Appeal No. UKEAT/0298/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 March 2019
Judgment handed down on 22 March 2019

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

THE GOVERNING BODY OF TYWYN PRIMARY SCHOOL — APPELLANT

MR M APLIN — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTOPHER HOWELLS (of Counsel) Instructed by: Neath Port Talbot County Borough Council Civic Centre Civic Square Port Talbot Neath Port Talbot SA13 1PJ
For the Respondent	MR ANDREW SUGARMAN (of Counsel) Instructed via Public Access Scheme

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

SEXUAL ORIENTATION DISCRIMINATION

The Claimant was a 42 year old primary school Head Teacher. He was openly gay. He met two 17 year old males on Grindr and the three of them had sex.

The Local Authority set up a Professional Abuse Strategy Meeting which concluded that no criminal offence had been committed and no child protection issue arose. The School nevertheless brought disciplinary proceedings. There were numerous procedural errors which amounted to a breach of the implied term of trust and confidence in the investigation and the disciplinary hearing. The panel of School Governors decided to dismiss the Claimant. He appealed against the decision, which had the legal effect of keeping his contract alive. There were further procedural errors in relation to the appeal and, before the appeal hearing, the Claimant resigned claiming constructive dismissal.

He brought proceedings in the ET claiming unfair dismissal and sexual orientation discrimination.

The ET found that he had affirmed the contract by bringing his appeal but that the continuing procedural errors in connection with the appeal entitled him to resign and that his claim of unfair constructive dismissal therefore succeeded. On the discrimination claim the ET found that the way he had been treated overall gave rise to a reversal of the burden of proof and that, in relation to the investigating officer, that burden was not satisfied and he had been subjected to sexual orientation discrimination, but that adequate explanations were provided in relation to the other parties involved, including the Local Authority lawyer and the Governors of the School.

The School appealed against the finding that the procedural errors in relation to the appeal amounted to a breach of the term of trust and confidence. The Claimant responded by saying

that, regardless of the merits of this argument, it was irrelevant because the ET had been wrong to find that the Claimant had affirmed the contract by bringing his internal appeal. The School's appeal was dismissed by the EAT on this basis for two reasons: (a) the ET were wrong to find that bringing the appeal gave rise to affirmation; rather it was a case of an employee giving his employer an opportunity to remedy the breach(es) of the implied term which arose from the investigation and disciplinary hearing and (b) in any event the School had expressly stated at an earlier hearing that they were not taking the affirmation point.

The School also appealed against the finding of discrimination on the basis that the ET were wrong to find that the burden of proof had been reversed. The EAT found that there were sufficient facts from which an inference of discrimination could be drawn and that the reverse onus was justified. The ET had found that the investigating officer had not given an adequate alternative explanation for his conduct and the finding of discrimination by him was accordingly upheld.

The Claimant cross-appealed on discrimination in relation to the Local Authority lawyer and the School Governors, maintaining that the ET had failed to take account of relevant evidence, had reached perverse conclusions and/or had failed to give adequate reasons for finding that there were adequate explanations for their conduct to satisfy the reverse burden of proof. The cross-appeal was allowed only in relation to the Governors; the ET's finding that they had "effectively abandoned their roles" and allowed their decisions to be taken by Local Authority officers "by proxy" was not consistent with other factual findings and in any event the ET should have asked itself why the Governors might have abandoned their roles and allowed their decisions to be taken "by proxy". The question whether the Governors had discriminated against the Claimant was remitted to the same ET.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal against a decision of an Employment Tribunal sitting in Cardiff (EJ Beard, Mr Charles and Mrs Humphries) sent out on 28 September 2017. After a five day hearing the ET decided that the Claimant, Mr Aplin, who was the Head Teacher of Tywyn Primary School and subject to disciplinary proceedings in 2015/16: (a) was unfairly constructively dismissed from his post and (b) was discriminated against by the investigating officer, Mr Gordon, because he was gay. The School's governing body appeals against those two decisions and Mr Aplin cross-appeals, saying that the discrimination also involved Mr Hodges, a lawyer with the Local Authority (the Neath Port Talbot Council), other local authority officers, and the governors of the School, and that it infected the whole disciplinary process.

