Appeal No. UKEAT/0211/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 13 December 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

GOVERNING BODY OF SUTTON OAK CHURCH OF ENGLAND PRIMARY SCHOOL & 2 OTHERS — APPELLANTS

MR M WHITTAKER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR MARTIN MENSAH (of Counsel) Instructed by: St Helens Borough Council Legal Services Town Hall Victoria Square St Helens WA10 1HP
For the Respondent	MR JOHN SMALL (of Counsel) Instructed by: National Association of Schoolmasters Union of Women Teachers (NASUWT) Hills Court Education Centre Rose Hill Rednal Birmingham B45 8RS

SUMMARY

SEXUAL ORIENTATION DISCRIMINATION

The Claimant is a primary school teacher. He was dismissed for being in a classroom alone with a male Year 5 pupil (referred to here as "LK") during the lunchtime break and offering sweets to LK. The Claimant's conduct was in breach of guidelines issued to him for similar conduct some years earlier.

The Claimant brought claims of unfair dismissal and discrimination on the grounds of sexual orientation and disability - the Claimant is gay and HIV-positive - as well as claims of victimisation and harassment. The claims of unfair dismissal and direct discrimination on the grounds of sexual orientation were upheld. The Respondents appealed against that decision on the basis that the Tribunal erred in law in its approach to the hypothetical comparator and/or that it reached a conclusion as to discrimination that was not supported by the facts.

Held: The Tribunal had erred in its approach to the hypothetical comparator. In particular, it had failed to ensure that the circumstances of the hypothetical comparator were not materially different from those of the Claimant. There was no proper factual foundation for the conclusion that the Claimant's treatment was on the grounds of sexuality, the Tribunal's decision being based on an incorrect factual premise and on factors relevant to individuals who were not the actual decision-makers.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. The Claimant is a primary school teacher. He was subjected to a disciplinary process after the Head Teacher of the school came across the Claimant in a classroom alone with a male Year 5 pupil (referred to here as "LK") during the lunchtime break. The Head Teacher saw the Claimant give the pupil a packet of Rolos. There followed a lengthy investigative process and the Claimant was subsequently dismissed. His appeal against that dismissal was not upheld.

2. The Claimant brought claims of unfair dismissal and discrimination on the grounds of sexual orientation and disability - the Claimant is gay and HIV-positive - as well as claims of victimisation and harassment. The Tribunal rejected the claims of disability discrimination victimisation, and harassment. However, the claims of unfair dismissal and direct discrimination on the grounds of sexual orientation were upheld. The Respondents appealed against that Decision on the basis that the Tribunal erred in law in its approach to the hypothetical comparator and/or that it reached a conclusion as to discrimination that was not supported by the facts.

Factual Background

3. The Claimant commenced working at the school in 2001. He was at that stage newly qualified. In 2002, he received a first written warning for inappropriate and unprofessional contact and involvement with a pupil (referred to here as "JJ"). Although the allegations related to "*hugging and tickling JJ, giving him a birthday card and photograph, visiting his home and offering him "a long ride" in his car,*" the school decided that he had been naïve, and gave him some guidelines in respect of his future conduct at the school.

4. There were eight guidelines in total, only four of which are relevant for present purposes. These were that: (a) the Claimant will ensure that he is not left alone with a pupil except in an open area accessible to all; (b) the Claimant will ensure that any actions involving the pastoral care of pupils are discussed with the Deputy or Head Teacher; (c) there will be no physical contact with a child which may be misconstrued; and (d) there will be no contact with the parents or pupils outside school.

5. There were no further incidents for the next 13 years during which, it is not in dispute, the Claimant developed into a very good teacher. He had also been given specific classes which were difficult to deal with because he was seen to be good at dealing with behavioural issues.

6. On 30 April 2015, the Third Respondent, Mr Williams, who had become Head Teacher in 2011, was doing his lunchtime rounds. He came across the Claimant alone in a classroom with LK and saw the Claimant give LK a packet of Rolos. Mr Williams entered the classroom, and the Claimant's reaction, according to Mr Williams, was that the Claimant went red and said, "*What will happen now?*".

7. The Head Teacher, who was also the Safeguarding Lead for the school, reported the matter to Mr Phil Ingham, the Human Resources Officer at St Helens Borough Council. Although Mr Williams had wanted to suspend the Claimant on that occasion, he was dissuaded from doing so by Mr Ingham. However, there were conditions attached to the Claimant continuing to teach whilst the investigation was ongoing. These were that there would be two full-time teaching assistants in the Claimant's classroom and that the senior leadership team were to be extra vigilant during lunch and break times. The Claimant was also instructed not to have any one-to-one contact with pupils and, in particular, to have no contact with LK or give any pupils chocolate.

