EMPLOYMENT TRIBUNALS

Claimant: Mr Robert Headley

Respondents: (1) London Borough of Newham
(2) Rokeby School
(3) Newham Community Services Trust

Heard at: East London Hearing Centre (by Cloud Video Platform)

Before: Employment Judge John Crosfill
Members: Ms S Harwood
Mrs B K Saund

On: 27, 28, 29 & 30 April and 8 June (In chambers) 2021

Representation

Claimant: In person

Respondent: Sinaed King of Counsel instructed by One Source

JUDGMENT

1. **The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 whether relying on Section 98 or Section 103A of that act is not well founded and is dismissed.**

2. **The Claimant's claim of direct discrimination relying on the protected characteristic of religion or belief brought under sections 13, 39 and 120 of the Equality Act 2010 is dismissed.**

3. **The Claimant's claim for notice pay brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 is dismissed.**

REASONS

1. The Claimant is a teacher who at the times we are concerned with taught secondary school pupils subjects which fell within the broad scope of Design and Technology. He commenced work at Rokeby School in September 2008. The Claimant is a Christian who, in addition to orthodox Christian beliefs, believes that the 'chosen people' were from Africa and, as a consequence of the slave trade now are found in the African Diaspora.

2. In 2019 the Claimant disagreed with his line managers about their approach to the grades he had given his students. He raised a complaint about that and other matters of examination practice initially internally and subsequently externally. At much the same time members of the schools staff viewed videos that the Claimant had posted on YouTube in which he talked about religion. A complaint was made that the content of those videos was discriminatory and contrary to the school's values. A disciplinary process followed during which the Claimant was summarily dismissed for gross misconduct.

3. The Claimant instigated the early conciliation process with ACAS in respect of all three Respondents and on 23 December 2019 he presented his ET1 in which he has made claims that his dismissal was automatically unfair as his complaints about the examination practices amounted to protected disclosures for the purposes of sections 43A and 103A of the Employment Rights Act 1996 or, alternatively, that his dismissal was unfair on ordinary principles. The Claimant is also brought a claim that his dismissal was an act of unlawful direct discrimination because of his religious beliefs. Finally, the Claimant claims notice pay and says that his summary dismissal was an unlawful breach of contract.

<u>Relevant procedural history and the hearing</u>

4. On 4 May 2020 there was a closed preliminary hearing that took place before Employment Judge Lewis. For reasons which are immaterial the Claimant was unable to attend. The Respondents had prepared a draft list of issues but thought that some further information was necessary in order that that list could be finalised. Employment Judge Lewis ordered the Claimant to give further information about his case. In particular she directed that he should:

    4.1. clarify the basis upon which he says he made protected disclosures

    4.2. identify the religion and/or particular belief or set of beliefs that he relied upon; and

    4.3. identify whether he was bringing claims of direct or indirect discrimination and, if so, how he put his case.

5. On 15 June 2020 the Claimant provided the further better particulars ordered by Employment Judge Lewis together with a document setting out his account of his religious beliefs. That document is attached to this judgment as Schedule 2.

6. The parties then sent to the Tribunal a list of issues on 6 July 2020 which was understood to have been agreed.

7. The final hearing had been listed as an in-person hearing but, due to the Covid 19 pandemic, was converted into a CVP hearing. The Claimant corresponded with the Tribunal in advance of the hearing stating that he would have real difficulties conducting the hearing via CVP from his own home. The Tribunal offered the Claimant the possibility of attending at its premises. The Claimant agreed to this. During the hearing the Claimant attended in one of the hearing rooms in which he was provided with a large screen. He was able to attend with his family and/or supporters who were able to observe the proceedings. The Claimant had his own set of documents in addition to the agreed trial bundle which he was less familiar with. The Claimant was able to use all of the available desk space to spread out his documents in order that he could find any document he was looking for.

8. At the outset of the hearing we first dealt with the fact that one of the allocated members had a close connection with the human resources organisation that had provided advice to the Respondents. We informed the parties of this and both parties indicated they were uncomfortable with this close connection (as was the member himself). Rather than examine whether the test for recusal was met we agreed to find out whether another member was available. That prove to be a possibility and the panel that heard the case is that named above.

9. We then turned to a discussion of the issues. The Respondent was concerned by recent correspondence from the Claimant that he was seeking to introduce claims that went beyond the agreed list of issues found within the bundle. It was suggested that in addition to claims of direct discrimination the Claimant was now seeking to introduce claims of indirect discrimination and harassment. When the Employment Judge explored that with the Claimant he indicated that he was not seeking to introduce any such additional claims under the Equality Act 2010. His sole claim under the equality act was that he was dismissed for his religious beliefs. He did however go on to say that he did not accept that the list of issues fully encapsulated his protected disclosures. After hearing representations the parties we decided that the Claimant should be permitted to argue that he reasonably believed that his references to regrading made in his email of 22 May 2019 (his first protected disclosure) tended to show that the Respondent was in breach of a legal obligation namely the examination standards imposed by the qualification body.

10. The list of issues that had been agreed between the parties is set out as

Schedule 1 to this judgment and reasons. That list of issues broadly speaking reflected the manner in which each party put its case. Where we have had to depart from the precise wording of that list of issues we have identified where we have done so and why.

11. Having resolved any dispute about the list of issues we proceeded to read the witness statements and documents in the absence of the parties for the remaining part of the first day of the hearing. We had agreed before breaking off for reading that the Respondents would call its evidence first and the Claimant was told the order in which the Respondents intended to call their witnesses.

12. We then heard from the following witnesses:

    12.1. Emma Hobbs, one of the Deputy Headteacher's at the school and the person who spoke to the Claimant about his YouTube videos in October 2018 and thereafter the person who took the decisions which resulted in the remarking of work of students taught by the Claimant.

    12.2. Jo Doyle, the other Deputy Head teacher at the school and the person who spoke to the Claimant about whether he was teaching flat earth theory and thereafter the person that complained to Charlotte Robinson about the content of videos placed on YouTube by the Claimant.

    12.3. Charlotte Robinson, the Headteacher and the person who commissioned an investigation into whether the content of the videos that the Claimant had placed on YouTube infringed any of the School's policies or standards. Charlotte Robinson was also responsible for commissioning an investigation into the allegations made by the Claimant that there had been breaches of the standards set by the examination board.

    12.4. Sarah Jacobs, a school Governor and by profession a former head teacher and Director of education. She was the person who sat as part of a disciplinary panel of two Governors that took the decision that the Claimant should be summarily dismissed from his employment.

    12.5. Michael Fenn, a school Governor, and by profession a commercial litigation solicitor. He sat on a panel of three Governors who heard the appeal brought by the Claimant against his dismissal.

    12.6. The Claimant then gave evidence on his own behalf.

13. The Claimant's evidence continued just after lunch on the fourth day of the hearing. Each party then made submissions. On behalf of the Respondents Ms King had prepared written submissions and had provided a number of authorities. The Claimant made oral submissions

in support of his case. We shall not set out the entirety of the parties submissions but took them into account in reaching the decisions set out below. We have dealt with the parts of the submissions that seem to us to be the most important within our discussions and conclusions.

Findings of Fact

14. Rokeby School ('the school') is an all-boys secondary school maintained by the First Respondent and 'federated' to the Third Respondent. It's pupils are drawn from the local community and come from a wide range of backgrounds and cultures. The school promotes its values as *being 'Respect, Success, Passion for Learning, Personal Challenge and Harmony'*. The school has been affiliated with the campaigning organisation Stonewall in an effort to combat intolerance of homosexuality. In common with many other schools in Newham there are ongoing concerns about the risk of radicalisation and the school works with 'Prevent' in order to address this. We find that there was a strong emphasis on inclusivity and tolerance which was very much part of the culture of the school and the image that it wished to project.

15. The Claimant started work at the school in September 2008 as a teacher of Design and Technology. He was latterly promoted to the Head of Graphic Products which is a position he held until his dismissal. In his time at the school the Claimant was never given any formal disciplinary warning in relation to any aspect of his conduct.

16. The Claimant was asked to agree and sign a number of policies. One policy material to the present claim was the ICT Guidelines and Acceptable Use agreement. That policy was primarily focused on the use of the school's IT systems but its terms went beyond that. The policy includes a statement that: *'I will ensure that my online activity, both in school and outside school will not bring my professional role into disrepute'*.

17. The School has a disciplinary policy which includes the following disciplinary rules (the final three being examples of gross misconduct):

    17.1. At paragraph 2.13 – *'Employees should ensure at all times, and particularly in any dealings with the public, that their words, appearances and actions do not bring the relevant body into disrepute'* .

    17.2. At paragraph 2.12.11 - *Serious or persistent acts of discrimination against employees, clients or members of the public, on grounds of race, religion, gender, marital status, disability, sexual orientation, age, or any other form of discrimination*.

    17.3. At paragraph 2.16.12 - *Serious or persistent failure to comply with the relevant body's equal opportunity policy*.

    17.4. At 2.17.12 - *Use of the internet that seriously undermines confidence and trust in an employee's suitability to perform their work-related tasks and/or is likely to cause a reasonable person to question an employee's suitability to hold their position of employment. For example, regularly*

viewing, disseminating, uploading or downloading child pornographic content.

18. The Claimant's witness statement included a suggestion that he had been unfairly subjected to a capability process in 2016. We find this is of marginal relevance to the issues that we have to determine. It is sufficient to say that, in 2016 Emma Hobbs was appointed as a Deputy Head Teacher. It appears that she initially commenced some form of formal performance management process on 5 October 2016 but on 12 October 2016, following discussions with the Claimant's trade union, it was agreed to follow a different process under Section 9 of the Appraisal Policy. It appears that this process involved regular meetings and mentoring. In minutes of those meetings it is suggested that the aim of the policy was to provide support and guidance. The minutes of the first meeting which took place on 4 November 2016 suggest that the schools concerns arose out of the exam results in the previous year and the level of progress made by students. After a series of meetings, on 15 March 2017 Emma Hobbs wrote to the Claimant informing him that he had now reached the required standards performance and that no further action would be taken. Emma Hobbs acknowledges in her witness statement that the fact that she had been responsible for this process soured her relationship with the Claimant. Equally, in the minutes of the final meeting the Claimant is recorded as saying that he would be unable to forget this experience. The Claimant regards the outcome of this process as him being 'vindicated'.

19. Two other senior members of the Design and Technology department left the school at about that time. We find that the Claimant believes that those 2 individuals were unfairly driven from their posts and that this added to his view that there was some agenda to dismiss him. With the loss to the Department of 2 teachers the Claimant took on additional responsibility. In August 2018 the Claimant's two examination classes achieved some of the best marks that had been obtained to date and the first ever A-Star. The Claimant was congratulated by both Charlotte Robinson and Emma Hobbs.

20. In 2013 the Claimant wrote a book entitled 'Scattered not Lost'. The central premise of that book is that the true 'Children of Israel' were not the Jewish people but were black Africans many of whom were then enslaved forming the Black Diaspora throughout the world. Until the events which led to the Claimant's dismissal the fact that he had published this work was not raised as an issue by the school. There is no evidence that any of the senior leadership team ever read the book for themselves.

21. From about the same time as he published his book the Claimant began to make videos and posted them on YouTube. In around October 2018 the school had a spider infestation and no pupils were in school. The Claimant made some videos in his classroom where he could be seen wearing the school logo sitting in front of a noticeboard which included pictures of staff members. A member of the school staff informed Emma Hobbs about these videos and she watched 3 or 4 of them and dipped into several others. She did consider that some of the content of the videos was at odds with the values of the school but her focus was principally on the safeguarding issues. She was concerned about any

filming on the school premises. However, she was also concerned about any identification of the school with the Claimant's personal views.

22. Emma Hobbs telephoned the Claimant and took a note of the conversation. Emma Hobbs is recorded as saying that she had no objection to the Claimant holding the views that he did, but that filming the videos in the school was unacceptable. She is also recorded as saying that the school must deliver a range and breadth of different religions and thoughts and could not be seen to be supporting the views of any individual or promoting a specific religious belief. The note records Emma Hobbs telling the Claimant that no more videos were to be made on school premises and that the Claimant should not wear anything identifiable with the school. The Claimant is recorded as describing Emma Hobbs stance as 'interesting' and suggesting that he might take legal advice. He is recorded as saying that he had a 'big' following on YouTube. He suggested that his videos had already been shared across other social media sites. We are satisfied that that note was an accurate reflection of what had been discussed. It is not a formal disciplinary warning but it did put the Claimant on notice that he should not make any more videos at school and he was reminded about the school's ethos of inclusivity. The Claimant took down all of the videos which were filmed on the school's premises and/or which displayed the logo of the school. Emma Hobbs took no further action other than to make a note and to ensure that Charlotte Robinson was aware of the situation.