Facts

2. After a period of acting up, Mr Aplin was appointed Head Teacher of the School with effect from 1 September 2015. At the time he was 42. He had been the Deputy Head since 2009 and a Teacher for 19 years. He was openly gay and the governors were fully aware of that.

3. In August 2015 he met two young men, referred to as A and B, through the "Grindr" app and, after two meetings, the three of them had sex together. A and B were both 17 although it was Mr Aplin's case that the app requires a user to certify he is over 18 and that he was led to believe that A and B were older than 17. The matter came to the notice of the police and the Local Authority's Social Services Department and a Professional Abuse Strategy Meeting

(PASM) was arranged for 28 August 2015, which was attended by Mr Latham, the Chairman of the School's governors. On 1 September 2015 Mr Aplin was suspended from duty by Mr Latham; he accepted before the ET that at that stage it was appropriate for him to be suspended.

4. A further PASM was held on 20 October 2015 and it was established that A and B had had full capacity to consent to sex, no criminal offence had been committed and no child protection issue arose. However, the PASM recommended that the School consider disciplinary action against Mr Aplin. Mr Gordon, who worked for the Local Authority, was appointed as Investigating Officer. His terms of reference, which were formulated by Mr Hodges (see: para 14.3 of the Judgment), were to consider whether Mr Aplin's "course of conduct" (a) brought the reputation of the School into disrepute, (b) impacted on his ability to undertake the role of Head Teacher and/or (c) demonstrated so gross an error of judgment as to undermine the School's confidence in him and, therefore, to call into question his continuation in the role.

5. Mr Gordon produced an investigation report which was heavily criticised by the ET for three main reasons: (a) for approaching the case on the basis that Mr Aplin was a potential danger to children (b) for drawing selectively on the PASM minutes and police material which were not made available to Mr Aplin (c) for failing, as required by the relevant guidance, to produce a report which was factual and objective, instead producing one that was laden with value judgments and conclusions which were hostile to Mr Aplin. Mr Latham and a fellow governor, Mr Crowley, discussed the report with Mr Gordon on 18 March 2016 and decided that the matter should proceed to a disciplinary hearing. The ET found that both Mr Latham and Mr Gordon based their approach to the case on the premise, which was not consistent with

the PASM conclusions or Mr Hodges's terms of reference, that Mr Aplin presented a child protection problem.

6. The School wrote to Mr Aplin on 24 March 2016 requiring him to attend a disciplinary hearing on 26 April 2016. The allegations of misconduct reflected Mr Hodges's terms of reference. Mr Aplin was warned that if found proved they could lead to termination of his employment on the grounds of gross misconduct. In spite of his requests, he was not supplied with the PASM minutes or the police material relied on by Mr Gordon; although there were difficulties about supplying these documents the ET found in effect that this was the fault of the Local Authority for which the School governing body was vicariously liable (see: para 19 of the Judgment).

7. The disciplinary hearing finally took place on 17 May 2016. The panel consisted of three governors, Mr O'Dwyer, Mrs M Evans and Mrs K Evans. Mr Hodges, the Local Authority lawyer, and Mrs Holt, an HR manager, attended to assist the panel. Mr Gordon presented the management case. Mr Aplin was assisted by a union representative. His position in essence, as disclosed by the minutes of the hearing, was that what he had done was lawful and part of his private life and that Mr Gordon's report and the management case were biased and homophobic.

8. Following a discussion involving the panel, Mr Hodges and Mrs Holt, the outcome of the hearing was announced in very brief terms (with fuller reasons to follow), which are recorded in the minutes at p176 of my bundle as follows:

> **"…We find that Mr Aplin's conduct, although not a breach of the criminal law, his perception of it and his inability to recognise any impact upon his role as Headteacher and the reputation of the school and himself as its figurehead, so call into question his judgment as to undermine the necessary trust and confidence in him and make it untenable for him to continue as Headteacher. Our decision is therefore that Mr Aplin's employment as Headteacher should be terminated with immediate effect…."**

When the decision was announced Mr Gordon reacted with visible relief. The decision was confirmed in a five-page letter dated 20 May 2016 which contained extensive reasons (see pp 177-181 of EAT bundle); the letter was signed by the Clerk to the Governing Body but was written by Mr Hodges, apparently without reference back to the panel.

