EMPLOYMENT TRIBUNALS

Claimant: Mr K Lister

Respondent: New College Swindon

Heard at: **Bristol** **On:** **18 to 22 March 2024 (25 to 27 March in chambers)**

Before: **Employment Judge Livesey**
Ms D England
Ms G Mayo

Representation:
Claimant: In person
Respondent: Ms Shepherd, counsel

JUDGMENT

The Claimant's complaints of unfair dismissal and discrimination on the grounds of religion or belief are dismissed.

REASONS

1. Claim

1.1 By a Claim Form dated 14 December 2022, the Claimant brought complaints of unfair dismissal under ss. 98 (4) and 100 (1)(e) and discrimination on the grounds of religion or belief.

2. Evidence

2.1 The Tribunal heard oral evidence from the Claimant and the following witnesses on behalf of the Respondent;

- Mrs Best (who gave evidence remotely by video – CVP);
- Miss Spanswick;
- Mrs Davison;
- Ms Kitching;
- Miss Plested;
- Mrs Fry.

2.2 The Tribunal also received the following documents;

- C1; Chronology (unagreed);
- C2; the Claimant's closing submissions
- C3; the Claimant's further submissions on the complaint of indirect discrimination;
- R1; Agreed hearing bundle;
- R2; Chronology (unagreed);
- R3; Cast List, which was agreed once one small amendment had been made;
- R4; Agreed List of Key Documents;
- R5; Ms Shepherd's closing submissions;
- R6; Ms Shepherd's further reply to C3.

3. Hearing and case management issues

3.1 Having considered the June 2022 *Practice Guidance on Remote Observation of Hearings* and upon the application of Ermine Amies of Tribunal Tweets dated 14 March 2024, the Tribunal determined that the press and others ought to have been given access to the hearing remotely in accordance with the terms of the Order that was then made on the first day of the hearing (18 March 2024).

3.2 The Respondent applied to allow one of its witnesses, Mrs Best, to give her evidence remotely. The application was not opposed by the Claimant and was granted.

3.3 The claim had been listed for a hearing to determine all matters of liability only, but it was agreed that the issues of contribution under ss. 122 (2) and 123 (6) and/or under the *Polkey* ought to have been addressed within it.

3.4 On the fourth day of the hearing (the third day of evidence), it was clear that the hearing had progressed a little more quickly than expected and all of the oral evidence had been heard. The parties requested that closing submissions should have been delivered on the sixth day (the Monday), leaving the fifth (Friday) wasted. The Tribunal did not think it necessary for the parties to have been given so long to arraign any closing arguments given the fact that there had only been 3 days of evidence. We considered that some thought ought to have been given to the law and closing argument both before and during the hearing. We asked to hear closing submissions on the fifth day at a time which was preferred by the parties. They agreed to do so at 1.00 pm.

3.5 The Claimant's closing submissions, although lengthy, had not covered his complaint under s.19. He said that he had not had time to consider it. We therefore allowed him to provide any further written submissions by 1.00 pm on the sixth day, with any further written submissions from Ms Shepherd (law and misstatement of facts) to have been submitted by 4.00 pm that day. Both parties were content with that approach and both duly submitted further written arguments (C3 and R6).

Rule 50 orders

3.6 Rule 50 orders had been made before the hearing in the following respects;

- An anonymity order in respect of any students referred to in the evidence, who were otherwise referred to as Students A, B, C etc.. (Order 30 June 2023);
- An anonymity order in respect of a particular member of staff, referred to as Employee C (Order of 30 June 2023);
- An anonymity order in respect of a relative of the Claimant's who was referred to in a conversation with Student A (Order of 3 January 2024).

3.7 On the seventh day of the hearing (26 March) and during the Tribunal's deliberations, it received an email from a former staff member who had been referred to in evidence and tweeted about by name. During the hearing, it had been alleged that he had been affected by negative comments made by the Claimant during a training session on transgender issues and, as an alleged transgender person, he was upset and had left the session. The email read;

"*On Thursday the 21st March I was told by my employer that I was mentioned in the ongoing tribunal. They have never told me that I was being used in evidence…I have looked at these leaks* [on tribunal tweets] *and I am very unhappy…This has now put me at risk, especially due to the political nature of the case….Also the information regarding me used in trial is incorrect and false…I am very confused as to why I would be used as evidence without being spoken to* [sic] *and to see whether to information was factual.*"

3.8 No application had previously been made under rule 50 in respect of his identity, as in the case of Employee C (see paragraph 3.6 above). At first sight, it seemed to the Tribunal that he ought to have had just as much right to protection as Employee C, who had been protected to save her identity and that of her son being known due to his transgender status (see paragraph 63 of the Case Summary of 13 June 2023).