8. A strategy meeting was convened to discuss the incident. The minutes of that meeting included a report that the Claimant lived alone, that in the past there had been concerns around his contact with children, and that he had been internally disciplined "*a couple of years ago*". The Tribunal found that that last reference was in fact to the incident in 2002. The notes of the meeting confirmed that the Claimant accepted that it was "silly" to meet with LK. An investigatory meeting was held on 15 June 2015 at which the following allegations were put to the Claimant: (a) that he had engaged in inappropriate contact with a child (LK); and (b) that his actions had breached a reasonable lawful management instruction.

9. Mr Williams and Mr Ingham prepared an investigation report. The Tribunal made the following findings, amongst others, in relation to the investigation report:

> **"44. The investigation report included the following: "that LK, the pupil involved in the recent issue, shared a similar profile with the child involved in 2002. They were of similar physical appearance". The school at the relevant times recognised both pupils as vulnerable due to their home situations.**
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> **…**
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> **53. The conclusions of the investigating duo were not disputed, in many respects, by Mr Whittaker. There was a reference to the fact that Mr Whittaker, in the guidelines of 2002, had been told that he must discuss pastoral issues with a Deputy or Head Teacher and he had made no attempt to do that with regard to LK. The report suggested that it was "of great concern that despite clear guidance that Mr Whittaker should not be alone with a pupil and despite having no legitimate reason to meet, on several occasions he instigated a situation where he would be alone in his classroom with LK". Management did not accept that meeting alone in a classroom constituted meeting in a "open area accessible to all".**
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> **…**
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> **57. The report goes on to say that in 2002 Mr Whittaker was given the benefit of the doubt in that his actions were naïve rather than having any ill intent, and consequently the conclusion was that the investigatory panel had serious safeguarding concerns in respect of Mr Whittaker and that he had left himself extremely vulnerable to the allegations. The recommendation was that formal disciplinary action should be taken."**

10. The disciplinary process took some time to arrange and there were several hearings held over the course of a few months. The first of these was scheduled to be heard on 24 November 2015. On that day the hearing was about to start when Mr Williams learned that the Claimant had breached the requirement not to have any one-to-one meetings with LK. It emerged that the

A Claimant had spoken to LK on 24 November. The Claimant said that this was in order to say his goodbyes as he considered his career was basically over. The disciplinary hearing was postponed and on the following day, the Claimant was suspended. The Claimant was told that he must not contact his colleagues without prior consent. However, the Tribunal found that the Claimant had breached that condition as well because he posted a message on Facebook addressed to a colleague.

C 11. The disciplinary panel was chaired by Ms Hyland, Chair of Governors. The panel concluded that the Claimant should be dismissed, and in a letter, dated 29 June 2016, the panel set out its findings in relation to two allegations as follows (paragraph 68):

D **"(1) The governors were also informed that the investigation found that you had been meeting with LK at lunchtimes, alone, and on occasions had given LK sweets. It was alleged that these meetings had been instigated by you without the knowledge of anyone else within the school. Management maintain that you had no legitimate reason for meeting with LK despite your claim that the meetings were to address his poor behaviour. Management believe that these meetings were in direct contravention of the guidelines issued to you in 2002.**

E **(2) Just prior to the reconvening of your disciplinary hearing on 24 November 2015 the panel was informed that whilst in school you approached LK, which in management's view contravened the restrictions placed on you whilst a disciplinary investigation was being conducted. Following a request by management to adjourn the hearing to investigate this incident further the governors agreed to this request."**

F 12. At the end of the letter the Chair of Governors confirmed that the Governors had found both allegations proven and that together they constituted gross misconduct. Having considered the sanctions available, the Governors had decided unanimously that summary dismissal was appropriate and the Claimant's employment at the school was terminated on 9 June 2016; which G was the effective date of termination.

H 13. The panel referred expressly to guidance issued by the Department for Education - *Guidance for Safer Working Practice for Adults who work with Children and Young People in Education Settings* - in relation to the giving of gifts. That guidance provides as follows:

> **"It is acknowledged that there may be specific occasions when [an] adult working with a child or young person may consider it appropriate to give a child or young person a small personal gift if insignificant value [sic]. This is only acceptable practice where, in line with the agreed policy, the adult has first discussed the giving of the gift and the reason for it, with the Headteacher, senior manager and the parent or carer and the action is recorded. Any gifts should be given openly and not be based on favouritism. Adults need to be aware however, that the giving of gifts can be misinterpreted by others as a gesture either to bribe or 'groom' a young person."**

14. The guidance defines grooming as "*the act of gaining the trust of a child so that sexual abuse can take place*". The Claimant had submitted to the disciplinary hearing that other staff who had acted inappropriately had been treated differently from him. The panel considered that the Claimant provided no evidence to substantiate those claims and the Tribunal also found these allegations relating to other staff were "*not of a similar nature to the allegation that the Claimant faced*" (paragraph 185).