9. The ET was highly critical of the disciplinary procedure for a number of reasons in addition to the unsatisfactory nature of the investigation report, including: (a) that by the time of the hearing Mr Aplin had still not been provided with the PASM minutes and the police material on which Mr Gordon had drawn; (b) that under the relevant policies Mr Gordon as the investigating officer should not have been involved in presenting the case and that he did so in a way which was "far from objective"; (c) that Mr Hodges improperly retired with the panel and that he alone, rather than the panel, was responsible for the decision " … at least in terms of detailed reasoning as set out in the outcome letter". Also, Mr Hodges accepted at the disciplinary hearing that Mr Gordon's report was not objective and the evidence was that he told the panel to ignore those parts which lacked objectivity; however, before the ET, Mr O'Dwyer was apparently unable to distinguish between the parts of the report which were objective reporting of evidence and those that involved subjective conclusions by Mr Gordon and the ET therefore found that the panel had not been able to exclude the subjective elements from their considerations. Further, Mr Aplin's contract could not be terminated until after he had had an opportunity to appeal, so that he should not have been dismissed with immediate effect.

10. Mr Aplin did appeal by letter dated 25 May 2016, raising numerous grounds, including the bias and unfairness of the investigation report, the failure to disclose the PASM and police documents, and allegations that the hearing was driven by homophobic beliefs and that the

decision had wrongly involved child protection issues which were not relevant. Everyone appears to have proceeded on the basis that this appeal resurrected Mr Aplin's contract of employment.

11. A decision was made by Mr Hodges that the appeal should take the form of a complete re-hearing: this was clearly a sensible decision, as the ET found, although Mr Aplin was unhappy with it. He was also unhappy about the continuing delay in disclosure of the PASM minutes and the police documents, about the fact that management decided at short notice to instruct a Barrister to present their case which in part caused an adjournment of a hearing arranged for 28 June 2016, about their failure to tell him until 29 July 2016 that that he was entitled to legal representation, and about a further change of the date of the appeal hearing from 8 to 23 September 2016 which was made without any consultation with him.

12. On 27 August 2016 Mr Aplin wrote his letter of resignation; he complained that there had been a totally inept and unfair investigation which had influenced the disciplinary panel and that his grounds of appeal had been ignored. He said that he was now intent on pursuing claims before the ET.

Appeal on constructive dismissal

13. The ET found that the unsatisfactory investigation report and the other failings in the disciplinary procedure involved breaches of the implied term of trust and confidence in Mr Aplin's contract of employment but that his appeal had the effect of affirming the contract. However, they also found that the way the appeal was handled, seen against the background of the earlier breaches, amounted to further breach(es) of the implied term which entitled him to resign and claim constructive dismissal.

14. The School's first main ground of appeal was that the ET was wrong to find that the post-affirmation conduct relating to the appeal involved any breach of the implied term. However, Mr Howells accepted that this ground of appeal must be dependent on the ET's finding of affirmation being correct, because there could be no challenge to the ET's findings that the School's conduct leading up to the dismissal amounted to breach(es) of the implied term and that Mr Aplin's resignation was at least in part a response to that conduct. He therefore conceded that if Mr Sugarman was correct in his contention that the ET was wrong to find that there had been an affirmation, this part of the School's appeal must fail.

15. I confess that at one stage I had thought that the ET must have been correct to find that Mr Aplin affirmed the contract by appealing and regarding himself as still employed while the appeal proceeded. However, although he did not formally concede the point, Mr Howells did not really argue in favour of that finding and, on reflection, I think that Mr Sugarman must be right to say that, in the context of this employment relationship, the bringing of the appeal did not amount to an affirmation. Rather, it was a case of Mr Aplin making clear his objections to the way he had been treated and giving the School an opportunity to remedy the breach(es) of the implied term which arose from the disciplinary procedure. In any event, it appears that the School had expressly stated at a Preliminary Hearing that they "… took no point with regard to … affirmation" (see page 86 of the bundle at para 8.3). In those circumstances, I am satisfied that the ET was wrong to find that there had been an affirmation of the contract and the School's appeal on constructive dismissal therefore fails.