23. In 2018 the Claimant applied for the role of Head of Department but was unsuccessful in obtaining that role. Mosh Laher was appointed and became the Claimants immediate line manager. Included in the bundle were Line Management Agendas for the academic year 2018-2019. Those documents disclosed that the relationship between the Claimant and Mosh Laher was not always straightforward. The notes on the documents suggest that Mosh Laher was concerned that Claimant is not following his instructions. One particular concern that is noted during the early part of 2019 is the Claimant referring to 'flat earth theory' with students.

24. The suggestion that the Claimant was promoting flat earth theory students was referred to Jo Doyle after it was raised by students during a 'Student Voice' which we understand is a forum the students to raise any issues. On 10 May 2019 Jo Doyle met with the Claimant to ask him whether he had been promoting flat earth theory. In preparation for that meeting Jo Doyle googled the Claimant's name together with the phrase flat earth theory. We find that this was a step taken to investigate whether the Claimant held the views he was alleged to have shared. Jo Doyle did find some videos that the Claimant had placed on YouTube but at that stage did not view them in any depth. When Jo Doyle met with the Claimant he assured her that any reference he had made to flat earth theory was a reference to perspectives, vanishing point and horizon relevant to the technology curriculum. The Claimant agreed that he would teach the same curriculum model as followed in science and geography that the earth was a sphere with a core, gravity and crust. In the course of his evidence in the tribunal the Claimant was in our view somewhat evasive when asked whether he believed the earth the flat he simply acknowledged that the weight of the scientific evidence pointed against that conclusion. We have not considered it

necessary to make any findings of fact as to whether Claimant actually believes the earth to be flat or that he discussed such thoughts with any student. It is sufficient to say that there was some evidence which would have caused the school to be reasonably concerned that that was the case. Jo Doyle no further action at that stage.

25. In the academic year 2018-2019 both the Claimant and Mosh Laher taught classes that were sitting exams set by AQA. The school employed a system of internal moderation to ensure that classes taught by different teachers were given consistent marks. In the first instance each class teacher was expected to mark the work of the students they had taught. The marks would then be compared to ensure the approach to marketing was consistent. Emma Hobbs told us in her witness statement and we accept that the first moderation meeting took place on 15 March 2019. During that meeting Mosh Laher raise concerns that there was a lack of work available from the Claimant's class.

26. A further meeting was set 26 April 2019 but was delayed because the Claimant was not ready. The second meeting was then reorganised for 3 May 2019. We were provided with the minutes of that meeting. It was not disputed that the Claimant had awarded his students consistently higher marks than Mosh Laher. The focus of the discussions was on the written work rather than the practical products produced by the students. Emma Hobbs sent an email to all of the staff members who had attended that meeting on 7 May 2019. She expressed her concerns about information available to allow an effective moderation to take place. Whilst there were some criticisms of Mosh Laher there were also criticisms of the Claimant. In particular that there were a number of gaps in the tracker documentation for student submissions and no final grade given.

27. The Claimant strongly objected to Emma Hobbs taking any part in the moderation process. His first question of her in cross examination was to ask whether she had any experience teaching Design and Technology. She readily accepted that she did not. However what she told us, and what we accept, is that she had sufficient experience and skills to oversee the moderation process. Her complaint about some of the marks given by the Claimant to his students was that the marking sheet did not record sufficient evidence to justify the scores that were given. We accept that it is not necessary for Emma Hobbs to be a subject expert herself in order to be able to give that sort of feedback.

28. A further meeting to discuss moderation was held on 8 May 2019. Emma Hobbs says in her witness statement that that meeting was unpleasant and unhelpful. We find that it was a difficult meeting where the Claimant would not accept that his marking was overgenerous. He has maintained that stance throughout and did so in his evidence before us. In the light of the disagreement Emma Hobbs arranged for the work completed by the Claimant's classes to be remarked by an independent marker. When that was done the marks finally awarded were less and in some cases significantly less than those that the Claimant had put forward. It was those marks that were submitted to the examination board. During that meeting the Claimant raised the issue of whether some students had been given inappropriate assistance with their practical work.

29. In the course of the hearing when cross-examined by Ms King the Claimant was criticised for the manner in which he had marked his students against a spreadsheet that he had produced. It emerged during the hearing that the criticism was based on a misunderstanding that the version of the document in the joint bundle was complete. It transpired that the document in the bundle was folded and had columns which were missing.

30. Whilst there was a lot of cross examination about the marks given by the Claimant to his students we have found it unnecessary to resolve for ourselves whether the Claimant was overgenerous or not. Where the evidence is relevant is on the question of whether the Claimant could have reasonably believed that the information he disclosed tended to show a breach of any legal obligation. We accept that the Claimant passionately and genuinely believed that the marks that he had given his students were fair and were in accordance with the requirements of the qualification board. We heard evidence that there had been some suggestion that the Claimant had been a generous marker in the past. However, there was no suggestion or evidence that he had been radically marked down in the past. In some instances the Claimant's marks were slashed from an excellent mark to a mark which would probably entail the student failing examination.

31. A further departmental meeting was held on 20 May 2019. At that meeting the Claimant suggested that the students in Mosh Laher's class had been given an improper level of assistance. He also expressed his concerns that some of his students would fail their examinations.

32. On 22 May 2019 the Claimant sent an e-mail to Charlotte Robinson he says that that e-mail was the first of two protected disclosures. The content of the e-mail was as follows:

'I just thought that I should make you aware of the adjustment to year 11 coursework marks for the group (11A/Dt2). The adjustment initiated by Ms E Hobbs saw students marks adjusted ranging from -11 to -41 marks. I also noted discrepancies in the marks submitted to the examination board and that given to me as the final adjusted marks of the students. I got no response to this enquiry.

During the process of remarking/adjusting the students of (11A/Dt2) folders, the practical work was not looked at raising serious concerns. The 'Students Record Form' for (11A/Dt2) and for which I had responsibility for 2 two years was not completed by me and I was not absent from school during that period.

I also raised my concern about the level of assistance given to students of (HA/Dtl) in the preparation of the written work in their folders; which to my mind was above and beyond what should be allowed.

Since no electronic copies were given to me, I cannot attach then but I do have some hard copied.

All for your information and guidance.'

33. We formed the view that the purpose behind the Claimant's email was essentially to record his position that the students that he had taught had been unfairly marked down. Whilst he did not ask for any particular action to be taken we find that he expected the matter to be reviewed by Charlotte Robinson. Charlotte Robinson replied first thing the following morning to the Claimant. She thanked him for raising his concerns and said that she would look into the matter forthwith. What she then did was to pass the Claimants email to Emma Hobbs. Charlotte Robinson told us, and we accepted, that she did not immediately recognise the Claimant's email as a protected disclosure that should be dealt with under any particular policy. She was already aware that the was a dispute between the Claimant and his Head of Department through the management meetings she had seen and feedback given at meetings. We find that Charlotte Robinson viewed the Claimant's complaint as being a matter which she needed to deal with professionally but not a matter of any enormous significance and certainly not a matter which she thought might impact on the reputation of the school.

34. Over the next two days Emma Hobbs prepared a detailed response to the Claimant's email. She explained the history behind the disagreement between the Claimant and herself and set out how she had resolved that by having the students' portfolios remarked both by Mosh Laher and an independent marker. She accepted that there had been some discrepancies in the marks Claimant had seen and was able to explain that these were the differences between the marks given by Mosh Laher and the independent marker. She acknowledged that the Claimant had raised the issue of inappropriate assistance to students. She said that the Claimant had been told that any assistance had been given was within the guidelines permitted. She said that she had reminded everybody that each member of staff was required to abide not only by teaching standards but professional code of ethics. Emma Hobbs emailed that response to Charlotte Robinson on 24 May 2019.

<u>Did Jo Doyle know of the Claimant's e-mail of 22 May 2019 when she made her complaint?</u>

35. An important matter needed to resolve was whether Jo Doyle's complaint about the content of videos posted by the Claimant on YouTube predated or post-dated the Claimant formally raising his concerns about the marks given to students and the assistance given to others. On 23 May 2019 Jo Doyle sent an email to Charlotte Robinson in which she drew attention to a video posted on YouTube by the Claimant that had been published on 11 May 2019 which was *entitled 'DNA of the Wicked*'. Her complaint was specifically that her understanding of what was said on the video was that the Claimant was alleging that LGBT people were from the seed line descended from the antichrist. She said '*these views are hurtful, discriminatory and go against everything we are working so hard to promote amongst our students, staff and community'*. She made it clear that she expected the matter to be investigated under the schools whistleblowing policy and made a clear request that these videos were investigated.

36. In her witness statement Jo Doyle dealt with the issue of timing. She said that on Sunday, 19 May 2019 she had been on YouTube and that the YouTube algorithm had suggested that she watched one of the Claimant's videos *'DNA of the wicked'*. Whilst the Claimant did not accept either the timing or reasons why this video had come to Jo Doyle's attention he had no contrary evidence other than to suggest that an inference could be drawn by the timing of his own complaint. Jo Doyle told us that she was openly gay and that she was very offended both by the references to LGBT people but also as she was a Catholic to some remarks made about the established religions. She told us that she had watched the video a second time with her partner to see whether she shared her concerns. In her witness statement she says she was livid about what she had seen. She said that she decided to reflect on the position before making a complaint. She denied having any knowledge of the Claimant's email of 22 May 2019 before she sent off her own complaint the following day.

37. When Jo Doyle gave evidence she maintained the position set out above. When she answered questions either Claimant and from the Tribunal she maintained her position that she found the content of the videos that she had watched to be deeply offensive. We accept that she did. There is no direct evidence to contradict what Jo Doyle told us in respect of the timing of her complaint or her knowledge of the Claimant's complaint. Her account of the timing of her complaint is consistent with the account she gave during the disciplinary investigation. No other witness suggested that they had informed Jo Doyle about the Claimant's complaint. We would accept that both Emma Hobbs and Charlotte Robinson worked closely together and would discuss many matters. We also accept that there was a delay between the point in time when the videos were watched by Jo Doyle and her reporting the matter. There was no 'history' between Jo Doyle and the Claimant. Jo Doyle had dealt with the question of whether the Claimant was teaching flat earth theory in a professional manner. We find that whilst the Claimant's complaints prompted some action they were not seen by Charlotte Robinson as being likely to damage the school's reputation.

38. We must make a finding on the balance of probabilities whether Jo Doyle is being truthful when she told us that she knew nothing of the Claimant's complaint at the time made her own complaint and/or viewed the videos. We are satisfied that Jo Doyle was telling us the truth. It therefore follows that the Claimant's complaint was not the trigger for Jo Doyle looking at the videos posted on YouTube.

<u>The Claimant's further complaint to the examination board.</u>

39. On around the third or fourth of July 2019 the Claimant contacted the examination board. He did so anonymously. In his ET1 the Claimant says that he provided the same information as he had provided to Charlotte Robinson. In his witness statement gives no further detail. It is clear that the disclosure most probably took place on 3 July because the Claimant was sent an email from a Bill Johnston on that day thanking him for reporting his concerns about the administration to GCSE Design and Technology assessments at the school. It

is also clear that the information provided was taken seriously by the examination board.

40. It appears that the examination board must have contacted Charlotte Robinson promptly after receiving the Claimant's concerns. The standard process appears to have been that the School would appoint an independent investigator who would be expected to report to the examination board. In this case Simon Round a Deputy Headteacher at the List Community School was appointed to investigate the matter.

41. On 5 July 2019 the Claimant was interviewed by Simon Round. We were provided with notes taken during that meeting. One matter raised during the meeting was the question of whether students had been given an exam paper in advance of the formal examination. The minutes suggested that the Claimant had not been the person that raised this but that it had been raised by a student. The Claimant then discusses his view that his students had been unfairly marked down. The main complaint that he makes is that the practical work undertaken by the students had been given insufficient weight or disregarded completely when awarding marks. He then went on to talk about a photograph of a newly qualified teacher Lauren Price and suggested that she could be seen working on a student's project when the student was not present. He finally talked about his concerns about the level of assistance given to students in Mosh Laher's group in the preparation of their written folders. The detail given was that the students had been provided with a template. The Claimant then returned to his complaint that the marks he had given his students had been reduced in the moderation process. He maintained his position that this was improper.