3.9 The Tribunal immediately asked for the parties' views by email about an anonymity order being made in respect of him. The Respondent supported the making of an order. The Claimant did not. He asserted that the individual's transgender status was public and not simply a private matter, that there was no evidence that the individual's safety had been threatened (despite his assertion of 'risk') and that, amongst other things, since the protection sought would apply just to him, not any child of his (as with Employee C), there was less reason to grant an order.

3.10 The Tribunal ultimately determined that an order ought not to have been made for the following reasons;

- 'Open justice' enabled the public to be able to attend hearings and the press to report upon them contemporaneously, including the identities of the parties and witnesses. In respect of this individual's identity, they had already done so. The burden of establishing any derogation from the general principle lay on the person seeking it. It must have been

established by "*clear and cogent evidence*" (see *Global Torch* per Maurice Kay LJ at paragraph 13 and *Fallows-v-News Group Newspapers* [2016] ICR 801);

- The individual had Article 8 rights. We noted that he was now in different employment and, whilst these parties knew him to have been of 'transgender status' (as the Claimant put it in his email of reply) his previous gender identity may not have been known to others. That issue, however, was *not* a matter raised by him in his email of 26 March. Rather, he complained about alleged inaccuracies in the evidence. Without knowing what they were, the Tribunal could not comment further, but that was not of itself a reason to make an order under rule 50. There was no 'clear and cogent' evidence that the individual's article 8 rights would have been interfered with had a rule 50 order not been made. The 'risk' referred to was not identified and did not necessarily attach to those rights.

3.11 Although the Tribunal was not prepared to make an order because it was not satisfied that the necessary test was met, it had a discretion whether to refer to any witness by name in its Reasons. Since the individual was concerned to have been identified, since he had not given evidence or been represented and since referring to him as Employee D did not affect the sense of the Reasons which follow, that was how we chose to proceed.

4. Issues

4.1 The issues in the case had been discussed, agreed and recorded in the Case Summary prepared by Employment Judge Roper following the Case Management Preliminary Hearing on 13 June 2023. They were confirmed at the further hearing which took place before Employment Judge Bax on 3 January 2024 and discussed again at the start of the hearing. That discussion produced some further illumination as follows (with reference to the paragraph numbering in Judge Bax's Case Summary [185-190]);

(i) In relation to the complaint of 'ordinary' unfair dismissal under s. 98 (4); the Claimant alleged that the procedure which led to his dismissal was flawed in two respects (paragraph 2.5 [186]);

- He was not given the communications which had passed between the Respondent and Swindon Borough Council (the LADO referral);
- He was not given the correspondence which had passed between Ms Alexander and others concerning his grievance and whistleblowing complaints, despite having asked for it since 5 April;

(ii) In relation to the complaints of direct discrimination, the Claimant was content that the Respondent's concession, recorded within paragraph 4.2 [188], captured the nature of the belief relied upon;

(iii) The Claimant's statement had referred to 3 actual comparators, including Mr Eggleton (paragraph 68) and Mr Stevenson

(paragraph 31), yet the claims under s. 13 had only previously been advanced on the basis of hypothetical comparators (paragraph 4.4 [189]). Following a discussion between the parties, it was agreed that, subject to the Respondent being permitted to adduce some small additional evidence in chief, the Claimant would only rely upon Employee C as an actual comparator in relation to those allegations at paragraphs 4.3.5 and 4.3.6 [188] (see paragraph 63 of his statement);

(iv) Very careful thought was given to the indirect discrimination claim. It was clarified that the actual PCP relied upon was within paragraph 4.1 of the Gender Reassignment Policy [196], which the Respondent accepted was a PCP. The particular disadvantages alleged were that, as a result of the positive approach to reassignment espoused, the Claimant's two safeguarding concerns were not considered adequately or at all (paragraph 5.5 [190]).

5. Facts

Introduction

5.1 The Tribunal found the following facts on the balance of probabilities on matters which were relevant to a determination of the issues in the case. Page references which appear in these Reasons are to pages within the hearing bundle, R1, unless otherwise indicated and have been cited in square brackets.

5.2 There was an issue between the parties as to how a transgender student, Student A, should have been referred to during the hearing. The Tribunal tried to adopt a gender neutral approach to nomenclature during the hearing and in these Reasons.

5.3 The Respondent is a further education college which operates at two sites in Swindon, Wiltshire; the North Star and Queens Road Campuses. It has nearly 8,000 students who undertake A-levels or vocational courses. Approximately 40% are under the age of 18. At the relevant time, Ms Kitching told us that there were about 19 transgender students at the College, about 0.2%, below the national average of 0.5%.