15. The Claimant appealed and, for reasons that need not be elaborated upon here, neither the Claimant nor his representative attended the appeal hearing. However, their submissions were considered. The appeal panel comprised Mr Dawson, who was the Chair, Mr Redmond and Ms Edgerton. The appeal panel considered that the allegations were proven and constituted gross misconduct and that the sanction of summary dismissal imposed by the school fell within the band of reasonable responses open to the original panel.

The Tribunal's Conclusions

16. The Tribunal found that the Respondents were not aware that the Claimant was HIV-positive. As such it found that none of the allegations of discrimination on the grounds of disability was made out. The Tribunal did find that it was known that the Claimant was gay. The Tribunal said it was difficult to pin down when the moment of knowledge came about. It referred to the fact that there were rumours about the Claimant's sexual orientation for some considerable time and that the Claimant had informed some of his colleagues that he was gay. However, the

Tribunal refers only specifically to the Head Teacher (in paragraph 122 of the Reasons), and there is no specific finding as to whether the Chair of either panel - that is to say the disciplinary or the appeal panels - had any knowledge of the Claimant's sexuality.

17. The Tribunal undoubtedly had a very difficult task. They were inundated with allegations from the Claimant set out in the very long Scott schedule, containing some 52 allegations, many of which were overlapping. In reaching its conclusions the Tribunal did not appear to distinguish carefully between those acts which might be relevant to whether or not the dismissal was unfair and those which might be relevant to discrimination. Although the Tribunal concluded that the dismissal was unfair for the reasons set out in paragraphs 158 to 170, (see paragraph 197) it is clear that several of those paragraphs strayed into the territory of discrimination. For example, at paragraph 160 the Tribunal concluded that "*it was unfair and directly discriminatory for the governors to take that long expired warning into account*". That conclusion of direct discrimination is not explained. It is not clear what, if any, comparative exercise the Tribunal undertook in order to come to the conclusion of discrimination. There are also references to certain acts not being discriminatory, again, referred to in the context of the unfair dismissal section, for example at paragraphs 144 and 151.

18. Having concluded that the dismissal was unfair, the Tribunal did turn its attention specifically to the allegation of discrimination at paragraphs 190 and 191, where it said as follows:

> **"190. We also felt that a teacher who did not have the protected characteristic of the claimant would have been dealt with differently. We had much debate as to the proper comparator in this claim. We considered a hypothetical, heterosexual male teacher found alone with a male pupil and a hypothetical male teacher found alone with a female pupil. On balance we preferred that latter comparator. Such a male teacher would not have been dealt with as the claimant was. Nor would there have been a presumption that he was grooming, in the circumstances, that the Head came across in that classroom. An explanation by an heterosexual teacher that he was supporting the child in a pastoral way would have been more readily accepted by both the Head and Mr Ingham.**
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> **191. We were concerned about the word "grooming" in the investigative report. There was an assumption by both Mr Ingham and the Head that there was a connection between the claimant being gay and him … being a paedophile."**

19. The Tribunal returned to the discrimination complaint in paragraph 201 of its summary:

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

The Legal Framework

20. Section 13 of the **Equality Act 2010** deals with direct discrimination. It provides:

> **"(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."**

21. Section 23 of the **Act** deals with comparison by reference to circumstances. It provides:

> **"(1) 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."**

22. The case law relating to the identification of the appropriate comparator is well-established, but the task of identifying a comparator remains a challenging one. I was referred to two authorities in this regard. The first authority was **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11:

> **"4. Thus, where the act complained of consists of dismissal from employment, the statutory definition calls for a comparison between the way the employer treated the claimant woman (dismissal) and the way he treated or would have treated a man. It stands to reason that in making this comparison, with a view to deciding whether a woman who was dismissed received less favourable treatment than a man, it is necessary to compare like with like. The situations being compared must be such that, gender apart, the situation of the man and the woman are in all material respects the same. This self-evident proposition is spelled out in section 5(3) of the [Sex Discrimination Act 1975]: see Dillon LJ in *Bain v Bowles* [1991] IRLR 356 357. As originally enacted (the later amendments are not relevant for present purposes), section 5(3) provides:**
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> > **"A comparison of the cases of persons of different sex or marital status under sections 1(1) or 3(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."**
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> **…**
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> **9. The present case is a good example. The relevant provisions in the Sex Discrimination (Northern Ireland) Order 1976 are in all material respects the same as those in the 1975 Act which, for ease of discussion, I have so far referred to. Chief Inspector Shamoon claimed she was treated less favourably than two male chief inspectors. Unlike her, they retained their counselling responsibilities. Is this comparing like with like? Prima facie it is not. She had been the subject of complaints and of representations by Police Federation representatives, the male chief inspectors had not. This might be the reason why she was**

treated as she was. This might explain why she was relieved of her responsibilities and they were not. But whether this factual difference between their positions was in truth a material difference is an issue which cannot be resolved without determining why she was treated as she was. It might be that the reason why she was relieved of her counselling responsibilities had nothing to do with the complaints and representations. If that were so, then a comparison between her and the two male chief inspectors may well be comparing like with like, because in that event the difference between her and her two male colleagues would be an immaterial difference.

