority and the school governors were particularly concerned about child protection matters arising from the claimant's conduct.

27. The tribunal was also asked to consider that the respondent had acted against the claimant in his search for new employment.

27.1. The tribunal were taken to text messages sent to a person who wished to employ the claimant which appear to indicate antipathy toward the claimant.

27.2. In addition, we were told generally about the claimant's difficulties in obtaining other school based employment.

27.3. However, in each case we are unable from the evidence to identify the source of any negative information being given about the claimant.

27.4. In those circumstances we are unable to infer, as the claimant asks we do, that responsibility for any negative information lies with the respondent.

27.5. The claimant, in addition to these matters, took the tribunal to two references from the director of education at the Local Education Authority.

27.6. It is clear that the first reference, which led to his appointment as head teacher is effusive and the latter after his resignation is cursory. However, that can be explained on the basis that between writing each reference there had been a finding (however flawed) that the claimant was guilty of gross misconduct. In those circumstances the tribunal would expect a degree of circumspection in any subsequent reference because of potential repercussions arising from a reference which was supportive.

The Law

28. The Equality Act 2010 provides at section 4 that sexual orientation is a protected characteristic. At section 12(1)(a) it is provided that sexual orientation includes a person's sexual orientation towards persons of the same sex. At section 12(2) In relation to the protected characteristic of sexual orientation it is provided that —

> *(a) a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation;*

29. Dealing with direct discrimination, the Equality Act 2010 provides at section 13:

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A*

treats B less favourably than A treats or would treat others.

Section 13 is supplemented by Section 23(1) which provides:

On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

In addition, at section 109 it is provided that:

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

Further, Section 136 the 2010 Act provides

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
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(6) A reference to the court includes a reference to—
(a) an employment tribunal;

30. When considering a complaint of direct discrimination, the tribunal should consider, first if there has been less favourable treatment of the claimant in comparison to others and then go on to consider the reason, whether conscious or subconscious, for the treatment complained of.
    30.1. It can be necessary to identify or construct a comparator to test whether treatment has been less favourable, however if the tribunal are able to answer the question as to "why" the treatment occurred without reference to comparator then that is sufficient.
    30.2. We remind ourselves that ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** indicates that a difference in treatment along with the protected characteristic alone is insufficient to establish unlawful discrimination, it is necessary to find that the protected characteristic is an operative cause of the treatment.
    30.3. However, ***Anya –v- University of Oxford & Anr. [2001] IRLR 377*** demonstrates that it may be necessary for the employment tribunal to look beyond the act in question to the background to consider whether factors connected to the protective characteristic have played a part in the employer's judgment, particularly in establishing unconscious discrimination.
    30.4. When we consider whether the evidence establishes unconscious factors operating on the approach of the respondent. ***Bahl v The Law Society [2004] IRLR 799,*** makes it clear that

unreasonableness as of itself is not an indication of discrimination. Simply put an employer may be unreasonable to all staff and if so there is no less favourable treatment. However, that must be compared with the decision in ***Eagle Place Services Ltd v Rudd [2010] IRLR 486*** where it is clear that when constructing hypothetical comparators (as opposed to an actual comparator who has been treated unreasonably) there is no basis for the tribunal to accept that an employer would be unreasonable in its approach to that comparator unless there is evidence which would lead to such a conclusion.

31. ***Igen –v- Wong and Ors. [2005] IRLR 258, Barton –v- Investec Henderson Crosthwaite Securities Ltd. [2003] IRLR 332, Madarassy v Nomura International PLC [2007] EWCA civ. 33*** and most recently in ***Efobi v Royal Mail Group Limited UKEAT/0203/16*** indicate that the tribunal is to decide whether the claimant has, taking account of all the evidence from both parties, demonstrated a *prima facie* case of discrimination. This leads the tribunal to an examination of whether the evidence permits it to draw any appropriate inferences such that the tribunal might consider there has been discrimination. If there is not sufficient evidence then the burden of proof will not shift to the respondent to provide an explanation. If the burden does shift to the respondent, then the explanation must show that the treatment was "in no way whatsoever" on the grounds of the protected characteristic.