42. Simon Round conducted a thorough investigation into all of the allegations that have been brought to his attention. He produced a written report by 18 July 2019. His report was in the agreed trial bundle. He interviewed the entire design and technology department and Emma Hobbs. He spoke with a significant number of students. In his report Simon Round rejected the allegation that any students had been provided with an examination paper in advance of the exam. Whilst that allegation had not emanated from the Claimant when interviewed he had suggested that students had gossiped that it might be true. It is clear that he tacitly supported the allegation. In respect of the allegation that students had been aided with their practical work Simon Round had asked each student whether or not their work was their own unaided work and each student had confirmed that it was. Simon Round was satisfied that the moderation process that had been undertaken was in accordance with the requirements of the examination board.

43. Simon Round's was submitted to the examination board. On 3 September 2019 AQA wrote to Charlotte Robinson. They accepted that there had been no malpractice in respect of the security of the examination paper on the basis of the evidence that had been provided. Charlotte Robinson said in her witness statement that there was no evidence to support any malpractice in respect of assistance given to students. We think that that is a somewhat rosy view of the letter written by AQA. The author of that letter raises a particular concern about

the photograph taken of Lauren Price. That photograph showed Lauren Price 'demonstrating' how to do something on the candidates own work. The suggestion is made that this should not be done in future in order to protect the integrity of examination. In our view this is somewhat less than a complete exoneration.

The investigation of Jo Doyle's complaint

44. Charlotte Robinson immediately recognised that she was obliged to take Jo Doyle's complaints seriously. She sought advice as to how the matter might be investigated and acting upon that advice she instructed an independent investigator to investigate matters under the schools disciplinary procedures. The investigator appointed was Helen Dorfman.

45. Helen Dorfman watched three of the videos posted by the Claimant on YouTube in their entirety and produced a summary of those videos which she later appended to her investigation report. In addition she purchased and read 'Scattered Not Lost' and again include a summary of parts of that book within her investigation report.

46. Helen Dorfman interviewed the following people on 6 June 2019:

46.1. Jo Doyle, who was further interviewed on a later date after Jo Doyle provided further information about another one of the Claimant's email is entitled Greetings from Rome which she told Helen Dorfman she found offensive; and

46.2. Shelly Eckton the school Business Manager; and

46.3. Bavesh Galoria, an Assistant Headteacher; and

46.4. Emma Hobbs; and

46.5. Tara O'Conner another Assistant Headteacher.

47. The Claimant was interviewed on 12 June 2019 in the presence of his trade union representative. After his interview the Claimant sent Helen Dorfman a commentary in which he criticised the content and manner of his interview. During his interview at various stages the Claimant did raise the issue of whether the complaints against him came from Emma Hobbs. He suggested a link between any complaints and the previous performance management process. He did not say in terms at that stage that any complaints were linked to whistleblowing.

48. Helen Dorfman obtained a number of cards sent to the Claimant by students. Amongst the comments on two of those cards were references to 'subscribe'. It is clear from the screenshots that we were provided with, and our own knowledge of the YouTube platform that it is possible to subscribe to a YouTube channel which enables the subscriber to be notified of new videos and benefits the person posting the videos.

49. Having conducted the interviews and investigation set out above Helen Dorfman prepared a report. She included as annexes to that report the various policy documents in which the school's standards were set out. The report concluded with a recommendation that the school follow a formal disciplinary process. That recommendation follows the final paragraph of the report which reads as follows:

    'I believe that in the context of my findings in the investigation and the guidance contained in the policies and statutory instruments referred to above, there is legitimate cause for concern regarding RH's professional conduct which could be considered to be unacceptable. On balance of probabilities, RH holds views and opinions that are at odds with Rokeby School's Vision and Values and could be considered to breach British Values. Further, that RH's conduct could be considered to bring Rokeby School and the teaching profession into disrepute'.

50. On 24 June 2019 the Claimant was invited to a disciplinary hearing which was set to take place on 10 July 2019. The Claimant was suspended from work on the same day. The disciplinary invitation explained that Helen Dorfman would present the facts on behalf of management side and that she would call as witnesses Jo Doyle, Shelley Ekton, Emma Hobbs and Bavesh Galoria. The Claimant was told that he would be supplied with a copy of all the documents that Mrs Dorfman would refer to when presenting the facts at least 10 working days before the hearing. The disciplinary allegations were made by making a broad statement that the Claimant had failed to comply with the expectations of the school and then referring to various numbered paragraphs of the Disciplinary Policy and Procedure. Whilst in our view it would have been useful to have spelt out precisely what the Claimant was said to have done wrong, he was aware that the disciplinary allegations were limited to the content of his YouTube videos and/or what he had said in his book and whether or not that had breached any of the disciplinary rules set out in the invitation letter.

51. After Helen Dorfman had completed her initial report. Charlotte Robinson learned from Tara O'Conner that she had overheard some students discussing the Claimant and flat earth theory during a walk in Epping Forest that took place on 9 July 2019. Charlotte Robinson asked Helen Dorfman to conduct a further investigation into whether that was true. Helen Dorfman interviewed a number of students. During those interviews several students alleged that the Claimant had been talking about topics such as flat earth theory and whether the moon landings were a fake. They also suggested that the Claimant had asked that discussions remain confidential and that they had ceased when they had been revealed to other teachers.

52. The Claimant's Trade Union representative objected to any further material being relied upon that did not concern the core allegations against the Claimant unless a postponement was granted to enable the Claimant time to consider the additional material. In particular he objected to the inclusion of the interviews of the students undertaken by Helen Dorfman. Charlotte Robinson decided that it was necessary to have the matter resolved before the summer holidays and that the pragmatic way forward was to proceed on the basis of the original

material without relying upon anything further said by the students. Therefore, by agreement, the later interviews with students were not put before the disciplinary panel. In order to accommodate the availability of all parties date of the disciplinary hearing was rearranged to take place16 July 2019.

53. Two Governors, Sarah Jacobs and Rodger Hilton were asked to chair the disciplinary meeting. The Claimant attended the meeting along with his trade union representative. The hearing had been arranged with the anticipation that it could be concluded within half a day. We find that that was hopelessly optimistic. Whilst there was little dispute on the facts the school was calling a number of witnesses. The hearing was considering whether a teacher of long standing should be dismissed. It was inevitable that the hearing would take longer than the few hours that were allocated and that proved to be the case. A further hearing could not take place until the next term. The hearing resumed on 17 September 2019. At the conclusion of the hearing the Claimant was informed of the outcome. He was summarily dismissed with no pay in lieu of notice.

54. Minutes were taken of the hearing. We find that whilst those minutes are clearly not a verbatim record we find they are broadly accurate. The notes reveal that:

    54.1. The Claimant was permitted to be accompanied by both a full time Trade Union representative and by a local trade union representative, Seamus Fox, who had accompanied him to his interview with Helen Dorfman. The only condition placed on the attendance of a second trade union representative was that he gave his evidence at the outset of the hearing. When he gave evidence Seamus Fox said that he had never heard the Claimant make any discriminatory comments nor had he heard any gossip from students the Claimant had posted videos or refer to flat earth theory.

    54.2. Jo Doyle then gave evidence she explained how she had come across a video on YouTube and she explained why she believed the content of the videos contravened the school's values. She was asked by the Claimant's representative whether she was aware of the Claimant's email of 22nd of May 2019 and she said that she was not. She accepted she had never heard the Claimant proselytise at school. The Claimant is recorded as interjecting saying that there had been no allegations against him until he had written to the headteacher. The panel are recorded as saying that they were not investigating whether or not the Claimant had talked to students about flat earth theory.

    54.3. Shelley Eckton gave evidence about the School's policies. She was asked whether she had been aware that the Claimant had posted videos in 2018 and said that she was. She said that she had been concerned at the time about the content of the videos and whether they were consistent with the school's values. Shelley Eckton was asked whether she had personally witnessed the Claimant discrimination against anybody at school and she agreed that she had not. In answer to questions by the governors she explained that the videos had come

to light in 2018 because of regular searches done to see whether there was any content on the Internet relating to the school.

54.4. Emma Hobbs gave evidence and talked about her discussions with the Claimant in 2018. She said that at the time her focus was on the fact that the videos were filmed at school and the Claimant could be seen wearing a pin identifying him as a teacher. She said that she had not been comfortable with the content of videos. Emma Hobbs agreed with the Claimant that she had never seen him demonstrate any discriminatory conduct within the school.

54.5. Bhavesh Galoria gave evidence and was asked principally about why he believed that students were aware of the Claimant's YouTube channel. He said that this was mentioned by a couple of students and his nephew had referred to the Claimant talking about flat earth theory. He accepted he had been aware that the Claimant had written his book and had been given a copy by the Claimant although had returned without considering the content. When asked questions by the Claimant admitted that he had been too polite to admit that he had not read the book. He was also aware that the Claimant had posted videos on YouTube.

54.6. Helen Dorfman then presented her report to the panel. She was then asked questions by the Claimant's trade union representative. Those questions initially focused on perceived inconsistency between the actions taken by the school in 2018 and the disciplinary procedure then levelled against the Claimant. Helen Dorfman said that she could not answer the previous decision-making. It was then suggested that the Claimant had no prior warning of the scope of the investigation. Helen Dorfman had no recollection of seeing any letter sent to the Claimant in advance of the investigation (nor was one provided to the tribunal).

54.7. The Claimant then called a witness Mr Linus Alua who had been a teacher at the school. Linus Alua said that he had never observed the Claimant discriminating or being homophobic and referred to the fact that the Claimant had a normal professional relationship with an openly gay teacher.

54.8. The Claimant called Tara O'Connor as a witness. She had been the person that had said she had overheard students talking about the Claimant teaching flat earth theory. In her answers to the Claimant's trade union representative she said that she had never personally heard the Claimant say anything discriminatory. When asked questions by Helen Dorfman she said that she had been told by some year 10 students that the Claimant had videos on YouTube she had looked at them but not really watch them but she was aware the students known about them.

54.9. The Claimant then gave evidence on his own behalf. He started by referring to the suggestion that he had mentioned flat earth theory despite the fact that he had been assured that this did not form part of

the disciplinary allegations. He explained that he had been trying to teach perspective. He was then taken through each of the allegations by his trading representative and denied any wrongdoing. He did not dispute that he was the author of Scattered not Last and that he had put all of the videos that had been discussed on YouTube. There was then insufficient time to conclude the hearing which as set out above was reconvened in September 2019.

54.10. It does not appear from the notes of the meeting at the Claimant was formally cross-examined by Helen Dorfman. However, his denial of any wrongdoing was explored by the Governors who asked him a series of questions about the videos that he had produced.

54.11. Each party then had an opportunity to sum up their case. Helen Dorfman invited the governors to accept that the spirit allegations were made out for the reasons set out in her report. About of the Claimant’s trade union representative focused on what he viewed as a discrepancy between treatment of the Claimant 2018 when his videos had first come to light and their treatment of him now. It was argued that given that the Claimant had followed the instructions he had been given not to associate any of his videos with the school it was not now open to the school to discipline him for continuing to post videos. It was argued that the evidence that students were aware of the videos was vague and should not be accepted. It was suggested that it would not be proper to judge the Claimant for his religious views. He relied heavily the Claimant’s otherwise blemish free career. The Claimant agreed that he would not place any further videos on the internet.

54.12. As set out above conclusion of the hearing the governors announced their view that some of the disciplinary allegations were made out and that the appropriate sanction was that the Claimant should be dismissed on the basis that he had committed gross misconduct.

55. The decision of the governors was confirmed in writing on the 24 September 2019 with a corrected version of the letter sent the following day. In the hearing before us Sarah Jacobs adopted the reasoning set out in that letter. As we have noted above the disciplinary allegations that mere made against the Claimant were made by references to the Disciplinary Policy and Procedure adopted by the school. The panel found that the following allegations were made out:

55.1. Conduct prejudicial to the school’s interests (paragraph 2.13.1 of the policy)

55.2. Serious or persistent acts of discrimination against employees, clients of members of the public (Policy paragraph 2.16.11)

55.3. Serious or persistent failure to comply with the equal opportunities policy (Policy paragraph 2.16.1)

55.4. Use of the Internet that seriously undermines confidence and trust in an employee’s suitability to perform their work-related tasks and or is likely

to cause a reasonable person to question an employee's suitability to hold that position of employment (policy paragraph 2.16.17)

55.5. The panel concluded that it was more likely than not that the videos had been viewed by students. The basis of this conclusion was the evidence that had been given by Bavesh Galoria and the thank you cards from students which had the word 'subscribe' and/or the YouTube logo on them.