10. I must take this a step further. As I have said, prima facie the comparison with the two male chief inspectors is not apt. So be it. Let it be assumed that, this being so, the most sensible course in practice is to proceed on the footing that the appropriate comparator is a hypothetical comparator: a male chief inspector regarding whose conduct similar complaints and representations had been made. On this footing the less favourable treatment issue is this: was Chief Inspector Shamoon treated less favourably than such a male chief inspector would have been treated? But, here also, the question is incapable of being answered without deciding why Chief Inspector Shamoon was treated as she was. It is impossible to decide whether Chief Inspector Shamoon was treated less favourably than a hypothetical male chief inspector without identifying the ground on which she was treated as she was. Was it grounds of sex? If yes, then she was treated less favourably than a male chief inspector in her position would have been treated. If not, not. Thus, on this footing also, the less favourable treatment issue is incapable of being decided without deciding the reason why issue. And the decision on the reason why issue will also provide the answer to the less favourable treatment issue.

11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be [sic] no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

23. Scott LJ in his opinion said as follows:

"108. First, the statutory definition of what constitutes discrimination involves a comparison 'treats that other less favourably than he treats or would treat other persons'. The comparison is between the treatment of the victim on the one hand and of a comparator on the other hand. The comparator may be actual (treats) or may be hypothetical (or would treat) but 'must be such that the relevant circumstances in the one case are the same, or not materially different, in the other' (see Article 7). If there is any material difference between the circumstances of the victim and the circumstances of the comparator, the statutory definition is not being applied. It is possible that, in a particular case, an actual comparator capable of constituting the statutory comparator can be found. But in most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator. In *Khan*'s case one of the questions was as to the circumstances that should be attributed to the statutory hypothetical comparator. It is important, in my opinion, to recognise that Article 7 is describing the attributes that the Article 3(1) comparator must possess.

109. But, secondly, comparators have a quite separate evidential role to play. Article 7 has nothing to do with this role. It is neither prescribing nor limiting the evidential comparators that may be adduced by either party. The victim who complains of discrimination must satisfy the fact-finding tribunal that, on a balance of probabilities, he or she has suffered discrimination falling within the statutory definition. This may be done by placing before the tribunal evidential material from which an inference can be drawn that the victim was treated less favourably than he or she would have been treated if he or she had not been a member of the protected class. Comparators, which for this purpose are bound to be *actual* comparators, may of course constitute such evidential material. But they are no more than tools which may or may not justify an inference of discrimination on the relevant prohibited ground, eg sex. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will

be the case for drawing the requisite inference. But the fact that a particular chosen comparator cannot, because of material differences, qualify as the statutory comparator, eg under Article 7, by no means disqualifies it from an evidential role. It may, in conjunction with other material, justify the tribunal in drawing the inference that the victim was treated less favourably than she would have been treated if she had been the Article 7 comparator.

110. In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. But the comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim."

24. The second case to which I was referred is **Aylott v Stockton on Tees Borough Council** [2010] EWCA Civ 910, [2010] ICR 1278. In that case, Mummery LJ held as follows:

"39. The employment tribunal selected a hypothetical comparator. As the identity of the comparator for direct discrimination must focus upon a person who does not have the particular disability, that disability must, as directed in section 3A(5), be omitted from the circumstances of the comparator. In other respects the circumstances of the claimant and of the comparator must be the same "or not materially different". The claimant's abilities, as directed in section 3A(5), must be attributed to the comparator. Although the comparator is not required to be a clone of the claimant, failure by the employment tribunal to attribute other relevant circumstances to the comparator may be an error of law on the part of the tribunal: see, for example, the judgment (Judge McMullen QC) in *High Quality Lifestyles Ltd v Watts* [2006] IRLR 850. However, as explained below, there is no obligation on the employment tribunal to construct a hypothetical comparator in every case and failure to do so does not necessarily lead to an error of law in the employment tribunal's findings.