32. In dealing with the constructive dismissal complaint the law that has to be to applied is Section 95 of the Employment Rights Act 1996 which provides so far as is relevant:

> *Circumstances in which an employee is dismissed*
> *(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),*
> *--------*
> *(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.*

33. The approach to constructive dismissal is set out by Lord Denning in ***Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, [1978] QB 761, [1978] 2 WLR 344, CA*** in which he defined constructive dismissal in the following way:

> *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he*

> *terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."*

34. Guidance is given for deciding if there has been a breach of the implied term of trust and confidence in ***Malik v. Bank of Credit; Mahmud v. Bank of Credit[1998] AC 20; [1997] 3 All ER 1; [1997] IRLR 462; [1997] 3 WLR 95; [1997] ICR 606*** where Lord Steyn said that an employer shall not:

> *". . . without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

35. In this case, we must also pay mind to the fact that the claimant relies on the last straw principle, in that he argues that the whole of the respondent's approach caused him to resign. ***In Lewis v Motorworld Garages Ltd [1986] ICR 157***, Glidewell LJ pointed out that at p 169 F-G that the last action of the employer which leads to the employee leaving need not itself be a breach of contract. In ***Omilaju v Waltham Forest London BC [2005] 1 All ER 75*** Dyson LJ said at paragraph 21:

> *"If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."*

36. The tribunal is therefore required to decide whether the respondent's conduct in this case could objectively be said to be calculated, or in the alternative likely, to seriously damage confidence and trust between the claimant and the respondent. Thereafter we are required to examine whether the claimant resigned in response to that conduct.

37. One issue that may be of importance is that It is trite law that notice, once given cannot be unilaterally withdrawn (see ***Riordan v War Office [1959]***

3 All ER 552). This raises a question as to whether the claimant was dismissed when the outcome letter was sent. The question to be resolved will be factual, whether or not there was a mutual agreement to withdraw the dismissal notice.

38. The tribunal was referred to the decision in ***R (OAO) Shoesmith v Ofsted & Ors [2011] EWCA Civ. 642*** as having relevance for this case, in particular in respect of the respondent's approach to the advice given by the LEA and the actions of the PASM chair. ***Shoesmith*** is a public law case. It can have no direct effect on the tribunal's decision as that case involved a judicial review not the application of statute. However, the principles set out and which insist that giving a party a fair hearing and an opportunity to address complaints are fundamental rights which are in our judgment applicable to the issue of reasonableness of approach when considering whether there has been a breach of the implied term of trust and confidence. In our judgment the effect of the decision in ***Shoesmith*** is that where there is unfairness of approach by a third party, and where that unfairness of approach impacts directly on procedural and substantive decisions in a dismissal, the reasonable employer would have some regard to the behaviour of the third party in applying its processes. This approach does not entitle an employer to ignore the issue of a third party's conduct. In approaching the question of injustice in this case it appears to us to involve an examination of whether the decision of the respondent was truly independent of the Local Education Authority. Whether in taking account of the Local Educations Authority's position the respondent adopted it's reasoning uncritically.

Analysis

39. In our judgment, there were serious failings at the investigation and disciplinary hearing stages of the process. There was an attempt to correct some of those defects before the first appeal hearing was convened However even at that stage counsel presenting the respondent's management case at appeal recognised that there were outstanding issues which could cause unfairness. We have no doubt that those elements played an important part in the claimant's decision to resign and hence the constructive unfair dismissal claim. In addition, those matters are of importance in the decision we have to make in respect of direct discrimination.

40. We shall deal with the issues identified by the parties at the outset of the hearing. The first of these relate to the claim of constructive unfair dismissal, the claimant alleges a breach of the implied term of trust and confidence which encompasses the following complaints:

    40.1. ***Shoesmith*** is a public law case. It can have no direct effect on our decision as that case involved a judicial review not the application of statute. However, the principles set out and which insist that giving a party a fair hearing and an opportunity to address complaints is a fundamental right, are in my judgment applicable to the issue of reasonableness in relation to the actions of the employer.

40.2. In our judgment, the effect of the decision in ***Shoesmith*** is that where there is unfairness of approach by a third party, and where that unfairness of approach impacts directly on a decision to dismiss, a reasonable employer would have some regard to the behaviour of the third party. The approach does not impose an obligation on the employer to investigate whether the actions of the third party are unlawful. However, neither does the approach entitle an employer to ignore the issue of the third party's conduct.