56. The disciplinary panel rejected a number of allegations. These included finding that the Claimant actions did not amount to serious or persistent acts of harassment. In addition they found that whilst the videos were concerning the was no evidence that the reputation of the school had actually been damaged.

57. In her witness statement Sarah Jacobs gave examples of the language used by the Claimant in his videos that had caused her and Rodger Hilton to conclude that the had been persistent acts of discrimination. She said this (edited to remove page references):

…Governors felt that misconduct had been demonstrated clearly by the videos which contained statements that were discriminatory in relation to race, religion and sexual identity. The acts of discrimination had been directed at groups, rather than specific individuals, but the videos were clearly discriminatory; employees, others associated with the school and members of the public could have interpreted these comments on a personal level and found them upsetting and offensive. Indeed members of staff, including Ms Doyle, had already been offended. Examples of these statements are:

i. "The antichrist is going to be from the Islamic World"

ii. "Hebrews can be infected by the seed line this is a virus. Jews, Scribes and Pharisees are of the devil"

iii. "You do not have to continue following Christianity or the Jew religion that people have made up because it is the line of Satan. It is natural for you to do everything that is evil. It is in your DNA to make good into evil."

iv. Appendix 1 DNA of the Wicked "…What is found in the DNA of Satan, like your LGBT…"

v. Appendix 1b DNA of the Wicked part 2 " The DNA of the wicked is the DNA that came down from Satan via the fallen angels…So, every seed line on this planet, your Jews, even the Jews of today…are of that same seed line

vi. Appendix 1 c Broadcast on Greetings (from Rome Part 2) "This [Rome] is the seat of the Beast, this is the seat of the false prophet, this is the seat of everything that's gone in opposition to the Most High Yah"

58. The letter to the Claimant dealt with the arguments that had been raised about the conversation that had taken place with Emma Hobbs about the videos in the following terms:

‘The panel heard that a different view had been taken in October 2018 and led to a different level of disciplinary action. On this occasion there had been a specific complaint raised about further videos that had been uploaded and addressed issues of discrimination against the LGBT community and other matters.’

59. Sarah Jacobs stated in her witness statement that she had been unaware of the Claimant’s letter of 22 May 2019 and that she had not seen the records of the interviews taken with pupils that had referred to the Claimant teaching flat earth theory (amongst other matters). We are satisfied that Sarah Jacobs was telling us the truth about both of those matters. There was simply no evidence to contradict what she said.

60. Sarah Jacobs suggested that the Claimant had never suggested in terms that the disciplinary investigation against him was prompted by anything he had written on 22 May 2019. Having carefully reviewed the minutes of the hearing we consider that that was a point that was made obliquely by the Claimant himself. He is recorded as saying ‘there had been no allegation to the headteacher’. According to the notes of the meeting, this was not pursued by the Claimant’s trade union representative in summing up his case. We find that the Governors did not explore this in any depth. They restricted their consideration the disciplinary allegations themselves. The foundation of those allegations was the undisputed fact that the Claimant had put videos on YouTube and written a book. The decision for the governors, as they saw it was essentially whether or not placing that material in the public domain meant that the disciplinary allegations framed by the school were made out. We do not consider it surprising that in those circumstances they did not focus on the suggestion that the allegations were retaliatory.

61. We are satisfied that the decision to dismiss the Claimant was taken by Sarah Jacobs and Rodger Hilton alone. We are further satisfied that the reasons for the dismissal were those set out in the letter sent to the Claimant. It follows from that that Sarah Jacobs and Rodger Hilton were not influenced in any way by the fact that the Claimant had made any protected disclosures.

62. The Claimant appealed the decision to dismiss by an email sent on 26 September 2019. Initially he gave no grounds of appeal but it was later clarified by his trade union representative to be an assertion that the disciplinary hearing unjustly found against him and/or that the dismissal was not appropriate.

63. In the run up to the disciplinary appeal the Claimant asked that Charlotte Robinson attend and give evidence. She wrote and explained that she was not intending to attend (being engaged elsewhere) but agreed to answer written questions. Those questions included the Claimant asking whether the disciplinary action was linked to his e-mail of 22 May 2019. Charlotte Robinson said that it was not.

64. The appeal panel comprised 3 governors including Michael Fenn. The appeal hearing started on 5 December 2019 but did not conclude on that day. The hearing resumed on 10 December 2019. Notes were taken of the appeal hearing. Those notes disclose that the Claimant and his trade union representative pressed for the attendance of Charlotte Robinson. The panel indicated that whilst they could not compel her to attend they did not believe that her attendance was relevant.

65. During the appeal:

    65.1. The Claimant's representative made lengthy submissions focussed on the fact that no action had been taken against the Claimant in 2018.

    65.2. The Claimant is recorded as making a presentation on his own behalf. He said in terms that the disciplinary action taken against him was a response to his disclosure to the AQA. The panel questioned whether this had been raised at the disciplinary hearing. The Claimant sought to suggest that it had been.

    65.3. Helen Dorfman gave evidence, presented her report and was asked questions by the Claimant's representative; and

    65.4. Sarah Jacobs presented the management case and explained why she and her colleague had dismissed the Claimant. She too was asked questions by the Claimant's representative. The bulk of these questions focussed on the suggestion that there had been a disparity between the steps taken in 2018 when the videos first came to light and the position in 2019.

    65.5. Both the Claimant's representative and Sarah Jacobs summed up their respective cases.

66. The Claimant was notified of the outcome of his appeal by a letter dated 16 December 2019. He was informed that his appeal was dismissed. At the conclusion of the letter the reasons for rejecting the appeal are summarised. The panel concluded that the disciplinary panel's findings were correct. They placed emphasis on the fact that one screen shot, provided by Helen Dorfman, showed that the Claimant had 257k subscribers and 17,500 'followers'. They described the Claimant's book *'Scattered but not Lost'* to be *'extremely offensive*'. They stated that in their view the Claimant should have reflected on his conversation with Emma Hobbs in 2018 and desisted from posting any offensive videos on the internet. Their conclusion was that the relationship of trust and confidence had been destroyed.

<u>The Law to be Applied</u>

<u>'Ordinary' Unfair Dismissal</u>

67. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed, putting to one side the question of whether any

dismissal is for an automatically unfair reason, the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

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

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

(b) relates to the conduct of the employee

(c) is that the employee was redundant, or

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

(3) …..

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

68. Unless the employer can establish that the reason for the dismissal was for one of the potentially fair reasons for dismissal listed in Sub-section 98(2) or is for some other substantial reason then the dismissal will be unfair. If the employer does establish that there was a potentially fair reason for the dismissal then the question of whether the dismissal was fair or unfair is determined by applying the test in Sub-section 98(4) of the Employment Rights Act 1996.

69. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

70. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129.**

71. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

72. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**.

73. In terms of the reasonableness of the investigation and the procedure that was followed, the “relevant circumstances” referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee ***A v B*** **[2003] IRLR 405**. ***A v B*** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions ***CRO Ports London Ltd v Mr P Wiltshire*** **UKEAT/0344/14/DM**.

74. Where a dismissal or the process leading up to a dismissal are said to engage one of the rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms, and domestically by the Human Rights Act 1998, the proper approach to whether a dismissal is fair or unfair is to be approached with regard to the guidance given in ***X v Y*** **[2004] IRLR 625** where Mummery LJ suggested that a tribunal take the following approach:

(1) Do the circumstances of the dismissal fall within the ambit of one or more of the Articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.

(2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.

(4) If it is not, was there a permissible reason for the dismissal under the ERA, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

(5) If there was, is the dismissal fair, tested by the provisions of s.98 of the ERA, reading and giving effect to them under s.3 of the HRA so as to be compatible with the Convention right?

75. Where, as here, the employer is a public sector employer it would be necessary for the employer itself to ensure that there was no unjustified interference with any convention right – see ***Hill v Governing Body of Great Tey Primary School*** **2013 ICR 691, EAT**. However, the tribunal itself as a public body is required by Section 3 of the Human Rights Act 1998 to apply Section 98(4) in a manner consistent with respecting the convention rights of the employee. It follows that the exercise is likely to be the same for public or private sector employees - ***Q v Secretary of State for Justice*** **EAT 0120/19**.

76. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

Protected disclosures and the automatically unfair reason for dismissal protected by Section 103A of the Employment Rights Act 1996.

77. The protection for workers who draw attention to failings by their employers or others, often referred to as 'whistle-blowers', was introduced by the Public Interest Disclosure Act 1994 which introduced a new Part IVA and Section 103A to the Employment Rights Act 1996.

78. In ***Jesudason v Alder Hey Children's NHS Foundation Trust*** **[2020] ICR 1226** Elias LJ described the purposes of the protection as follows:

'Ever since the introduction of the Public Interest Disclosure Act 1998, the law has sought to provide protection for workers (colloquially known as whistleblowers") who raise concerns or make allegations about alleged malpractices in the workplace. Too often the response of the employer has been to penalise the whistleblower by acts of victimisation rather than to investigate the concerns identified. The 1998 Act inserted a new Part IVA into the Employment Rights Act 1996 designed to prevent this. The long title to the Act describes its purpose as follows:

> *"An Act to protect individuals who make certain disclosures of information in the public interest: to allow such individuals to bring action in respect of victimisation; and for connected purposes."*

The law which gives effect to the simple principle enunciated in the long title is far from straightforward. The basic principle, set out in section 47B of the Employment Rights Act 1996, is that a worker has the right not to be subject to a detriment by any act of his employer on the grounds that he has made what is termed a "protected disclosure".'

79. Section 43A of the Employment Rights Act 1996 provides that a disclosure will be protected if it satisfies the definition of a 'qualifying disclosure' <u>and</u> is made in any of the circumstances set out in Sections 43C-H. The material parts of the statutory definition of what amounts to a qualifying disclosure are found in Section 43B of the Employment Rights Act 1996 which says:

    43B Disclosures qualifying for protection.

    (*1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*

    > *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
    >
    > *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
    >
    > *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
    >
    > *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
    >
    > *(e) that the environment has been, is being or is likely to be damaged, or*
    >
    > *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

80. The proper approach to assessing whether there is a qualifying disclosure for the purposes of Section 43B is that summarised by HHJ Auerbach in ***Williams v Michelle Brown AM*** **UKEAT/0044/19/OO**. He said:

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

81. To amount to a 'disclosure of information', it is necessary that the worker conveys some facts to her or his employer (or other person). In ***Kilraine v London Borough of Wandsworth*** **2018 ICR 1850, CA** the meaning of that phrase was explained by Sales LJ as '*it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)'.*

82. The effect of Section 43B Employment Rights Act 1996 is that to amount to a qualifying disclosure, at the point when the disclosure was made, the worker must hold a belief that (1) the information tends to show one of the failings in subsection 43B(1) (a) – (e) and (2) that the disclosure is in the public interest. If that test is satisfied the Tribunal need to consider whether those beliefs were objectively reasonable. The proper approach was set out in ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)*** **2018 ICR 731, CA** where Underhill LJ said:

26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B (1).

27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that

matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

83. When going on to consider what was required to establish that something was in the public interest Underhill LJ said at paragraph 37:

"….. *in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."*

84. The 4 relevant factors identified by Underhill LJ were (at paragraph 34):

"(a) the numbers in the group whose interests the disclosure served – see above;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

85. The fact that a disclosure is about a subject that could be in the public interest does not automatically lead to the conclusion that the worker believed that she or he was making the disclosure in the public interest: ***Parsons v Airplus International Ltd*** **UKEAT/0111/17/JOJ**. It is a question of fact as to whether the worker held the necessary belief.

86. Where a worker says that the information they conveyed tended to show a breach or likely breach of a legal obligation they do not have to be right either about the facts relayed or the existence of the legal obligation. It is sufficient that the worker actually holds the belief and that objectively that belief is reasonable - see ***Babula v Waltham Forest College*** **[2007] EWCA Civ 174**. However, it is necessary that the belief is actually held. In ***Eiger Securities LLP v Korshunova*** **[2017] IRLR 115** Slade J said:

'…. in order to fall within ERA section 43 B(1)(b), as explained in Blackbay the ET should have identified the source of the legal obligation to which the Claimant believed Mr Ashton or the Respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.'

87. There is no requirement for a worker to spell out what legal obligation they say is engaged within any disclosure but a failure to do so is evidentially relevant to the question or whether they actually held the necessary belief that their information tends to show the commission of any offence and/or breach of any legal obligation see ***Twist DX Ltd and ors v Armes and anor*** **EAT 0030/20**

88. Any assessment of the belief held by the worker is entitled to take into account any specialist knowledge the worker may have - ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** **[2012] IRLR 4**

89. Section 43C provides that a qualifying disclosure will be a protected disclosure if it is made to the employer.

90. Section 43F provides that a qualifying disclosure if it is made to a person prescribed by an order made by the Secretary of State and the following conditions are satisfied:

    (b)[The worker] reasonably believes—

    (I)that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

    (ii) that the information disclosed, and any allegation contained in it, are substantially true.