16. There was another ground of appeal in relation to constructive dismissal which was rightly abandoned in Mr Howells's skeleton argument. It was said that the ET ought to have considered (as it was invited to do) whether Mr Aplin's dismissal was "within the range of

reasonable responses" in the light of his conduct. This was clearly misconceived: in a case of constructive dismissal it is the employer's repudiatory conduct (i.e. here their failings in relation to procedure) which have to be justified under section 98 of the **Employment Rights Act 1996**, rather than a putative decision by the employer to dismiss. However, it is noteworthy that in dealing with this point (at para 40.5.16 in the Judgment) the ET said (a) that it was reasonable for the School to consider that Mr Aplin's actions "were significant failings in someone designated as … Head teacher" but (b) that they could not say that dismissal was "within the range of reasonable responses" given their concerns about the preparation of Mr Gordon's report and that the charges brought against Mr Aplin did not reflect what Mr Gordon and Mr Latham had in mind when writing the report and deciding to proceed to a disciplinary hearing respectively (they being concerned about child protection) and (c) that an argument that Mr Aplin would have been dismissed in any event was more appropriately addressed at a remedy hearing.

ET's decision on discrimination

17. It was Mr Aplin's case that the entire disciplinary process (including the appeal) and the decisions reached during the process were influenced by his sexual orientation and therefore amounted to direct discrimination under section 13 of the **Equality Act 2010** (see paragraph 5.2 of the Judgment). It is worth setting out the terms of section 13(1) at this stage:

> **"A person (A) discriminates against another (B) if, because of [his sexual orientation], A treats B less favourably than A treats or would treat others."**

The ET's conclusions on this part of the claim are at para 40.6 of the Judgment (see pages 27 to 31 of the bundle).

18. In considering whether there had been discrimination of the basis of sexual orientation, the ET constructed two hypothetical heterosexual comparators in Mr Aplin's position, one being a man who had had sex with two 17 year old females and the other a woman who had had sex with two 17 year old males (see para 40.6.3.3.7). The ET then decided at para 40.6.4 that this was a case where the "reverse burden of proof" applied; in summary this was because: (a) on "first examination" there was reason to think that sexuality "underpinned" the treatment of Mr Aplin; (b) there were serious failings in the way he was treated although the School had the benefit of professional advice; (c) the failings were so substantial and wide ranging as to allow an inference to be drawn that there was a "particular reason" for them which would not have applied to the hypothetical comparators in Mr Aplin's position; (d) without explanation it was possible to infer that the less favourable treatment received by Mr Aplin was based on his sexuality. The ET then considered separately the positions of Mr Gordon, Mr Hodges, the other Local Authority Officers involved and the Governors.

19. In relation to Mr Gordon, the ET found (at paragraph 40.6.9) that he was an experienced officer who understood his brief and was aware that he was only meant to find facts and not express conclusions, but that he had reached adverse conclusions which he expressed in a forceful way and he had allowed himself to have a personal investment in the outcome of the process; overall, he had adopted a biased and irrational approach towards Mr Aplin. However, before the ET he was not able to recognise any bias in his approach or offer any explanation for it. In those circumstances the ET were able to conclude that the (reverse) burden of proof had not been satisfied in relation to Mr Gordon (see: paragraph 40.6.9.10) and (it follows) that he treated Mr Aplin less favourably than he would have treated a hypothetical comparator because of his sexual orientation; the claim of direct discrimination against the School's governing body

(which the ET found was vicariously liable for Mr Gordon's treatment: see para 40.3) was therefore well founded.

20. The ET found, however, that Mr Hodges's actions in relation to the disciplinary and appeal processes were not "motivated by [Mr Aplin's] sexual orientation and that his conduct is explained by his lack of experience in dealing with teachers" (see paragraph 40.6.5). The ET went on to find that he was asked to produce charges in line with the PASM recommendation and produced a "rational set of complaints based on the" (sic: the sentence ends in the middle)". He initially approached the case as one where Mr Aplin was a regular employee of the Local Authority (rather than a Teacher to whom special procedures apply). When he became aware of special procedures he reacted by trying to comply with them. His continuing failings were explicable as attempts to ensure that the substantive matters were dealt with and "… a lack of vision as to what could be done about …" obtaining the PASM minutes.