40.3. Here, having found that the respondent abdicated some of its responsibilities by allowing LEA officers to take decisions on its behalf, we are entitled to consider those officers as agents for the respondent for which it is vicariously liable. We must therefore examine the conduct of those officers in deciding whether the respondent dismissed the claimant.

40.4. The complaint in relation to the manner in which the claimant was purportedly dismissed can be combined with the complaints that the respondent unreasonably accepted that the allegations made against the claimant were substantial in nature; that the respondent carried out an inept and inappropriate investigation; that the respondent prepared an investigation report which was manipulative and inept; that the way in general which the process was conducted leading up to the disciplinary hearing and the conduct of the disciplinary hearing itself was flawed. All of these issues relate to application of the disciplinary processes to the conduct of the claimant.

40.4.1. The claimant accepted that his suspension was necessary based on the respondent's initial information. The tribunal agree at that time there were child protection issues at large and given the claimant's role it was essential that children at the school were protected from any risk of harm. The PASM was to provide the necessary information to take matters forward.

40.4.2. It is obvious that at this first stage the concerns were substantial in nature. The second PASM had removed the questions of harm or potential harm to a child protection, criminal issues and had not ordered an investigation where the claimant's behaviour presented a risk to children. However, it had recommended disciplinary proceedings.

40.4.3. Were the concerns substantial? The tribunal considers that the "concerns" that the PASM expressed about the claimant's conduct requiring a disciplinary process were never defined. In those circumstances it is difficult to understand what went forward to be the subject of discipline other than the admitted fact that the claimant had consensual sex with two young men of 17.

40.4.3.1. The difference in the understanding of Mr Latham and Mr Gordon on the one hand and Mr Hodges on the other as to the conduct is instructive. The former two were concerned about child protection issues, the latter, a lawyer who understood the implications of the PASM outcome was clear there was no child protection question.

40.4.3.2. The result was that the terms of reference drawn up by Mr Hodges and accepted uncritically by Mr Latham did not

address the issues about the claimant's conduct that Mr Latham actually had.

40.4.3.3. Mr Hodges terms of reference related to whether having the sexual relationship with A and B affected, potentially or actually, the school's reputation; whether it actually or could be perceived to affect his ability to carry out a head teacher's role and finally whether it was such an error of judgement that it undermined the trust and confidence. Much of this refers to the claimant's judgment and the external perception of that judgment.

40.4.3.4. Mr Gordon in contrast appeared to be concerned with concentrating on the conduct itself, albeit that this conduct was never formally described. His concentration therefore was on the vulnerability of A and B and the claimant's perception of that vulnerability rather than any reputational damage or the claimant's ability to recognise that.

40.4.4. This itself led to a problem in the investigation in that Mr Gordon, trying to keep to the letter of the terms of reference, was nonetheless approaching them on the basis that the claimant was a potential danger to children and this should be a concern for the school.

40.4.5. The differences could be expressed in this way in respect of the claimant's judgment:

40.4.5.1. If child protection is ignored an exploration of the claimant's perception of the level of risk involved in his behaviour as damaging to the school's reputation is called for.

40.4.5.2. However, if child protection is included then an exploration of the vulnerability or otherwise of the 17 year olds is relevant and appropriate.

40.4.5.3. The former approach explores the claimant's state of mind, the latter approach explores the status of A and B.

40.4.6. This difference in approach meant that in practical terms that the claimant was not able to properly understand and therefore to respond to the case against him. This can be seen in that the claimant was presenting a defence which related to why he considered A and B to be over the age of eighteen, whereas Mr Gordon took as read that these were vulnerable young men and judged the claimant's conduct on that basis.

40.4.7. This was a poor start for the investigation and was not the last flaw in approach.

40.4.7.1. Mr Gordon had access to documents that he knew the claimant would not be given access to. He could have ignored the documents and carried out a direct investigation with witnesses, e.g. the police, he did not do this.

40.4.7.2. Instead Mr Gordon used information from the documents in evidence in his report. If he had done so by fairly recording evidence that could inculpate or exculpate the claimant, then there would be less room for criticism. However, he only included elements from the documents which undermined the claimant.