91. The persons prescribed for the purposes of Section 43F are listed in the schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014 SI 2014/2418. Whilst there are a number of regulators of matters relating to education or qualifications individual examination boards are not listed.

92. A qualifying disclosure can be a protected disclosure if made to a third party (not covered by the other sections) providing that the conditions in Section 43G are met. That section reads as follows:

    '43G Disclosure in other cases.

    (1) A qualifying disclosure is made in accordance with this section if—

    (a). . . . .

    (b)the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

    (c) he does not make the disclosure for purposes of personal gain,

    (d) any of the conditions in subsection (2) is met, and

    (e)in all the circumstances of the case, it is reasonable for him to make the disclosure.

    (2) The conditions referred to in subsection (1)(d) are—

    (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b)that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(I) to his employer, or

(ii) in accordance with section 43F.

(3)In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c)whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure'

93. Where the worker is an employee and complains of a dismissal by their employer (in contrast to the actions of a fellow worker in deciding to dismiss them) then the employee may present a claim that they have been unfairly dismissed under Section 111 of the Employment Rights Act 1996. If they can establish that they have been dismissed, then the dismissal will be automatically unfair if the requirements of Section 103A are met. Section 103A reads as follows:

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Equality Act 2010 claims

Statutory Code of Practice

94. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

> *The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.*

Burden of proof

95. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

'136 Burden of proof

(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.'

96. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ 1648** Lord Justice Underhill reviewed the case law and said:

17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

97. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or ‘mere intuitive hunch’ see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from ‘thin air’ see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

98. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and*** another ***v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said

“the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"”

Direct Discrimination

99. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

‘(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age then A does not discriminate against B if A can show that A’s treatment of B is a proportionate means of achieving a legitimate aim.’

100. Section 10 of the Equality Act 2010 defines the protected characteristics of Religion or belief as follows:

Religion or belief

(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

101. In ***R (on the application of Hodkin and anor) v Registrar General of Births, Deaths and Marriages*** **2014 AC 610, SC**, Lord Toulson (with whom the rest of the Supreme Court agreed) said, in the context of that case ‘religion’ could be described as ‘a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief

system'. Not every religious belief will be protected. Paragraph 2.54 of the statutory code of practice says*: 'a religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system'* . For any belief system to be categorised as a religion it is necessary that the belief system is worthy of respect in a democratic society see - ***Campbell and anor v United Kingdom*** **1982 4 EHRR 293, ECtHR**.

102. The characteristics of religion and belief are separate protected characteristics. Most if not all religions will require adherents to hold beliefs. For any philosophical belief to attract the protection of this section the beliefs need to satisfy the criteria set out in ***Grainger plc v Nicholson*** **[2010] IRLR 4, EAT**. Those criteria include the requirement that the beliefs are worthy of respect in a democratic society.

103. In order to establish less favourable treatment it is necessary to show that the claimant has been treated less favourably than a comparator not sharing his/her protected characteristic. Paragraphs 3.4 and 3.5 of the Code of Practice say:

3.4 To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.

3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

104. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances. Paragraphs 3.22 – 3.27 say (with some parts omitted):

> *3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'.*
>
> *Who will be an appropriate comparator?*

3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

Hypothetical comparators

3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.

3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.

3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

105. An explanation of the differing ways in which treatment might be because of a protected characteristic was given in ***Amnesty International v Ahmed*** **[2009] IRLR 884** by Underhill P (as he was). He said

'33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. James v Eastleigh [Borough Council [1990] IRLR 288] is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately

have been stated as "free entry for women at 60 and men at 65". The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p.294, paragraph 36), "gender based". In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in James v Eastleigh decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which Nagarajan is an example – the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions) …'

106. In this case the proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572.**

107. The reason for the unlawful treatment need not be conscious but may be subconscious. In ***Nagarajan*** Lord Nicholls said:

'I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

Discussion and conclusions

The proper Respondent to each claim

108. The first matter that we shall address is the question of who is the proper respondent to these claims. It was common ground before us that Rokebey School was at the time of the Claimant's dismissal a Foundation School. That

is a species of 'maintained school'. The school was governed by a board of governors who exercised the right to a delegated budget. The Claimant was engaged under a contract of employment between himself and the London Borough of Newham. By reason of the Education (Modification of Enactments Relating to Employment) (England) Order 2003/1964 any claim falling within schedule1 to that Order made by a teacher at a maintained school must be brought against the Governors of the school. A claim of unfair dismissal is a claim listed in Schedule 1. However, the Schedule makes no reference to the Employment Equality (Religion or Belief) Regulations 2003 (which were the earliest provisions introduced to outlaw discrimination on the grounds of religion/belief) which were not in force at the time of the Modification of Enactments Order. There is no mention in Schedule 1 of a claim for breach of contract.

109. It follows that the claim for unfair dismissal can only be maintained against the Governors (who have been named as 'Rokeby School'). The claim brought under the Equality Act 2010 and the claim for breach of contract (notice pay) can only be maintained against the London Borough of Newham (the first Respondent).

110. The Third Respondent is a federation of schools of which Rokeby School is a member. The Claimant has not set out any legal basis for his claim against that federation (which may not have any legal personality). At the preliminary hearing on 4 May 2020 EJ Lewis made an order that; *'The claims against the Third Respondent will stand dismissed on 1 June 2020 without further order, unless before that date the Claimant has explained in writing why the claim against the Third Respondent should not be dismissed'*. The Claimant did write to the Tribunal on 26 May 2020 objecting to the proposal to strike out the claims against the Third Respondent. In those circumstances the order of EJ Lewis did not take effect. Before us the Claimant did not give any evidence or make any argument as to how the Third Respondent could be legally responsible for his claims. As we have gone on to dismiss those claims the question of whether the Third Respondent could have any liability is entirely academic.

Whether the Claimant's e-mail of 22 May 2019 amounted to a protected disclosure.

111. We approach the question of whether the Claimant's e-mail of 22 May 2019 was a protected disclosure by addressing the questions set out in ***Williams v Michelle Brown AM***. In the list of issues the Respondents have conceded that the e-mail contains 'information'. We believe that that concession has been properly made. As explained in ***Kilraine*** what is necessary that there is sufficient factual information that the disclosure can be capable of 'tending to show' one of the categories of actual or potential wrongdoing. In his e-mail the Claimant refers to the adjustments of marks, the fact that practical work was not looked at and that he had raised concerns about the level of assistance given to students. That last matter includes an implicit reference to a factual situation. The information is capable of showing that the submission of marks to the qualifications body was not in accordance with their rules.

112. The Claimant had been ordered by EJ Lewis to provide further information about how he said his e-mail was a protected disclosure. He had purported to do so in an e-mail sent on 15 June 2020. He said that the e-mail *'showed that the Respondent were [sic] failing to comply with their legal obligations and/or that a miscarriage of justice was taking place'*. That is the phrase adopted in the agreed list of issues.

113. The next question we need to address is whether the Claimant as a matter of fact believed that the information contained in his email tended to show either that there was a breach of a legal obligation or that there was a miscarriage of justice. We shall deal first with the question of whether he believed there was a breach of a legal obligation. The Claimant did not assist himself with a clear statement in a witness statement or anywhere else about what he actually believed. We were left to piece together what his beliefs actually were. We are satisfied that the Claimant genuinely believed that the moderation process would result in the examination board being misled as to the true grades that ought to have been given to his students. We are further satisfied that the Claimant genuinely believed that some students had been given improper assistance and that that would result in the examination board being misled about their abilities.

114. We do not accept that the Claimant held a concluded view about what legal obligation might be engaged. He was unable to explain even before us precisely where the legal obligations might lie. Nevertheless, we do accept that he had a genuine belief that there was a legal obligation of some description to comply with the requirements of the examination board to ensure that the students were awarded the grades to which they were entitled. This went beyond the situation described in ***Eiger Securities LLP v Korshunova*** such as a mere belief that the actions were morally wrong or contrary to guidance. Ms King sought to persuade us that the Claimant would never have held a belief that the moderation process was contrary to the requirements of the examination board. She argued that the Claimant had a good working knowledge of how moderation worked from previous years. In putting for these arguments she referred obliquely to the principles in ***Korashi v Abertawe Bro Morgannwg University Local Health Board***

115. We do not accept her arguments. Before us the Claimant repeated on a number of occasions the fact that under his stewardship his students had been awarded some of the highest grades in 2018. We find that he was genuinely affronted to have his assessments questioned by others. We remind ourselves that he didn't have to be right about what he believed to be the case provided that actually held belief that what he had put in his email tended to show some wrongdoing. We find that he did hold that subjective belief.

116. The next question is whether the Claimant's belief that the information he disclosed tended to show a breach of a legal obligation was reasonable. Once again Ms King sought to persuade us that even if the belief was genuinely held it could not be said to be reasonable. We do not agree. The test is most certainly not whether the Claimant was right. It appears from the subsequent investigation by the examination board that the Claimant probably was incorrect

about the moderation process. However, that does not mean that he could not have reasonably believed that he was not. We consider that the Claimant could have reasonably believed that he was an experienced teacher in the subject area and that he did not have a track record of being wildly inaccurate in the marks that he gave. We further consider that he could have reasonably believed that the remarketing of his students work significantly adjusted the marks of those students. These were not therefore minor professional differences but were substantial. We consider he could have reasonably believed that something had gone wrong. It further appears that there were professional differences of opinion about the extent to which assistance could be given to students. We remind ourselves of the manner in which the test was put in ***Chesterton Global*** there may be more than one reasonable view. We are satisfied that the Claimant could reasonably believe that drawing attention to substantial changes in the marks submitted to the examination board and assistance given to students tended to show a breach of some legal requirement imposed by the examination regulations.

117. We then turn to the question of public interest. Ms King suggested that the purpose of the email to Charlotte Robinson was the Claimant getting his retaliation in early because he recognised that he had probably overstepped the mark in his disagreements with his colleagues. Her argument was essentially that this would be sufficient to displace any notion that the Claimant gave any thought to the public interest. We would have no hesitation in accepting that the Claimant wished to escalate the dispute to the headteacher. We do not agree that that is necessarily incompatible with believing that any disclosure was in the public interest. It was quite clear to us that the Claimant passionately believed that his students had been shortchanged by the moderation process. It was more than his own professional pride that drove him to argue with his managers and escalate the matter to Charlotte Robinson.

118. We have had regard to the test for when a disclosure might be in the public interest explained in ***Chesterton Global***. We find that a disclosure which tends to suggest that the public examination results of a class of students might not have been awarded in accordance with the examinations set down by the examination board is capable of engaging the public interest. Once we have rejected the suggestion that the Claimant was acting solely in his own interests then it is not difficult to conclude that at least in part he genuinely believed that making the disclosure in his email was in the public interest.

119. We are further satisfied that the Claimant's belief that disclosing what he genuinely believed the examination irregularities was in the public interest was in itself a reasonable belief. There is a strong public interest in public examinations, the outcomes of which will have a significant impact on the future lives of the students, being conducted scrupulously and fairly. It follows that we find that the communication sent by the Claimant to Charlotte Robinson on 22 May 2019 amounted to a qualifying disclosure. As it was made to the Claimant's employer it is also a protected disclosure.

120. We shall deal briefly with the second way the Claimant put his case that he believed that the information he gave tended to show a miscarriage of justice.

We do not believe that the phrase *'miscarriage of justice'* is shorthand for unfairness or other moral wrongdoing. We consider that it is a term of art and refers to an inaccurate verdict or judgment in criminal or civil court proceedings. Had it been necessary to do so we would have found that any belief by the Claimant that the information he disclosed tended to show a miscarriage of justice would not have been held reasonably.

<u>Whether the information passed to the examination board on 3 or 4 July 2019 amounted to a protected disclosure?</u>

121. There was no reference to the information passed by the Claimant to the examination board within the agreed list of issues. However, in his ET1 the Claimant makes it quite clear at paragraph 10 that he is alleging that he made a second protected disclosure and states in terms at paragraph 12 his case that both disclosures led to his dismissal.

122. It is clear from our findings of fact that the Claimant repeated his allegations about the moderation of marks and about assistance he says that Mosh Laher gave his students to the examination board. In addition, the Claimant sent the photograph of Lauren Price to the examination board.