21. As for the other Local Education Authority Officers involved in the process the ET found that they were trying to reconcile the process "… with the attitude of the PASM officer carrying out her separate function" (see para 40.6.6) and, in any event, most decisions were taken by Mr Hodges.

22. As for the Governors, the ET state that they effectively abdicated their roles and decisions were taken by officers so that their "personal motivation" was not raised; in reality they followed the decisions of Mr Hodges which were not discriminatory (see: para 40.6.7).

23. The ET therefore found discrimination only on the part of Mr Gordon. Their Judgment simply records that the "claim of sexual orientation discrimination is well founded" and the consequences of that finding are left over to the Remedy Hearing.

The School's appeal on discrimination

24. The School challenges the finding that Mr Gordon discriminated against Mr Aplin on the basis that the ET applied the wrong legal test in, or there was no evidence to justify, "shifting the burden of proof" as the ET did at para 40.6.4 of the Judgment.

25. The relevant provision in relation to shifting the burden of proof is section 136 of the Equality Act 2010 which says this:

> **"(1). This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2). If there are facts from which the [employment tribunal] 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."**

I was also referred to the familiar and extensive case law on the drawing of inferences of discrimination and the proper application of the statutory predecessors of section 136, in particular **Igen Ltd v Wong** [2005] ICR 931 and the guidance annexed to it.

26. I accept that para 40.6.4 of the Judgment could probably have been much better expressed but in my view the thrust of it is clear and it provides a sufficient basis for the ET's decision that the burden of proof had shifted on the question of whether Mr Aplin was treated unfavourably because of his sexual orientation. What the ET do in para 40.6.4, as it seems to me, is first to recognise that the background to the whole case was intimately connected with Mr Aplin's sexuality; they then judge that the procedural failures by the School were so egregious that the inference could be drawn that there was more to it than simply the fact that

A he had had lawful sex with two 17 year olds; and they therefore considered that it would be possible, in the absence of any other explanation, properly to infer that he had been discriminated against because of his sexual orientation. That seems to me a perfectly acceptable line of reasoning.

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27. Mr Howells suggested that it was not enough to say that it was "possible" to draw such an inference and that Mr Aplin had to prove on the balance of probabilities that there had been discrimination before the burden of proof could shift. I am afraid that is just not correct: one set of facts may give rise to various inferences which a Tribunal could properly draw; what section 136 says in effect is that if one such possible inference is that there was discrimination, that inference must be drawn unless the contrary is proved.

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28. Mr Howells also referred to passages in the authorities which make it clear (a) that the bare fact of a difference in status and difference in treatment without more is not sufficient to allow such an inference to be drawn and (b) that unreasonable treatment in itself also cannot give rise to an inference of discrimination. But in this case Mr Aplin was not relying on a difference in status and a difference in treatment at all, for the obvious reason there was almost inevitably no actual comparator for him to rely on. And the ET did not simply rely on unreasonable treatment: they recognised that Mr Aplin's sexual orientation was right at the centre of the case and made a judgment that the failings in the procedure were ***so*** unreasonable that it was possible to infer that there must have been more to it than simply that he had sex with two 17 year olds.

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29. Mr Howells also drew my attention to Mr Gordon's evidence recorded at para 14.4 that he understood the "course of conduct" by Mr Aplin that he was concerned with in his

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investigation was that Mr Aplin had had sex with "two young people", rather than that he had had sex with two young males, and to the finding of the ET at para 15.5.2 to the effect that they did not consider him to be dishonest. But the ET's finding at para 40.6.9 that Mr Gordon was an experienced officer and understood his brief but that he had an "unconscious bias" against Mr Aplin which he was unable to recognise or explain is entirely consistent with his evidence recorded at para 14.4 and to the finding that he was not dishonest.

30. I therefore reject the School's appeal against the ET's finding of discrimination based on Mr Gordon's approach to the investigation and the disciplinary hearing.