40.4.7.3. Procedurally Mr Gordon was required to set out an objective record of evidence gathered upon which the respondent could base its decisions and to draw no conclusions of his own. Mr Gordon understood this yet he produced a report that not only was one sided in the evidence presented but was positively biased against the claimant in conclusions set out within it.

40.4.7.4. This problem is then further compounded by Mr Gordon presenting the management case at the hearing. This meant that the report was presented by an individual who was not independent nor objective, as was required by the process.

40.4.7.5. Mr Hodges recognised that the report was not prepared so as to be objective in accordance with the procedure. However, despite this he advised the panel that they could ignore those elements that were not objective. The panel read the report and, on the evidence, were not properly able to distinguish between objective reporting of fact and subjective opinion in the report contents. This is yet another flaw in the process.

40.4.7.6. The claimant had raised his concerns about these issues and from his perspective those concerns were ignored or if addressed a decision was made to his disadvantage.

40.4.7.7. All of these matters can properly be described as the respondent conducting itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

40.4.8. In addition to this the outcome letter was a clear breach of the claimant's terms of employment which did not permit dismissal until the time for the claimant to institute an appeal had passed.

40.4.8.1. However, the claimant appealed the decision. In our judgement, this appeal having been instituted by the claimant, accepted by the respondent, which evinced an intention to hold a re-hearing and the claimant continuing to receive pay and benefits all point to a mutuality of approach that dismissal notice was withdrawn. On this basis, in our judgment, the claimant had, at that stage, affirmed the contract despite these earlier breaches.

40.5. The last straw relied upon is the manner in which the preparation for the appeal was handled this ties in with an argument that there was manipulation of the appeal process to provide a re-hearing. In addition, the claimant complains about the involvement of the LEA, which he contends acted with a particular agenda which was to engineer the claimant's dismissal.

40.5.1. With time to consider the claimant's grounds of appeal and review the policies Mr Hodges became aware of the failures in procedure noted above and, as a result, his advice changed. The approach his advice included rehearing all matters.

40.5.2. In addition, Mr Hodges was now inclined to accept arguments that the investigation report could not go forward in its original form. In consequence of this he was prepared to advise

that the report be redacted to remove those elements of subjective opinion.

40.5.3. The tribunal consider that Mr Hodges changed approach was because he had now familiarised himself with the relevant policies and procedures and had reconsidered the natural justice elements required in any procedure. We do not consider that he personally had an agenda of dismissing the claimant. We note that he was prepared to engage positively with the claimant's representative as to which elements of the investigation report should be redacted.

40.5.4. However, that said we consider that the LEA as a body was less than pro-active when it came to obtaining and disclosing to the claimant copies of the PASM minutes and the police niche logs. This was an obvious disadvantage to the claimant in that even the redacted report still relied upon the reported elements of the PASM minutes and niche logs which as we indicate above were not balanced.

40.5.5. We consider that the preparation for the hearing was also marred by the fact that the claimant was informed about the appointment of a barrister at such a late stage. Whilst the respondent may have been entitled to do this under the procedure it is a matter which needs to be considered in context.

40.5.5.1. The claimant had been subject of a deeply flawed disciplinary process up to the outcome letter.

40.5.5.2. This included the fact that the claimant was excluded from part of the meeting where LEA officers remained.

40.5.5.3. As we have found the respondent was effectively passing its decision making to the LEA officers and was not carrying out its function as an employer. This was not made clear to the claimant and was also an unfair part of the process, but would also lead any objective observer to conclude that the LEA was unduly influencing the process.

40.5.5.4. The claimant was already disturbed that this was to be a re-hearing, as the respondent was aware.

40.5.5.5. The claimant had already complained about the issue of who made a presentation at the disciplinary hearing stage. Once again, an appointment on presentation was made without communication from the claimant: the policy suggested co-operation on the appointment.

40.5.5.6. The claimant was entitled and did perceive, from the communications sent by the respondent that he was only entitled to trade union representation. Appointing a barrister without informing the claimant that he might instruct his own legal representative was likely to create a suspicion of a determination to dismiss the claimant.

40.5.5.7. The claimant reasonably perceived this as the respondent, colloquially put, "bringing out the big guns". As such the impression of a deep inequality of arms was to be expected.