40. In this case the employment tribunal selected as the hypothetical comparator a person who was off work for a similar number of days, but did not have the bipolar disorder affective disorder suffered by the claimant. The appeal tribunal did not think that that detail went far enough. It is correctly explained in the appeal tribunal's judgment that, in deciding upon the characteristics of a hypothetical comparator, it is necessary to determine the reason why the complainant received the treatment of which complaint is made. The relevant circumstances and attributes of an appropriate comparator should reflect the circumstances and attributes relevant to the reason for the action or decision of which complaint is made. The appeal tribunal concluded that, in the selection of the comparator, the employment tribunal erred in law, first, by not including other circumstances of the claimant that should have been included, and, secondly, in relation to the dismissal, by failing to use a comparator at all, and instead simply saying that the council had a "stereotypical view of mental illness".

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49. I would accept that an employment tribunal can err in law if they conclude that liability for direct discrimination has been established simply by relying on an unproven assertion of stereotyping persons with that particular disability. Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment, such as a decision to dismiss."

25. It is clear from these cases that it may not always be necessary to identify a hypothetical comparator at all. There may be circumstances where the identification of the reason for the

A treatment of the Claimant itself provides an answer to the question of whether it was on the proscribed ground or on some other ground. However, if the Tribunal concludes that the hypothetical comparator is an appropriate approach to take, then it must be careful to ensure that the attributes of that comparator are such that there are no material differences between the circumstances of that comparator and those of the Claimant. Failure to ensure that this is so could mean that the comparative analysis is flawed.

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Grounds of Appeal

26. There were initially seven grounds of appeal. However, only two of these – grounds 6 and 7 - were permitted to proceed by Mrs Justice Simler (President) on the sift. These were as follows:

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(a) Ground 6: the Tribunal erred in law in its approach to the hypothetical comparator, in particular by failing to identify a hypothetical comparator in circumstances that were materially similar to those of the Claimant;

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(b) Ground 7: the Tribunal reached a conclusion at paragraph 169 that there were no concerns about the Claimant being with other children until he was suspended and that was unsupported by and/or inconsistent with the evidence.

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The Parties' Submissions

27. The Respondents, represented here, as below, by Mr Mensah, submit that the Tribunal erred in drawing a comparison with a hypothetical comparator of a heterosexual male teacher found alone with a female pupil. He submits that that hypothetical comparator fails to take account of the reasons why the Claimant was treated as he was, and that the appropriate hypothetical comparator can only be properly constructed if those reasons are taken into account: see **Shamoon v Chief Constable of the Royal Ulster Constabulary** at paragraph 10. Here, the

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relevant circumstances included the fact, submits Mr Mensah, that the Claimant had been subject to guidelines, that he had accepted that he had met the pupil (LK) on five or six occasions without informing the pupil's teacher, and that he accepted that he had given sweets to the pupil as a gift whilst alone in a classroom. Those are the material circumstances, submits Mr Mensah, that should have been applied to the hypothetical comparator. When those circumstances are taken into account, he submits that it is inevitable that such a comparator would have been similarly subjected to a disciplinary process and dismissed. In accordance with the policy, applicable to all adults dealing with children in education, the conduct of the hypothetical heterosexual male teacher could also be interpreted as grooming irrespective of the actual intention behind the teacher's conduct. Instead of taking the correct approach to the hypothetical comparator, the Tribunal, submits Mr Mensah, proceeded on the assumption that the investigators were applying a stereotypical "*connection between the claimant being gay and him ... being a paedophile*" (paragraph 191).

28. Mr Small, who appears on behalf of the Claimant, submits that this appeal is not so much about the hypothetical comparator as it is about whether the Employment Tribunal's findings and the reason for dismissal were supported by the evidence. He submits that there were ample detailed findings of primary fact which supported the Tribunal's conclusion that the reason for dismissal was the Claimant's sexual orientation. These included the fact that the 2002 incident was a long time ago, since which time the Tribunal accepted the Claimant had become a very good teacher; that the guidelines provided in 2002 had long since 'lapsed'; that the Claimant was recognised as being good at dealing with children with behavioural issues; that the reason he had not discussed this pastoral care of LK was that he had had run-ins with the pastoral team at school; that the Claimant is something of a maverick who is willing to be disdainful with policies; and that he did not at any stage seek to keep his meetings with LK secret.

29. Taking these factors into account, Mr Small submits that the Tribunal was entitled to conclude that the investigators had leapt to an incorrect assumption that the Claimant was in the early stages of grooming. It is of particular relevance, submits Mr Small, that the investigation report referred to LK and JJ sharing a similar profile, and that it was reported at the strategy meeting that the Claimant lived alone and had been disciplined "a couple of years ago" in relation to his practices with children, whereas that previous action was in fact 13 years previously.