123. We have already held that the information provided in respect of the moderation of marks and the assistance given by Mosh Laher was capable of satisfying and did the test set out in Section 43B of the Employment Rights Act 1996 when included in the Claimants email of 22 May 2019. In respect of the additional information in the form of a photograph of Lauren Price we would have no hesitation in concluding that that photograph amounted to information which in the Claimant's genuine and reasonable belief tended to show a breach of a legal requirement to conduct examinations in accordance with the exam board regulations. We repeat the reasoning that we have set out above and conclude that in all three respects the disclosures are qualifying disclosures.

124. This qualifying disclosure was not made to the Claimant's employer but was made to the examination board. The examination board is not a prescribed person. Accordingly, the qualifying disclosure will only be a protected disclosure if it satisfies the requirements of section 43G set out above. We are satisfied that the Claimant reasonably believe the information that he disclosed was substantially true. We note that he does not have to be right about whether that information amounted to a breach of any legal obligation. The truth of what the Claimant said was not substantially disputed. Accordingly, the requirement in subsection 43G(1)(b) is met. The Claimant did not make the disclosure for any personal gain (satisfying Sub-section 43G(c)). The Claimant had previously disclosed to his employer the information about the moderation of the marks and the assistance given by Mosh Laher. He had not made a disclosure of information in respect of Lauren Price. That allegation was new. So Subsection 43G(1)(d) – read with Subsection 43G(2)(c)(i) is satisfied but only in respect of the first two aspects of the disclosure.

125. We are satisfied that it was reasonable for the Claimant to approach the AQA with his concerns. He had reported his concerns to Charlotte Robinson, but she

had simply delegated the task of responding to Emma Hobbs who was in reality one of the people that the Claimant was complaining about. As such the Claimant could reasonably have felt that Emma Hobbs was marking her own homework. In the circumstances, reporting the matter to the examination board was perhaps the only means of ensuring that the matter will was addressed by an independent person.

126. It follows that we are satisfied that the Claimant's report to AQA did amount to a protected disclosure. It is fair to comment that neither party placed any great emphasis on this second disclosure during submissions because it was quite clear that by the time the disclosure was made the disciplinary action against the Claimant was well underway. However, we have dealt with the matter for completeness.

Unfair Dismissal

127. There was no dispute before us that the Claimant had sufficient continuity of service to present a claim of unfair dismissal without relying on any automatically unfair reason for the dismissal. The significance of that is that the burden of proving a potentially fair reason for the dismissal fell on the Second Respondent. The Claimant does however say that his dismissal was automatically unfair contrary to section 103A of the Employment Rights Act 1996. In ***Kuzel v Roche Products Limited*** **[2008] EWCA Civ 380** the Court of Appeal held that whilst the employee must produce some evidence to support their assertion that they have been dismissed for an automatically unfair reason they do not bear the burden of proof and it is for the employer to prove that the reason asserted by the employee was not the reason or principal reason for the dismissal.

128. The decision to dismiss the Claimant was taken by the two governors who conducted the disciplinary hearing. We should make it clear that we are satisfied that they took that decision on their own although they would have listened to advice from others. We have accepted the evidence given by Jo Doyle that she knew nothing of the Claimant's first protected disclosure at the time that she made her complaint about the content of the videos posted by the Claimant. As such, her actions in complaining could not have been influenced in any way by a protected disclosure that she knew nothing about.

129. Charlotte Robinson did know of the Claimant's first protected disclosure at the time that she received Jo Doyle's complaint. As such it is at least theoretically possible that she was influenced by that disclosure when commissioning an investigation into the videos posted by the Claimant.

130. We have accepted the evidence given by Sarah Jacobs that neither she nor her fellow governor Rodger Hilton had any knowledge of the content or subject matter of the Claimant's protected disclosures at the time they made their decision that the Claimant should be dismissed. It was mentioned by the Claimant that he had made a complaint or had written to the headteacher. As such there was some very limited knowledge that the Claimant has raised some issues.

131. During the hearing it appeared that that the Claimant was suggesting that even if the disciplinary panel were telling the truth about having no knowledge of his protected disclosures he could still succeed in his claims by showing that either Charlotte Robinson or Jo Doyle had acted as they had because of his protected disclosures. The Claimant had referred to the decision of the Supreme Court in ***Royal Mail Group Ltd v Jhuti*** **[2019] UKSC 55** in correspondence leading up to his disciplinary appeal. In that case the Supreme Court answer the question of law which they had identified as the key to the case by saying: *'if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason'*. What is clear from the decision of the Supreme Court is that generally speaking the reason for any dismissal will be the facts known to and opinions held by the person who took the decision itself. Only rarely will that be displaced. Whether that ordinary position is displaced will turn on the facts of each individual case.

132. The avoidance of doubt, we rely on the following findings of fact either drawn our findings above or made here:

    132.1. We do not accept that Jo Doyle's complaint was influenced in any way by the Claimant's email of 22 May 2019.

    132.2. Whilst we accept that Charlotte Robinson was aware of the Claimant's email of 22 May 2019, we do not find that that played any part whatsoever in her decision to instigate a disciplinary investigation. We find that she was exclusively motivated by a genuine concern about the matters raised by Jo Doyle in her letter.

    132.3. We accept that the Claimant's later protected disclosure came to Charlotte Robinson's attention almost immediately and that caused her to commence a formal investigation into the allegations made by the Claimant.

    132.4. We accept that there was some further investigation commissioned by Charlotte Robinson into allegations the Claimant had talked about flat earth theory to students which postdated his second protected disclosure.

    132.5. We do not accept that either of the Claimant's protected disclosures were the reason or indeed any part of the reason why Charlotte Robinson commissioned the additional investigation into whether the Claimant had discussed flat earth theory.

    132.6. The allegations about the Claimant discussing flat earth theory were not revealed to the disciplinary panel and formed no part of their decision to dismiss the Claimant.

    132.7. We have found that the reasons of the disciplinary panel for dismissing the Claimant were exclusively those set out in their letter of dismissal and were not in any way influenced by the protected disclosures.

133. We have come to the conclusion that in the light of those findings of fact the reasoning in ***Jhuti*** is of no assistance to the Claimant. This is not a case where Charlotte Robinson or Jo Doyle put a bogus reason before the disciplinary panel. The information put forward by both was factual and not actually disputed by the Claimant. The question for the disciplinary panel was whether the posting of the material on the Internet breached policies and procedures and ultimately was incompatible with the Claimant's continued employment. Our findings that, in complaining and commissioning an investigation, neither Charlotte Robinson nor Jo Doyle were motivated in any way by the protected disclosure is fatal to any suggestion that the disciplinary panel were manipulated by the actions of others such that the true reason for the dismissal would be some reason held by those others.

134. It follows from those conclusions that we are satisfied that the reason for the dismissal was those reasons held by Sarah Jacobs and Rodger Hilton and explained by them in their letter of 24 September 2019. We then need to ask ourselves whether those reasons amounted to 'conduct' for the purposes of section 98(2). Whilst the majority of the actions which gave rise to the dismissal took place outside of the workplace that does not mean that the reason for dismissal falls outside the definition of conduct. We find that the conduct that gave rise to the dismissal had a sufficient connection to the workplace to satisfy the conditions identified in ***Thomson v Alloa Motor Co Ltd***. Accordingly we are satisfied that the reason or principal reason for the dismissal was conduct and not a reason falling within section 103A of the Employment Rights Act 1996. Therefore the dismissal was not automatically unfair and we need to go on and ask whether the dismissal was fair or unfair applying the test in section 98(4).

135. In assessing fairness we need to take all of the surrounding circumstances into account. This will include looking at the process and procedure that was followed as well as the substantive decision to dismiss the Claimant. We shall deal with each in turn.

136. We are satisfied that it was a reasonable step for Charlotte Robinson to commission an external investigation by Helen Dorfman. The alternative would have been to have the matter investigated by somebody in the Claimant's line management. He was already deeply suspicious of that line management. We see no proper objection to the matter being investigated by an independent external investigator.

137. We consider that the investigation was undertaken by Helen Dorfman was exceedingly thorough. She spoke to all the individuals who had found out about the Claimant's YouTube channel in 2018 and asked about what action had been taken at that stage. She included that material in her investigation report. Helen Dorfman prepared a summary of several videos and a digestive of the Claimant's book 'Scattered but not Lost'. She attempted to summarise her understanding of the Claimant's beliefs. She conducted a lengthy interview with the Claimant in which she discussed the material that he had posted on the Internet and attempted to understand the nature of his beliefs. We take the view that that was entirely appropriate in circumstances where the Claimant was suggesting that his online activities were a manifestation of his belief system.

Where we would wish to express some concern is our view that Helen Dorfman prepared a summary of what she believed were the Claimant's beliefs. We do not see that that was entirely necessary, and it was a risky undertaking. That said the Claimant had an adequate opportunity to correct that document during the hearings that followed.

138. The Claimant sought to persuade us that at least at some stage in the disciplinary process Charlotte Robinson should have been questioned and he should have been afforded the opportunity to have challenged her motivation in putting forward Jo Doyle's complaint for an investigation and accepting Helen Dorfman's recommendation that the matter proceeded to a disciplinary hearing. It appears to us that Charlotte Robinson and the panel hearing the appeal considered the question of whether she was motivated by any complaint by the Claimant to be irrelevant. We can see some force to that argument. If the Claimant's online activities were sufficiently serious to justify disciplinary action it could be said that it was irrelevant whether attention was drawn to those activities an improper motive or not. However, we would accept that the issue was not quite that simple. The Claimant was arguing that his online activities had been noted in 2018 and no action was taken at the time. If he was right that the matter had been brought up again because of his complaints, then that might provide some support for his position.

139. The Claimant was given an opportunity, both in the original disciplinary hearing and in the appeal, to ask questions of Emma Hobbs who was the person that had spoken to him in 2018. He was fully able to explore the question of whether he was effectively given assurances by Emma Hobbs that provided he did not connect his online activities with the school he was free to continue to post videos online.

140. Overall, we are not persuaded that there was any significant unfairness in not requiring Charlotte Robinson to attend either the initial disciplinary hearing or the appeal hearing as a witness. The absence of Charlotte Robinson did not prevent the Claimant from making any points he wished about whether the content of his videos/book was compatible with his employment. He was not prevented from advancing his argument that the actions of Emma Hobbs in 2018 made it unfair to raise the matter again in 2019. Emma Hobbs was present to explain her actions. He was able to suggest that the matter had only been raised in retaliation for his own complaints. It was open to the governors to say, whether or not that was the case, they were entitled to look in to whether the Claimant had breached the school's policies himself.

141. A further point taken by the Claimant in respect of the process related to the reference in the appeal outcome letter to the number of subscribers shown on a screenshot provided by Helen Dorfman. The Claimant produced at the hearing before us a further screenshot which suggested that he had very few subscribers and that the videos had only been viewed by a small number of people. He suggested in robust terms that Helen Dorfman must have fabricated the evidence in order to make it appear that his videos had a wider audience then they did.

142. We would accept that the Claimant's YouTube channel does not have as many subscribers as the appeal panel found it did. We do not have any evidential basis for a finding that Helen Dorfman somehow manipulated the YouTube channel before she took a screenshot. We do not think there was a reasonable basis for that allegation. We have no idea why YouTube would show a high number of subscribers and then remove them but there is no basis for believing that Helen Dorfman was responsible for any manipulation of the site. It appears that the number of subscribers was a matter picked up by the panel in discussions rather than during the hearing. Clearly if it was a matter of importance to the panel it would have been fairer to have asked the Claimant to comment. We note that it was sufficiently important that the panel mentioned it in their decision letter. We return to the effect of this below.

143. We find that the decision not to permit an expansion of the disciplinary allegations against the Claimant to include allegations that he had been suggesting that the earth was flat and/or the moon-landings were faked was pragmatic and generous. There was sufficient evidence that the Claimant had done both of these things. It would not be unreasonable to consider that a teacher who discussed such matters with impressionable students should be disciplined. The fact that Charlotte Robinson agreed to abandon this action demonstrates a willingness to act fairly.

144. We did not consider that there were any other procedural issues. The disciplinary panels were in our view sufficiently independent. Each side had an adequate opportunity to call witnesses and to address the panel. Whilst it was unfortunate that there was a delay between the first and second disciplinary hearings that had no obvious effect on the fairness of the proceedings.

145. We turn to the issue of whether the findings of fact made by the disciplinary panel were made on reasonable grounds.