40.5.5.8. This was and was likely to be perceived as an ambush given the late hour the claimant was informed of the appointment.

40.5.5.9. In those circumstances in our judgment, looked at objectively, in those particular circumstances this was conduct on the part of the respondent which was likely to undermine the implied term of trust and confidence.

40.5.6. The case was to be re-heard. The claimant strongly objected to this.

40.5.6.1. The respondent abdicated its decision-making responsibility about whether there should be a re-hearing to the LEA. However, the decision itself was rational.

40.5.6.2. The claimant's complaints were, in general, procedural.

40.5.6.3. These were issues which were necessarily potentially serious, as accepted by the claimant in evidence. The policy provides for a rehearing if the circumstances support such an approach.

40.5.6.4. Given the level of failing at the disciplinary level it is almost certain that an appeal would have to be allowed if only procedural matters were addressed. Allowing the claimant's appeal in those circumstances would mean, in effect, that the substantive issues would not properly be addressed.

40.5.6.5. Given that the substantive issues were serious then not addressing them and allowing the appeal on procedural grounds only would have been a failure to responsibly approach matters.

40.5.7. The Claimant was told that the date of the adjourned hearing was to be delayed. There was no communication on this.

40.5.8. Although the claimant was eventually informed that he could obtain legal representation this was a decision made and communicated to the claimant very late in the day.

40.5.9. Added to this was that there was a significant time lapse in informing the claimant that he would have an opportunity to view the niche logs and PASM minutes.

40.5.10. It is to be remembered that despite the redactions, Mr Gordon's report was to form the basis of the case to be presented against the claimant.

40.5.11. In our judgment, the conduct of respondent towards the claimant could objectively be viewed as likely to undermine the implied term of trust and confidence.

40.5.12. Despite the concessions made to the claimant these were generally late in the day, piecemeal and came as a result of the claimant making complaints about the process adopted.

40.5.13. The insistence on a rehearing formed part of the claimant's complaint but did not form the entirety of his reason for resigning. In our judgment, the claimant resigned in response to an accumulation of matters which were to be seen in the light of the earlier breaches.

40.5.14. There was a wholesale failure at the investigation and disciplinary stage which amounted to a breach of the implied term. Whilst the claimant had by appealing generally waived those

breaches at that stage (obviously if an appeal was successful he would be returning to employment despite the breaches), the later continuing conduct of the employer further undermined the claimant's confidence. In our judgment that conduct which included appointing a barrister (in the context described) and postponing and rescheduling the appeal without consultation are sufficiently serious taken together with earlier events to amount to a breach of the implied term of trust and confidence. The claimant resigned in response It was reasonable for the respondent to consider that the claimant's actions were significant failings in someone designated as the school's Head teacher.

40.5.15. Mr Howells argued that in the circumstances, it would have been within the range of reasonable responses to dismiss the claimant. The respondent argues that if there was a dismissal the decision to dismiss was procedurally and substantively fair, or that the claimant would have been dismissed in any event.

40.5.16. It was reasonable for the respondent to consider that the claimant's actions were significant failings in someone designated as the school's Head teacher.

40.5.16.1. Given our view as to the preparation of the report we cannot say that it was within the range of reasonable responses to dismiss the claimant.

40.5.16.2. We add to this our concerns that the charges drawn up against the claimant were not those in the mind of Mr Gordon in preparing the investigation or Mr Latham in coming to a decision as to whether the claimant should face a disciplinary hearing.

40.5.16.3. In respect of the argument that the claimant would have been dismissed in any event, we consider that to be an issue more appropriately addressed at a remedy hearing.

40.6. The claimant's case on sexual orientation discrimination is that the entirety of the Local Authority child protection process and the disciplinary processes, including the decisions that were reached during those processes, were influenced by the claimant's sexual orientation and amounted to direct discrimination.

40.6.1. We first indicate that we have no jurisdiction to deal with the Local Authority in carrying out its child protection function. The local authority is not a party to these proceedings. ***Shoesmith*** is a public law case as we refer to above it cannot allow us to find discrimination against an entity which is not party to these proceedings. The conduct of the LEA officers can be considered when dealing with the respondent when they act as agents of the respondent because of section 109 EA 2010 liability. However, when they act pursuant to their local authority function, and not on behalf of the respondent they fall outside our purview.