30. It is not accepted by Mr Small that the reference to "grooming" in the investigation report arose out of the guidance from the Department. He submits that it is clear from the Tribunal's conclusions that it found as a fact that the investigating officers thought the Claimant was grooming LK. All of the above demonstrates, in his submission, that the Respondents thought the Claimant was targeting LK because of his physical similarity to JJ. This was an assumption borne out of the knowledge that the Claimant was gay and the result of assuming some sort of connection between that protected characteristic and grooming behaviour.

Discussion and Conclusions

31. The Tribunal's conclusions in respect of sexual orientation discrimination would appear to be set out at paragraphs 190, 191 and 201 of the Reasons. However, as noted above, the Tribunal did stray into the analysis of discrimination during the section of its Judgment concerned with unfair dismissal. Of course, findings of fact relevant to a specific head of complaint might also be relevant to another head of complaint. There is no error, necessarily, in failing to adopt a strict separation between findings of fact under different heads. However, that failure can in certain circumstances lead to errors in analysis because when it comes to a consideration of whether or not there has been discrimination, the Tribunal needs to be particularly clear as to facts upon which its conclusions are based and from which adverse inferences are being drawn.

32. Furthermore, if the Tribunal seeks to rely upon certain findings of fact as giving rise to the positive finding that certain treatment was on discriminatory grounds, it is incumbent upon the Tribunal to identify what that specific treatment in question is and the facts which enabled it to conclude that that treatment was on the proscribed ground. In my judgment, paragraphs 190, 191 and 201 are deficient in this respect. Thus, it is not clear what facts were being relied upon to support the conclusion that, "*There was an assumption by both Mr Ingham and the Head that there was a connection between the claimant being gay and him … being a paedophile*" (paragraph 191). No relevant facts were identified in the paragraph itself. Putting aside the obvious difficulty that any assumptions by Mr Ingham and Mr Williams tell one very little about the motivations of the decision-makers in this case, it is simply not apparent from this part of the Judgment why the Tribunal reached that conclusion.

33. Mr Small invites me to have regard to the Judgment as a whole, which he says does enable one to discern the relevant facts in support of that conclusion. In particular, he submits that the finding that the school proceeded on the basis that LK was of a "*similar profile*" to JJ involved in the 2002 incident demonstrates that the school was operating under an assumption based on the Claimant's sexuality. In my judgment, it is difficult to see why the reference to LK sharing a similar profile to JJ should necessarily give rise to any inference that the school was acting as it did because of the Claimant's sexuality. Insofar as the Tribunal found that that was the basis for its conclusion at paragraph 190 (and that is far from clear), the basis for the connection between the Claimant's sexuality and his activities is not explained.

34. The Tribunal also made a series of findings which are described as "*positive findings*" with regard to the Respondents' treatment of the Claimant. Thus, it found that the Claimant accepted that he should not have been with LK; that the process of disciplining the Claimant or

discussing the matter with him was not something he could complain about; that he did not tell the Head Teacher that he was meeting with LK; that the school already had reward structures in place with regard to giving gifts to children and the Claimant did not need to supplement those policies; that teachers should know and "*Mr Whittaker in particular because of the 2002 warning*" that having one-to-one meetings with pupils would leave him open to allegations of impropriety; and that they should be wary of allowing themselves to be drawn into such situations (paragraph 155). In my judgment, those are all potential reasons for treating the Claimant in the way that he was, none of which have anything to do with his sexuality. The Tribunal has not explained why, notwithstanding those positive findings, the treatment of the Claimant amounted to discrimination on the grounds of sexual orientation. At paragraph 190, the Tribunal reached the conclusion that "*Such a male teacher would not have been dealt with as the claimant was*". It is not clear what specific treatment the Tribunal had in mind when reaching that conclusion. We do not know, for example, whether it was the fact of the investigation, the disciplinary proceedings or any aspect thereof, or the decision to dismiss. One might be able to infer from the final sentence of paragraph 190 that the treatment found to be discriminatory was the failure to accept the Claimant's explanation that he was meeting LK in order to support LK in a pastoral way. If that is the case, then it would suggest that everything that followed from that initial failure was consequential upon that initial act of discrimination. However, that would, on the face of it, be inconsistent with the Tribunal's clear findings that the Claimant could not complain about the fact that he was being disciplined or that the matter was discussed with him (see paragraph 154).