146. The vast majority of the factual issues that the panel had to deal with were not disputed. The Claimant did not dispute that he was the person who had written 'Scattered but not Lost'. He accepted that he had posted videos on-line. His account of the discussions in 2018 with Emma Hobbs did not significantly differ from her note/recollection. We find that there were reasonable grounds for concluding that the Claimant (1) had been spoken to by Emma Hobbs in the terms she recorded in her note of the conversation and (2) that he was the author of the materials in his book and videos.

147. One more controversial issue was the extent to which students were aware of the Claimant's YouTube channel. The disciplinary panel had evidence in the form or a reported discussion and in the form of the thank-you cards that supported their conclusions that the Claimant's students were aware of his channel. The Claimant could only point to low viewer figures to suggest that it was unlikely that any students watched his videos. The videos were on a public platform and were associated with the Claimant's real name. We find that there were reasonable grounds for finding that students were aware of the channel.

148. We have set out the disciplinary rules that the Claimant was found to have breached in our findings of fact above. We find that there was an ample basis

for the disciplinary panel concluding that the Claimant's online activities breached the four rules they identified. We consider the fact that the panel rejected some other allegations to be indicative of a fair-minded approach. In his public broadcasts the Claimant had stated LGBT people, Jews and Catholics were of the DNA of Satan and as such lesser than the true Israelites. The context of those remarks made it clear that the Claimant regarded all three groups as evil or sinful. Such remarks are clearly aimed at the protected characteristics of others. A reasonable person could consider those remarks to be discriminatory. They are views which are entirely inconsistent with the ethos of the school and its equal opportunities policy. As such we consider that the conclusions arrived at by the disciplinary panel were reasonably open to it.

149. We need to deal with the questions that arise from the conversation between Emma Hobbs and the Claimant in 2018. We would accept in principal that had Emma Hobbs given the Claimant a clear reassurance that, provided that he did not link his YouTube channel to the School, the School would have no proper objection to anything he said, a reasonable employer would not have departed from that assurance without proper cause. We have set out above in our findings of fact the approach of the disciplinary panel. In essence the disciplinary panel appear to have regarded the complaint by Jo Doyle and in particular her complaint that the public comments of the Claimant towards LGBT people as fresh circumstances which permitted the matter to be looked at afresh.

150. The Claimant took exception to the suggestion in the letter of dismissal that the conversation that he had with Emma Hobbs had resulted in any disciplinary outcome or that it should have been regarded as a 'warning'. We do not accept that the approach of the disciplinary panel was wrong or unfair. It was not ever suggested that the Claimant had been given any formal disciplinary sanction (warning or otherwise). No sanction whatsoever was applied. That was known to everybody and the dismissal letter needs to be read in that context. However, as we have found above the Claimant was 'warned' of the need to respect the school's plurality and of the dangers of being seen to promote one particular view.

151. Michael Fenn pulled no punches when dealing with this point in his evidence. His view was that the Claimant was lucky not to have been dismissed in 2018.

152. We do not think that a reasonable employer would have regarded the events of 2018 as providing the Claimant with an assurance that no action would be taken against him provided that he removed any videos that were filmed at the school or showed the logo of the school. It was reasonable to regard the conversation with Emma Hobbs as a reminder of the standards required. There was nothing in the conversation that took place about any specific comments and nothing that could have led the Claimant to believe that any particular remarks were acceptable to the school.

153. We consider that a reasonable employer could fairly have though that the conversation of 2018 laid down some form of a marker for the Claimant and did not amount to a green light for any future activities.

154. In addition, the video that sparked Jo Doyle's complaint and which referred to *'like your LGBT, like your anti-Christ, like your Cain…'* was published on 11 May 2019. In our view it was entirely reasonable to revisit the question of whether the Claimant's online activities were compatible with his position in the light both of new videos and in the light of a complaint.

155. The question that remains is whether the decision to dismiss the Claimant was fair or unfair. As we have indicated above that requires us to consider whether any human right was engaged by the dismissal and, if so, whether in the light of that the dismissal was fair – see ***X v Y***.

156. The case before us proceeded on the basis that is any right was engaged it would be Article 9. The text of that article reads as follows:

Article 9: Freedom of thought, conscience and religion

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance.*

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

157. It is clear from the text above that the right to hold beliefs is absolute. The restrictions on any right to manifest any religious belief are subject to the requirements/conditions at the end of paragraph 2. Whilst the Claimant did not put any reliance on Article 10, we should briefly say that in our view if he had the result would have been the same. Article 10 is a qualified right with a somewhat broader list of qualifications than in Article 9.

158. The first question is whether the Claimant's Article 9 rights were engaged at all. We find that they were. The Claimant was using his YouTube channel to preach and to proselytize. In ***Eweida v United Kingdom*** **48420/10, [2013] IRLR 23** The ECHR accepted that not every action inspired or motivated by a religious belief attracts protection However, where there is a sufficiently close direct nexus between the act and the underlying belief the potential protection of Article 9 will be engaged. Here we find that direct nexus.

159. We shall turn directly to the issue of whether any of the qualifications set out in Article 9(2) apply in this case. The Respondents did not seek to argue that there could have been any justified interference with the Claimant's right to preach in a public forum if the Claimant had restricted himself to preaching the beliefs that we have set out in the schedule to this judgment. What the Respondents say is justified is treating as gross misconduct language that refers to LGBT people as having the DNA of Satan and equating Jews and Catholics as being satanic

or evil in a public forum which might be visited by students.

160. At the core of the argument presented by the Respondents is the fact that the school promotes itself and its values as being inclusive. We find that those values are genuinely held and consistently promoted. We accept that it would be difficult if not impossible to promote values of plurality and openness to students when it was known that a senior teacher publicly denounced LGBT people, Jews and Catholics as being evil or the descendants or followers of Satan. There was evidence, which we accepted, that there were a number of openly gay students at the school. Common sense would suggest that others might be questioning their own sexuality. In her witness statement Jo Doyle said this:

‘25. Rokeby is a small school with a strong commitment to equality and diversity for all. Many students come from backgrounds where sexuality may be an initial concern and we need to support them and allow them to be accepted. To see a member of staff saying derogatory, divisive and hateful things about LGBT and Christian community on a public platform distressed, upset and saddened me.

26. We have had a lot of training including how staff should manage social media and safeguarding. Robert had participated in this training and should have known what was expected of him.

27. I am comfortable with who I am, but I am more concerned with the effect these views might have on younger members of staff, students and families. There are some very vulnerable boys and young staff who may be exploring their sexuality and questioning it and it is important that they are not judged or made to feel that they are evil.’

161. The school’s concerns that the manner in which the Claimant had expressed his beliefs was likely to or could potentially damage those students and their relationship with the school if the Claimant remained in post is in our view entirely justified.

162. Having heard the Claimant’s evidence and listened to his explanations about the language that he used we are prepared to accept that the foundations of the Claimant’s beliefs in good and evil are rooted in the King James bible. Put in moderate terms the Claimant believes that engaging in same sex sexual activity is sinful. He believes that those people who do not worship god in the manner instructed by the bible are sinners. He believes in heaven and hell and believes that any unrepentant sinners will be sent to hell. We would accept that the right to hold and manifest religious views particularly outside any workplace is an important right.

163. The proper approach to the exercise that has to be conducted has been recently set out in the decision of the Court of Appeal in ***Page v NHS Trust Development Authority*** **[2021] EWCA Civ 255**. We have extracted the following principles from that case:

163.1. The test for justification requires balancing the interference with the fundamental right in question against the legitimate interests recognised by paragraph 2 of both articles (see paragraph 52).

163.2. The use of the word 'necessary' in paragraph 2 of both Articles 9 and 10 does not import any higher standard than that there is a need to balance the two competing interests (see paragraph 58)

163.3. *'The extent to which it is legitimate to expect a person holding a senior role in a public body to refrain from expressing views which may upset a section of the public is a delicate question which can only be decided by reference to the facts of each particular case'*. (see paragraph 59)

163.4. The manner in which any religious beliefs are expressed may be a relevant consideration in the balancing exercise (see paragraph 59)

163.5. We have assumed that the Court of appeal have endorsed the Mr Page's argument that the mere fact that the expression of any view has the capacity to offend is not by itself sufficient to justify any interference with a right to manifest a belief/freedom of expression (from paragraph 57 read with paragraph 59).

164. In this case the issue is not the beliefs that the Claimant holds but the fact that he expresses them in trenchant terms. The Claimant cannot reasonably expect the Respondents, the school pupils or teachers to understand that when he describes a person or religion as linked to Satan or evil, he is simply saying that following that path will result in exclusion from heaven. Many if not most people would regard it as offensive if their sexuality or religious beliefs were described as evil. Any balancing exercise conducted under to Article 9(2) needs to reflect not only what the Claimant believes, but how he has expressed himself, and in what terms.

165. We have considered whether the Claimant's offer made during the disciplinary process to remove his videos and to desist from posting any more has a bearing on the issue of justification (and indeed the question of whether the dismissal was fair). The evidence of Sarah Jacob was consistent with the dismissal letter. Her reasons for concluding that the Claimant should be dismissed was an absence of the necessary trust and confidence for any ongoing relationship. We consider that she had a reasonable basis for this conclusion. Despite the Claimant's offer to remove his videos there was no suggestion from the Claimant that he accepted that he might have caused offence or that his publicly expressed views were contrary to the ethos of the school. The Respondent could reasonably have believed that the damage had been done. The Claimant had offended Jo Doyle and other staff members. He had not apologised or resiled from his views. The respondent had accepted that students had viewed the videos. There was no means of the school stopping the dissemination of any gossip between students.

166. Taking these matters together the question for us is whether the School's decision to dismiss the Claimant for expressing his religious views on YouTube in the terms that he did was justified by the exceptions set out in paragraphs (2)

of both Articles 9 and 10 of the Convention. We acknowledge the importance of such rights but have concluded that the School's own assessment that the interference was justified is the same as our own. The School was entitled to conclude that its own interests in promoting pluralism and the welfare of its students were a sufficient reason for restricting the Claimant's rights to manifest his religious beliefs and/or express his opinions in public in the manner that he did.

167. Having decided that any interference with the Claimant's convention rights was justified we need to deal with the question of whether or not the decision to dismiss the Claimant fell within a range of reasonable responses. We do not consider that the process followed by the School was perfect. We have identified the following matters:

167.1. The invitation to a disciplinary hearing might have spelt out the matters for which disciplinary action was contemplated in clearer terms; and

167.2. There were some delays caused by failing to appreciate the time required; and

167.3. If the appeal panel intended to place any emphasis on the number of subscribers/views for any video, which they then did, fairness demanded that this was raised during the appeal hearing and not just in the outcome letter.

168. We have to step back and have regard to the entirety of the process – ***Taylor v OCS Group Ltd*** **[2006] IRLR 613**. Having done so we are satisfied that overall the process that was followed was fair. In essence the issues were very simple. The Claimant accepted what he had done. He had every opportunity to explain himself and say why his activities were not a breach of any policy and/or did not warrant any disciplinary action. That is the core of a fair disciplinary process.

169. When Sarah Jacobs gave evidence she told us that she was acutely aware that the Claimant had been a teacher for 16 years and that that was a matter that she had taken into account. Such a matter of course cuts both ways. The claimant's experience and the fact that he should have been aware of professional boundaries was also a relevant consideration.

170. We must not substitute our view for that of the Second Respondent. We need to determine when the process and final decision are looked at as a whole the decision to dismiss was one open to a reasonable employer. We find that it was. We consider that the school could reasonably have concluded that it no longer had sufficient trust and confidence in the Claimant in the light of his public pronouncements to enable him to carry on as a teacher at the school.

171. Accordingly we find that the complaint of unfair dismissal is not well founded.

Discrimination contrary to Section 13 of the Equality Act 2010.

172. We have found above that the reason that the Claimant was dismissed by the

Respondent was those reasons set out in the letter of dismissal. The key issue for us is whether or not a dismissal for those reasons *is 'because of'* the Claimant's religious beliefs.

173. The statutory Code of Practice says this about the overlap between the holding of any belief and its manifestation (our emphasis added):

2.61

Manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. <u>There is not always a clear line between holding a religion or belief and the manifestation of that religion or belief</u>. Placing limitations on a person's right to manifest their religion or belief may amount to unlawful discrimination; this would usually amount to indirect discrimination.

174. The right to manifest any religion guaranteed by Article 9 is subject to qualifications as we have outlined above. Where a person manifests their religion in a manner which is 'unacceptable' a dismissal for acting in an unacceptable way can be a distinct reason from a dismissal because of religion or belief. In ***<u>Page</u>*** Underhill LJ said:

'68. I start with a point which is central to the analysis on this issue. In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it: see para. 29 above. It is thus necessary in every case properly to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief the EAT case-law has recognised a distinction between (1) the case where the reason is the fact that the claimant holds and/or manifests the protected belief, and (2) the case where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act complained of. Of course, if the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself.