40.6.2. There is a clear difficulty in this case: the reason why the claimant was investigated, subjected to disciplinary proceedings and dismissed was because, factually, he had sex with two males. On a very simple analysis that would mean that sexual discrimination would be made out, however, the analysis must be more subtle as the motivating factor must be the claimant's sexual

orientation not just a specific event involving a sexual relationship (although that can be evidence of such a motive).

40.6.3. It is clear that the claimant was subjected to an investigation, a disciplinary process and dismissal (hereafter "the process") because of the sexual relationship. The question for us is was this treatment less favourable than would be experienced by someone not of the claimant's sexual orientation.

40.6.3.1. We must examine whether the treatment of the claimant was less favourable by creating a hypothetical comparator unless we are clear that the "reason why" the claimant was subject to the process was or was not his sexual orientation. We are not able to conclude that the "reason why" the treatment occurred is clear and therefore must consider the hypothetical comparator.

40.6.3.2. What we are to compare, in pursuance of Section 23 Equality Act 2010 is the treatment of the claimant in contrast with the treatment of another individual, in the same or significantly similar circumstances. Guidance on comparators indicates that they should be created by changing the relevant protected characteristic but keeping the other relevant circumstances as similar as possible.

40.6.3.3. Following that guidance would result in a comparator who was a heterosexual male but who had sex with two males.

40.6.3.3.1. This comparator appears unsatisfactory because, in practical terms, others who discriminate will do so on their perception of a person's sexual orientation.

40.6.3.3.2. This type of discrimination is more akin to religion and belief discrimination and less like race or sex discrimination because it is the perceived external actions (including comportment, demeanour, behaviour and/or conduct) of the individual that informs the discriminator rather than an innate observable characteristic.

40.6.3.3.3. In the circumstances of this case that perception will be informed, obviously, at least in part by the claimant's admitted conduct with the two young men.

40.6.3.3.4. In a similar way, if a heterosexual male teacher had sex with two males in similar circumstances, then he could be perceived as having a homosexual orientation and therefore the process of comparison would be obscured.

40.6.3.3.5. Creation of the hypothetical characteristics becomes more complex when the respondent's case is that it is not the claimant having sexual relationships with males that is crucial to its treatment of the claimant but having sexual relationships with vulnerable seventeen year olds.

40.6.3.3.6. This creates a potential chicken and egg situation in secondary fact finding. In order to decide the correct relevant circumstances to create the comparator, the

tribunal has to consider whether, consciously or unconsciously, the gender of those in the sexual relationship with the claimant was key or not. If the gender was not key then changing the gender of the comparator assists in the comparison and is likely to demonstrate no less favourable treatment, if the gender was key then sexual orientation could be shown to be at the heart of treatment. However, the entire purpose of creating the comparator is to make that very decision.

40.6.3.3.7. The practical question the tribunal must answer is: was it the age and/or vulnerability of A and B or the fact that they were the same gender as the claimant that resulted in the treatment complained of. This results in two potential comparators (1) a female having a sexual relationship with two 17 year old males or (2) a male having a sexual relationship with two 17 year old females. It appears to the tribunal there is little to choose between those two comparators as it is the distinction between homosexual orientation and someone of a different sexual orientation that must be tested. Both forms of hypothetical comparator must be a Head-teacher in a primary school, both must have arranged a sexual relationship via a "dating" App, that App must require participants to declare that they are 18, there must be questions raised about the vulnerability of the two young people and they must have acted in such a way as to cause a PASM to be arranged and finally that PASM must have recommended disciplinary action.

40.6.4. The tribunal consider that we this is case where the reverse burden of proof applies.

40.6.4.1. There is evidence that, on first examination, sexuality could form the factual substance underpinning the respondent's treatment of the claimant.

40.6.4.2. There is significant evidence of failings in the procedure adopted to deal with the claimant. It is of note that those advising the respondent were professionals who could be expected to advise and act in accordance with policies and procedures.

40.6.4.3. The failings of procedure are so substantial and additionally so wide ranging as to allow inferences to be drawn that the professionals acting in that way are doing so for a particular reason, and it is possible on that basis to conclude that the hypothetical comparator (which ever version we rely upon) would not have been treated in this manner.