35. Much attention was placed on the Tribunal's approach to the use of the word "grooming" in the investigative report. It is important to note that the Tribunal correctly found that the content of the report (at paragraph 56 of the Judgment) was that it said that "*management have serious concerns over Mr Whittaker's intentions and cannot ignore that the actions could be considered*

to constitute the early stages of grooming" (emphasis added). However, in paragraph 166 of the Judgment, the Tribunal said that the report described the meeting as follows:

> **"166. … [The opinion that Mr Whittaker's contact with LK was "highly inappropriate"] was from a trainee social worker, which together with the comment made in the investigative report describing the meeting between Mr Whittaker and LK as "being in the early stages of grooming" must have influenced the disciplinary panel even if only on a subconscious level and it is not fair to Mr Whitaker." (Emphasis added)**

36. The first, and most obvious, point to note here is that the Tribunal has incorrectly quoted from the report. In doing so, it appears to have transmuted a conclusion in the report that the Claimant's conduct *could be* considered to constitute early stages of grooming to one where the conduct *was* in the early stages of grooming. Any conclusions that the Tribunal drew from the reference to grooming in the report, therefore, appear to have been based on an incorrect factual premise. Insofar as the investigative report concluded that the Claimant's conduct *could be* regarded as grooming, that is entirely consistent with what is set out in the guidance, which states that, "*Adults need to be aware however, that the giving of gifts can be misinterpreted by others as a gesture either to bribe or 'groom' a young person*".

37. The Tribunal's further conclusion, that this reference to grooming "must have influenced" the disciplinary panel, is not explained. The Tribunal made detailed findings at paragraphs 68 to 83 of the Reasons as to the disciplinary panel's reasons for the dismissal. These included the circumstances of the Claimant's meetings with LK and the fact that the Claimant had chosen to meet LK once again, just before the first scheduled disciplinary hearing, in direct contravention of restrictions placed upon him. There is nothing in the Tribunal's Judgment to suggest that those reasons were not the reasons for dismissal. In fact, the finding of unfair dismissal appears to be based on certain procedural defects which render the dismissal unfair. Moreover, the disciplinary panel's reasons for dismissal do not appear to refer to grooming at all. In those circumstances, it is not possible, in my judgment, to discern the factual basis on which the Tribunal concluded that

the disciplinary panel was influenced by the reference to grooming. Clearly the panel read the reference to grooming in the report, but it is a leap to go from that to being influenced by it in some inappropriate way, which is clearly the implication of the Tribunal's Judgment. Of course, even if there had been a reference to grooming in the disciplinary panel's decision, it is difficult to see why that, in itself, or even in conjunction with other findings made by the Tribunal, would lead to the conclusion that the treatment was on the grounds of the Claimant's sexuality. I shall return to this point when I consider comparators below.

38. The above analysis as to shortcomings in the analysis in relation to discrimination, is strictly by way of background. That is because this appeal is brought principally on the ground that the Tribunal erred in its approach to the hypothetical comparator. However, those background deficiencies - if I may call them that - are not irrelevant because they highlight the deficiencies in the analysis as to the hypothetical comparator.

39. The Tribunal identified two potential comparators, namely a heterosexual male teacher found alone with a male pupil and a heterosexual male teacher found alone with female pupil. The Tribunal said that on balance it preferred the latter. That preference is not explained, but, more significantly, the Tribunal does not appear to have ascribed to this hypothetical heterosexual comparator any of the attributes of the Claimant other than meeting the child alone. In particular, the Tribunal does not appear to have ensured that, at the very least, the attributes of the hypothetical comparator were identified having regard to the reasons for the Claimant's treatment. Thus, it is not clear whether the Tribunal's comparator had been the subject of a warning in 2002 for inappropriate contact with children, had been subject to clear guidelines which the employer regarded as operative, had given sweets to the child on more than one

occasion, and had decided to undertake pastoral work with LK without discussing it with any other teachers.

40. Mr Small submits that on a fair reading of the Judgment one can see that the Tribunal had in mind the other relevant circumstances, notwithstanding the fact that they are not mentioned at paragraphs 190 and 191, such as to render the comparator an appropriate one within the meaning of section 23. However, in my judgment, whilst it might be said that the purportedly pastoral basis for the contact was an attribute which the Tribunal had in mind, it would be overly generous to assume that the Tribunal had any of the other relevant attributes in mind. The failure, in particular, to refer to the giving of gifts or sweets, and to the fact that the Claimant was subject to a prior warning about similar conduct, seem to me to be material omissions rendering the Tribunal's hypothetical comparator inappropriate. One cannot infer from the mere reference to those circumstances in relation to the Claimant that the Tribunal also took those into account in constructing the hypothetical comparator. If that were the correct approach then the Tribunal, in constructing the hypothetical comparator, would need to do little more than refer to a hypothetical comparator without any details as to what that involved, leaving the reader of the Judgment to infer all the relevant attributes from the remainder of the Judgment. That, in my judgment, cannot be the correct approach.