Mr Aplin's cross-appeal on discrimination

31. Mr Aplin cross-appeals against the ET's findings that there were adequate non-discriminatory explanations for the conduct of Mr Hodges, the other Local Authority Officers and the School's Governors, on the grounds that the ET failed to apply the correct test, failed to take account of relevant evidence, reached perverse findings and/or failed to give adequate reasons. Mr Sugarman drew my attention to relevant case law which emphasises (a) that a Tribunal would normally expect "cogent evidence" to discharge the reverse burden of proof and (b) that a defence of "unreasonable [but] not discriminatory" unfair treatment in a case where only the Claimant has been treated unfairly should be examined with "particular scrutiny".

Mr Hodges

32. Mr Sugarman makes some valid criticisms of the ET's Reasons relating to Mr Hodges at para 40.6.5. He is right to say that reference to Mr Hodges's actions not being "motivated" by Mr Aplin's sexual orientation was not necessarily sufficient to negate a finding of discrimination, which could have been based on unconscious assumptions. He is right to say

A that any "lack of experience" in dealing with teachers did not, on analysis and bearing in mind that Mr Hodges was an experienced lawyer with access to all the necessary material, provide an entirely adequate explanation for the way he dealt with matters. The thrust of Mr Sugarman's remaining points on Mr Hodges was really that, as a Local Authority lawyer, he should have done far more to see that the correct procedure was followed so that Mr Aplin was given a fair hearing and that there was no proper explanation for that failure.

C 33. Again, it seems to me that para 40.6.5 could have been much better expressed. However, giving it a fair reading, I think what the ET are saying is that they accepted that Mr Hodges was doing his best to deal properly with the situation with which he was presented but D that he lacked the specific experience, the imagination and the confidence to do so effectively. They found that he had drawn up charges that were rational (and, I think it must follow, non-discriminatory, though it is unfortunate that para 40.6.5.1 appears to end in mid-sentence). And, although they found that he alone had been responsible for drawing up the reasons for the E dismissal decision as set out in the letter of 20 May 2016, I think it is implicit in their findings that they considered that those reasons were also rational. In those circumstances it seems to me that the ET's finding that there were valid, non-discriminatory, explanations for his F approach and his decisions, is legally sound.

34. Mr Sugarman also relied on what he described as "a key piece of evidence" relating to G Mr Hodges which the ET do not refer to in this context at all: after Mr Aplin's resignation Mr Hodges wrote to the Disclosure and Barring Service on behalf of the Local Authority on 8 September 2016 seeking guidance as to whether they were required to notify what had H happened and in the course of the letter he stated that the PASM " … had concluded in the light of the vulnerability of the children (which they remained in law), this amounted to abuse …". I

do not think that this statement has as much significance as Mr Sugarman seeks to give it. It must be seen in the context of the uncertainty about what the PASM were finding (see: para 12.2 of the Judgment) and the fact that he was expressly seeking assistance from the DBS. In any event, it was not inconsistent with a finding that he was concerned with the age of the people Mr Aplin had sex with and not their gender.

Other Local Authority Officers

35. Very little is said in the Judgment about other Local Authority Officers involved in the process, except in effect that they were doing their best and acting on Mr Hodges's advice (see: para 40.6.7). It does not seem to me that there is any basis for challenging the conclusion that they were not discriminating against Mr Aplin because he was gay.

The Governors

36. The ET's decision in relation to the Governors was set out very briefly at para 40.6.7 of the Judgment. They found that the Governors had not been discriminatory because they "effectively abdicated their roles" and allowed their decisions to be taken "by proxy" by the Local Authority officers, Mr Hodges in particular. Thus, whatever the Governors' personal beliefs, those beliefs did not influence the decisions that were made.

37. It is not clear whether what is said at para 40.6.7 of the Judgment is intended to include Mr Latham (or indeed Mr Crowley), who made the decision to proceed to a disciplinary hearing. Given that they made this decision following a discussion with Mr Gordon (presumably on the basis of his investigation report), and given the ET's findings that Mr Latham wrongly based his approach on the premise that Mr Aplin represented a child protection problem and that he (Latham) had already decided that Mr Aplin was guilty of gross

misconduct (see: paras 16.3 and 17 of the Judgment) and that no detailed reasoning for their decision was recorded, it seems to me that the ET ought at least to have given express consideration to the question whether there was discrimination by Mr Latham and Mr Crowley in making this decision.