40.6.4.4. Without explanation for that less favourable treatment it is possible to infer on the basis of the heterosexual comparators we have created that the reason for the less favourable treatment was the claimant's sexuality.

40.6.5. We consider that the actions of Mr Hodges in approaching the disciplinary and appeal process were not

motivated by the claimant's sexual orientation and that his conduct is explained by his lack of experience in dealing with teachers.

40.6.5.1. Mr Hodges was asked to produce charges in line with the recommendations of PASM and did so. It was a rational set of complaints based on the

40.6.5.2. He was not experienced in the special arrangements for teachers in terms of disciplinary procedures, and mistakenly approached the matter as if the claimant were an employee of the local authority.

40.6.5.3. When he became aware of the procedural requirements he reacted by attempting to comply with those procedures.

40.6.5.4. Whilst there are failings in Mr Hodges approach even after this stage, they were explicable as attempts to ensure that the substantive matters in the process was dealt with and a lack of vision as to what might be done about the intransigence of the PASM chair about provision of the minutes.

40.6.6. In terms of the LEA officers making decisions about the process, once again we draw the conclusion that there is an explanation in that those officers are trying to reconcile the process with the attitude of the PASM officer carrying out her separate function. In any event most decisions about this stage are in conjunction with advice from Mr Hodges and therefore the explanation about his approach applies to their actions.

40.6.7. We also consider that because the respondent governors' effectively abdicated their roles, that their decisions were taken by proxy by the LEA officers, that the question of their personal motivation is not raised. The reality is they followed the decisions of the LEA officers and Mr Hodges which were not discriminatory. Therefore, whatever the governors' personal beliefs they were not weighing those beliefs at the time when the decisions were made.

40.6.8. On that basis, there is a non-discriminatory explanation for the approach of the LEA officers, Mr Hodges and the School Governors' in their part of the process.

40.6.9. We do not consider that there is an explanation for Mr Gordon's approach. Once again we start from the premise that the factual situation being dealt with was that of having lawful sexual intercourse with A and B.

40.6.9.1. Mr Gordon is an experienced local authority officer. He has experience of carrying out investigations.

40.6.9.2. Mr Gordon understood his brief required him to approach the investigation on a purely fact finding basis and, in particular, he was to express no conclusions in his report.

40.6.9.3. Mr Gordon not only expressed conclusions, he did so in a linguistically forceful manner.

40.6.9.4. In the judgment of the tribunal Mr Gordon's report was biased in its gathering and reporting of evidence to the claimant's disadvantage. In particular he was emphasising evidence about the vulnerability of A and B without disclosing other evidence which could indicate a contrary position.

40.6.9.5. Mr Gordon appeared, by his physical reaction, to express relief at the disciplinary hearing when the decision to dismiss the claimant was communicated. The tribunal consider this to be an indication of a personal investment in the outcome of the hearing.

40.6.9.6. Mr Gordon was unable to recognise at the time of giving evidence to us that there were flaws in his investigation and report. This was despite the fact that it had been accepted (as early as the appeal stage) that there were such flaws.

40.6.9.7. The tribunal considered that it was appropriate to draw inferences from this latter fact in particular that Mr Gordon was not able to recognise in himself an unconscious bias against the claimant.

40.6.9.8. We also take the view that there is no explanation provided on the part of Mr Gordon for this bias against the claimant.

40.6.9.9. Using the comparators we have imagined and relying on the decision in ***Rudd*** we consider that the approach taken by Mr Gordon to investigating the claimant's conduct was irrational. We do not consider that the approach to a hypothetical comparator would have also been irrational in this way. On that basis, we consider that the treatment of the claimant in this investigation was less favourable than it would have been to a comparable individual.

40.6.9.10. On that basis, we consider that, in the absence of an explanation, applying the reverse burden of proof the reason for that less favourable treatment was the claimant's orientation as a homosexual.

40.6.9.11. The claim of direct discrimination is therefore well founded.

Judgment posted to the parties on

28 September 2017

EMPLOYMENT JUDGE W BEARD

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Dated: 25 September 2017

For Secretary of the Tribunals