41. This is also not a case where it can be said that, due to clear positive findings pointing to discrimination, the Tribunal's identification of a hypothetical comparator was unnecessary or otiose. The findings as to discrimination appear to be largely, if not entirely, based on the reference in the report to "grooming" and to the fact that LK shared a similar profile to JJ. Those findings do not necessarily lead to an inference that the school's treatment of the Claimant was on the grounds of his sexuality. It is difficult to see why a male heterosexual comparator, whose

conduct was also subject to similar references in an investigative report, would have been treated any differently by the Respondents.

42. Given that it is the mental processes of the decision-maker that are to be scrutinised, there is little in the Judgment to show that the Tribunal specifically addressed the motivations of the disciplinary or the appeal panels in reaching their decisions. The only findings as to discriminatory motivations were in relation to Mr Ingham and Mr Williams (see paragraphs 191 and 201). For reasons explained above, there does not appear to be any evidential basis for the conclusion that such motivation also operated on the minds of the relevant decision-makers. If a more appropriate comparator had been identified, then the conclusion as to whether or not the treatment of the Claimant by the actual decision-makers was on the grounds of his sexuality might well have been very different. It is certainly difficult, based on the present findings of fact, to see why an appropriate comparator would have been treated differently; although I would not go as far as Mr Mensah who submits that it is inconceivable that an appropriate comparator would not have been subject to disciplinary action.

43. For all these reasons, ground 6 of the appeal is upheld and the finding that there was discriminatory treatment on the grounds of sexuality is set aside.

44. Ground 7 is a short point. It relates more to the finding of unfair dismissal than discrimination. The concern is that the finding at paragraph 169 of the Reasons that "*until the claimant was suspended, there were no concerns about the claimant being with other children*" is one that is not supported by the evidence and/or is inconsistent with other evidence in the case. I have already referred above to the evidence in question. This involves the Claimant being subject to certain conditions, including that he was not to have one-to-one contact with any pupils,

including LK; that two full-time teaching assistants should be in the Claimant's classroom full-time; and that the senior leadership team were to remain extra vigilant at lunch and break times. It would appear that the Tribunal's conclusion that there were "no concerns" about the Claimant being with other children is inconsistent with those other findings, but it seems to me that this ground of appeal does not really advance matters.

Disposal

45. The decision in respect of ground 6 means that it is inevitable that this matter must be remitted to the Employment Tribunal to rehear the claims of direct discrimination on the grounds of sexual orientation. The question is whether it should be remitted to the same or to a differently constituted Tribunal. Mr Mensah submits that it should be to a differently constituted Tribunal. Mr Small submits that it would be disproportionate to remit to a fresh Tribunal because this Tribunal is required to deal with the remedy in respect of unfair dismissal in any case; and the Tribunal's task of having to tease out the relevant findings of fact in order to reconsider its conclusions on discrimination would be less onerous than for a fresh Tribunal which does not have all the background knowledge that this Tribunal does.

46. I have considered this matter quite carefully, and I bear in mind the principles established in the case of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 for determining whether to remit to the same or to a different Tribunal. The factors which are relevant in reaching that decision include: proportionality; the amount at stake; the passage of time; whether the decision was totally flawed or mishandled; and the fact that a decision should only be sent back to the same Tribunal if the Appeal Tribunal can be confident that, with guidance, the Tribunal would be prepared to take a fresh look at further matters and thus be willing to come to a different conclusion.

47. It is with considerable misgivings that I have decided that the matter has to be remitted to a differently constituted Tribunal. Whilst the decision as a whole cannot be said to be totally flawed - because the finding of unfair dismissal remains unchallenged - it is clear, in my judgment, that the conclusions in respect of discrimination on the grounds of sexual orientation were seriously flawed. Moreover, the findings of fact upon which the Tribunal relied in reaching its conclusions on discrimination were intertwined to a considerable extent with the findings of fact in respect of unfair dismissal. It seems to me that it would be a very difficult task for the Tribunal to have to go over all of its findings again and to separate out those findings of fact, and to make further findings of fact, if necessary, relevant to discrimination.

48. Whilst I have no doubts about the professionalism of the Tribunal, I am concerned that this Tribunal reached very firm conclusions, which were largely unsupported by evidence, as to Mr Ingham's and Mr Williams' motivation, and in particular the purported connection made by them between the Claimant being gay and being involved in grooming. In those circumstances, there is a real concern that the Tribunal has effectively made up its mind on that issue and that it may well, despite best intentions, be very difficult, if not impossible, for it to come to a different view.

49. In remitting the matter back to a differently constituted Tribunal, I make clear that: (a) the fresh Tribunal only has jurisdiction to consider the complaint of direct discrimination on the grounds of sexuality; and (b) that the fresh Tribunal can make any findings of fact which it considers necessary in order to determine that question.