38. As to the Governors on the disciplinary panel, Mr Sugarman points out that in fact the ET found that they made a number of decisions which were adverse to Mr Aplin: they were not prepared to adjourn the hearing to allow him to see the PASM minutes and the police material so as to prepare his defence properly (see: para 20.8 and 20.9); they were not concerned about Mr Aplin's complaint that Mr Gordon should not be presenting the management case (see para 20.9); and they decided they would be able to ignore the subjective parts of Mr Gordon's report although the ET found that Mr O'Dwyer was not in fact able to distinguish between subjective and objective elements in the report when asked about it at the ET hearing (see: para 20.10 to 20.12). Further, as I read the ET's Reasons, they found that the panel did make the decision that Mr Aplin should be dismissed but, perhaps significantly in this context, that they were left with "no real basis for understanding how the decision was rationalised" (see: para 20.7.7). It may also have been significant in this context that Mr O'Dwyer's evidence that the Governors took the decision to dismiss in the absence of Mr Hodges and Mrs Holt was apparently rejected by the ET (see: para 20.7.4).

39. Further, in so far as the panel members did abdicate their roles, I accept the submission that the ET ought at least to have considered why they might have done so, a point to which Mr Howells did not really have an answer.

40. Looking at all these points, I think Mr Sugarman is right to say that the ET did not properly scrutinise the position of the Governors or take account of all the relevant evidence or give sufficient reasons for saying that they had discharged the burden of proof in relation to discrimination. I therefore consider that Mr Aplin's cross-appeal should be allowed in so far as it relates to the Governors.

Conclusion and disposal

41. For all those reasons, I propose to dismiss the School's appeal and to allow Mr Aplin's cross-appeal, but only to the extent that it relates to the School Governors.

42. Mr Sugarman suggested that if I allowed the cross-appeal it would be open to me to decide that Mr Aplin had been subject to discrimination beyond that already found by the ET. Notwithstanding my rejection of the appeal in relation to the shifting of the burden of proof I do not think it would be proper for me to usurp the function of the ET in deciding the issue of discrimination in relation to the School Governors: whatever the burden of proof, it is an issue which involves findings of fact (albeit to a large extent based on inference): findings of fact are matters for the ET to make based on the evidence that they have heard, not matters for a judge in the EAT. The issue will therefore have to be remitted to the ET.

43. I have considered whether the matter should be remitted to the existing ET or to a fresh one. I think the case should remain with the existing ET for the following reasons:

(1) Although I have criticised the clarity of the ET's reasoning in parts and have allowed the cross-appeal to an extent, this is not a case of a totally flawed decision or anything approaching that;

(2) The issue which needs to be remitted, though it may have great significance for the individuals involved, is a relatively minor one in the context of the case as a whole; indeed, I think Mr Sugarman accepted that, even if he was totally successful on the cross-appeal, the only effect in terms of remedies was likely to be an increase in Mr Aplin's compensation for injury to feelings;

(3) The case relates to events which took place three years ago and it has no doubt involved a great deal of expense on both sides already; a remittal to a fresh Tribunal would be very likely to involve substantially more expense and delay than a remittal to the existing Tribunal;

(4) I have no reason to doubt that the existing ET will be able to address the question of discrimination by the Governors with an open mind on the basis of the evidence they have heard already and such further representations as they see fit in the light of this Judgment, and then to decide the possibly difficult issues which arise on remedies promptly and fairly.

44. I therefore make the following orders and directions:

(1) The School's appeal is dismissed;

(2) Mr Aplin's cross-appeal is allowed only in relation to the ET's finding that there was no direct discrimination based on Mr Aplin's sexual orientation by the School Governors but is otherwise dismissed;

(3) The issue whether there was such discrimination is remitted to be re-considered by the same ET;

(4) No further evidence shall be received in relation to that issue but the parties may make further representations in the light of the EAT's Judgment.

45. The parties were provided with a copy of these Reasons in draft before handing down in the normal way and had no objection to the contents of paragraphs 43 and 44 above.