69. The distinction is apparent from three decisions in cases where an employee was disciplined for inappropriate Christian proselytisation at work – Chondol v Liverpool City Council [2009] UKEAT 0298/08, Grace v Places for Children [2013] UKEAT 0217/13 and Wasteney v East London NHS Foundation Trust [2016] UKEAT 0157/15, [2016] ICR 643. In essence, the reasoning in all three cases is that the reason why the employer disciplined the claimant was not that they held or expressed their Christian beliefs but that they had manifested them inappropriately. In Wasteney HH Judge Eady QC referred to the distinction as being between the manifestation of the religion or belief and

the "inappropriate manner" of its manifestation: see para. 55 of her judgment. That is an acceptable shorthand, as long as it is understood that the word "manner" is not limited to things like intemperate or offensive language.'

175. Ms King made the submission that the Claimant's case was doomed to failure because it was quite clear that his dismissal was nothing whatsoever to do with the beliefs he had identified in the schedule to this judgment. We would agree that the Claimant was not dismissed for expressing any of those views. It seems to us that the Claimant has been very careful to restrict the beliefs that he has relied upon to broadly mainstream Christian beliefs. However, it would in our view be unfair (where the Claimant represents himself) to deal with the case on that limited basis. As we understand his case the Claimant is saying that the beliefs that he has identified include a belief that, whilst 'his people' 'the true Israelites', can fall into sin the others (LGBT people, Jews and Catholics) start from a position of sin and must repent. He says that any references to 'evil' or Satan' need to be seen in that context.

176. We would accept that many religions include the concept of a 'chosen people'. We shall not illustrate that with any examples lest we cause offence. Ms King invited us to conclude that any such opinion was racist. We would accept that a moderate expression of those beliefs within the workplace could not reasonably be distinguished from holding the belief itself and would not always be unacceptable. However as the authorities referred to in ***Page*** show, depending on the facts of the case, the manifestation of any belief can cross the line into unacceptable conduct. A dismissal for that unacceptable conduct itself is a distinct reason from dismissing because of any belief itself.

177. The reason that the Claimant was dismissed was that the public expression of his beliefs were in such trenchant terms. All of the comments to which objection was taken referred to the protected characteristics of others. Many reasonable people would consider language of the views that were expressed to be shockingly discriminatory. It was this discriminatory language that led the disciplinary panel to conclude that the four allegations against the Claimant were made out. It was the effect that this had or could have on the school's reputation and ethos and the effect it might have on its pupils and staff that together gave rise to the reason for the dismissal.

178. We conclude that the treatment of the Claimant was not because of religion or belief. The reasons for the dismissal are in our view entirely severable from the beliefs themselves and are solely because those beliefs were manifested in a manner entirely inconsistent with the Claimant's position as a Senior Teacher at a multicultural Secondary School which strived to promote pluralism and equality. Had the Claimant chosen to express himself in other terms the outcome might have been very different.

179. We have not considered it necessary to deal with the issue of whether the Claimant was treated differently to his named comparator. For completeness we should say that the evidence of Charlotte Robinson was that she had no knowledge that a Muslim teacher had removed or defaced LGBT posters. The Claimant did not give any evidence that she was aware of this. To conduct any

proper comparison the comparator would need to be a person whose actions had come to the attention of the school's managers. There was no evidence of that occurring here. We have dealt with the matter by going straight to the question of why the Claimant was treated as he was.

180. It has proved unnecessary for us to deal with the question of whether the Claimant's beliefs fall to be protected at all. The analysis above assumes that they do. Clearly the beliefs that the Claimant has set out in his schedule would be protected. Unpalatable as it may be to some, we would have reached the same conclusion about any view that some people are 'chosen', and others are not. Equally we would have accepted that a belief that practicing homosexuals are acting sinfully is a belief capable of protection. This case does not turn on those points. This case turns on how those beliefs were manifested and in what context.

181. Our conclusions mean that the Claimant's claim of direct discrimination is dismissed.

Breach of Contract – Notice Pay

182. There was no dispute that the Claimant was dismissed without notice. Unless the First Respondent can show that it was contractually entitled to take this course then the dismissal will be a breach of contract entitling the Claimant to damages. The claim is presented as a claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. We consider that it is necessary for us, as a public body, to ensure that our decision in respect of the contractual claim is in conformity with the Claimant's convention rights. We repeat our analysis set out under the heading of Unfair Dismissal.

183. An employer (or employee) will be entitled to terminate a contract without notice where there has been a serious breach of contract. The modern approach was explained in ***Neary & Neary v Dean of Westminster*** **[1999] IRLR 288** where Lord Jauncey said *'conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'.*

184. The First Respondent bears the burden of proof in order to demonstrate that the Claimant's conduct reached the threshold identified above.

185. We are entitled to have regard to the entirety of the evidence and not only the matters in the mind of the employer at the time of the dismissal.

186. As we have said above there was no dispute that the Claimant was the author of 'Scattered but not Lost' and that he presented the videos summarized by Helen Dorfman in her report. The Claimant did not dispute the quotations that she extracted.

187. We consider that some conduct outside of work is clearly capable of amounting to a breach of the implied term of trust and confidence. The policeman who beats his wife or the accountant who steals might be obvious examples. It is

clear from those examples that the position of the Claimant is relevant. Here we are satisfied that the Claimant was a Senior Teacher at a diverse secondary school based in an area where extremism has historically been a problem. We find that the nature of his position required him to conform to high standards in promoting pluralism and equality.

188. We have reached the conclusion that the Claimant's conduct was without any reasonable cause likely to seriously undermine trust and confidence. We are acutely aware that this judgment will be published online. We have, where possible, avoided giving too much detail about how the Claimant expressed himself. That is known to all parties. What we have concluded is that the Claimant has expressed himself in ways which are discriminatory and offensive on YouTube and in his published book. We shall restrict ourselves to the following examples but had regard to the entirety of the evidence:

188.1. In his book the Claimant makes the following comments: *'the European Jews who went to our land in 1948 are possessed with the spirit of Esau as mentioned earlier..'* and *'The Jewish/Israeli flag is comprised of 6 points, 6 triangles and 6 sides of a hexagon ('666') …'*

188.2. In DNA of the Wicked he said 'I'm going to come back and deal with this in a very shorter video and highlight the point of what is found in the DNA of Satan like your LGBT, like your antichrist…'

188.3. In Greetings from Rome Part 2 he said (in a clear reference to the Catholic Church) *'This Rome is the seat of the beast, this is the seat of the false prophet, this is the seat of everything that is in opposition to the Most High Yah'*

189. The first example we have given is in our view antisemitic and highly offensive playing on a trope about the Israeli flag in offensive terms. The second example, the main comment that prompted Jo Doyle's complaint, goes well beyond simply suggesting in moderate terms that LGBT activity is sinful. That might have been what was intended but the Clamant must bear responsibility for the way he has chosen to express himself. We would accept that the final example we have chosen might not be very different to the teachings of Martin Luther. That is not the point, Martin Luther did not work in a pluralist school in the 21st Century. There may be a time and a place for such religious debates but a teacher in the context we have described should have been aware of the effect of his words on his own position.

190. We do not consider it necessary to set out any further examples. It is sufficient to say that the language used by the Claimant, in public, in his own name was discriminatory and offensive. We would accept that a one-off use of discriminatory language outside the workplace may not be sufficient to seriously damage trust and confidence. That is not what we are faced with here. The Claimant has made public statements over a number of years. We accept that the cumulative effect of those statements is such that it seriously damaged the employment relationship. Accordingly we find that there was a serious breach of contract by the Claimant which entitled the First Respondent to dismiss him without notice or a payment in lieu of notice.

The Employment Judge's apologies

191. As the parties are aware the Tribunal met in June 2021 and the decisions recorded above were written in note form at that time. The Employment Judge had numerous other outstanding judgments at that time. Shortly after the hearing he sat on a case lasting nearly 2 months. There have been many cases since.

192. The Employment Judge extends his apologies to the parties for the delay in providing this judgment and reasons. He is acutely aware that the parties have been anxiously awaiting the outcome of the proceedings. He apologises for any additional anxiety that the delay has caused.

Employment Judge Crosfill
Dated: 2 March 2022

Schedule 1

The list of issues agreed between the parties before the hearing

Correct Respondent

1. Should the Third Respondent be a Respondent in the case?

Whistleblowing

2. Was there a relevant disclosure for the purposes of Section 43 Employment Rights Act 1996 (ERA)?

3. The Respondent accepts that there was a disclosure of information that is capable of being a disclosure for the purpose of section 43 ERA 1996 on 22 May 2019 when the Claimant sent the Headteacher an email expressing concerns.

4. Did the Claimant s make the disclosure in the public interest?

5. Does the disclosure tend to show one or more of the types of wrongdoing or failure listed in section 43B (1)(a)-(f) of the ERA 1996?

6. The Claimant contends that the disclosure tends to show that the Respondent was failing or is likely to fail to comply with any legal obligation to which it was is subject (43B (1) (b)) and/or that a miscarriage of justice had occurred, was occurring or was likely to occur(43B (1) (c)).

Wrongful Dismissal

7. Was the Claimant dismissed without being given contractual or statutory notice?

8. Was the Claimant guilty of a repudiatory breach of his contract of employment?

Automatic Unfair Dismissal Section 103A ERA 1996

9. If there was a protected disclosure as set out above:

10. Was the reason or the principle reason for the Claimant's dismissal because he made a protected disclosure?

Unfair Dismissal

11. What was the reason for the Claimant's dismissal?

    a. The Respondent pleads that the reason for dismissal was conduct – namely gross misconduct.

12. Was the decision to dismiss the Claimant fair in all the circumstances?

    b. Was there a fair investigation?

c. Was the Claimant afforded a fair hearing and right to appeal?

d. Did the decision maker have a reasonable belief that the Claimant was guilty of the allegations?

e. If so was the decision to dismiss within the range of reasonable responses available to a reasonable employer?

13. If the dismissal was unfair in any way should there be a reduction in compensation due to the Claimant's own conduct or because the Claimant would have been dismissed/or would been likely to have been dismissed had a fair procedure been carried out?

Religious Discrimination

14. The Claimant's religion for the purposes of the section 10(1), EqA 2010 is Christianity.

Section 13 Direct Discrimination Equality Act 2010 (EqA 2010)

15. Was the Claimant treated less favourably than someone who does not share his religion/ religious or philosophical beliefs by:

f. Dismissing the Claimant for gross misconduct?

16. Was the Claimant treated less favourably because of his religion/ religious or philosophical

beliefs?

17. The Claimant relies on:

g. A hypothetical comparator in not materially different circumstances to the Claimant;

h. Mr Farooq, who the Claimant says tore down posters posted in Rokeby School and which supported LGBTQ communities on several occasions.

Schedule 2

The Claimant's further particulars of his religious beliefs

Robert Headley-Religious Beliefs- I am a Christian (Protestant)-Holy Bible

- I believe in one living and true God as is revealed in the Bible. That he alone deserves worship and absolute obedience.
- I believe that He is Infinite, Infallible, Omnipresent, Omnipotent and Omniscient.
- I believe that he is the Creator of everything visible and invisible.
- I believe that He expressed and revealed himself to mankind in the person his Son.
- I believe that the Son was the express Image of the Father.
- I believe that the Son was murdered but was resurrected by the power of the Holy Spirit.
- I believe that the Holy Spirit is active in the Earth bringing about the will of the Creator.
- I believe that God moves in History with and through his People; the descendants of Abraham, Isaac and Jacob.
- I believe that God delivered his chosen people from Egyptian slavery via the hand of Moses.
- I believe that God bound his people to himself covenant.
- I believe in the TEN COMMANDMENTS, and all the laws and teachings of the Prophets.
- I believe that God blessed, blesses and Judged and judges his people.
- I believe that God created human beings male and female.
- I believe in divine healing.
- I believe in Sin, Redemption, The final Judgement and Eternal punishment in Hell's fire.
- I believe that God sent the promised Deliverer to his people.

- I believe that he was the son of Mary and Joseph and a descendant of King David.
- I believe that he was truly and fully human.
- I believe that the Bible is the written Word of God.
- I believe that the Son is the Living Word of God.
- I believe that His People the descendents of Abraham, Isaac and Jacob will be re-gathered to the HOLY LAND Africa.

Submitted by

Mr R Headley