5.4 The Respondent employs about 600 members of staff. The key personnel who were relevant to the evidence were as follows;

- Ms Kitching; the former Principal and CEO;
- Miss Plested; Deputy Principal – Curriculum, Quality and HE;
- Mr Horrobin; Deputy Principal - Finance and Resources;
- Mrs Davison; Assistant Principal - Quality of Education;
- Miss Spanswick; Assistant Principal for A levels – Science and Humanities and the Claimant's line manager from January 2022 (now retired);
- Ms Foreman; the Claimant's line manager until January 2022;
- Mr Young; the former Director of Student Services and Designated Safeguarding Lead;

- Mrs Best; Student Experience Manager, until her departure in September 2022;
- Mrs Fry; Head of HR, now no longer with the College;
- Ms Moore; HR Business Partner ('BP').

5.5 The Claimant started with the Respondent on 17 August 2020 as a full-time lecturer, having previously taught at Cirencester College since 2004. He taught A-level maths, Advanced Maths and Computer Science and was the Programme Leader for the first two of those three subjects. By signing his contract, he had agreed to familiarise himself with the Respondent's policies and procedures (Clause 3.1 [253]).

5.6 Policies about which specific evidence was given included;

- The Safeguarding and Child Protection Policy [238-244];

  The Policy recognised that students needed to feel protected in order to be able to develop and learn to their full potential. It placed a duty on all staff to report any safeguarding issues to the Safeguarding Team which would then determine what action ought to have been taken. Once raised with the Team, responsibility for addressing the concern rested with them. The Policy also suggested that, if staff had concerns about the Team and its safeguarding practices, they should raise them with the senior leadership team [244].

  The Safeguarding Team worked closely with external agencies such as the police and the Local Authority Designated Officer ('LADO').

  The Claimant said in evidence that he did not know who the Designated Safeguarding Lead was, but accepted that he did not ask and could have done;

- The Staff Code of Conduct [209-214];

  The Code set out to provide guidance to facilitate "*the safest possible environment for learning*" (Clause 1.1). Amongst other things, it required staff to treat students with respect and dignity (Clause 11.4);

- The Disciplinary Policy; [215-225];

  The Policy defined acts which might have been considered to have been gross misconduct, which included the harassment or discrimination of a student (clause 3.20 [221]);

- The Gender Reassignment Policy [196-207];

  This was the particular policy relied upon Claimant in support for his complaint of indirect discrimination.

The Policy had been created in October 2009 and reviewed in 2021. It sought to ensure the fair treatment of staff and students who were "*living in or intended to live in a gender other than that previously ascribed to them.*" Ms Kitching said that, in the absence of clear guidance from the Department for Education at the time, the College had looked to the Association of Colleges ('AOC'), which comprised many similar teaching establishments who worked with the relevant unions and funding authority, for guidance. The Policy had been drawn up on the basis of that guidance and the Education Act 2010 (although we thought that she had probably meant the Equality Act).

Clause 4.1 was relied upon as the specific PCP [196];

> "*New College celebrates and values the diversity of its student population and workforce. The College will treat all employees and students with respect, and seek to provide a positive working and learning environment free from discrimination, harassment or victimisation. The aim is to create a positive inclusive ethos with a shared commitment to respecting diversity and difference, and to encouraging good relations between people with any gender identity. New College applies these principles beyond the scope of the Equality Act 2010 to all those with gender variance, some of whom may not permanently identify as male or female.*"

The Claimant's detailed views on Clause 4.1 were sought in cross examination. He considered that it did not cause him a particular disadvantage on the basis of its literal wording, save the last sentence, but did because of the alleged manner that it was interpreted and implemented by the Respondent. For example, the third sentence, he said, caused him a disadvantage because he could not comply with how the Respondent applied it which, he considered, actively encouraged transitioning students. In relation to the last sentence, he said that the stated aim of offering protection above that offered by the Equality Act was "*illegal*" and was a recipe for 'making up the law as the College went along'.

The Policy stated that the Respondent would not discriminate against its students on the grounds of gender identity (clause 4.3 [197]) and that acts of discrimination, harassment or abuse on such grounds would have been treated as a serious disciplinary offence (paragraph 11.2 [199]). The combined effect of Appendices 3 and 5 is that students over the age of 16 may request a name change. If so, the Policy directed staff to adhere to their requests in that respect (paragraph 2 [204] and paragraphs 1 – 6 [206]). The direction to staff was as follows;

> "***Use the name, title and pronoun*** *by which the person wants to be addressed. If you are not sure, just ask. If you make a mistake, correct yourself and move on*."

The Claimant accepted that the Policy did not seek to change his philosophical beliefs but, rather, seek to modify his behaviour and speech.

- The Bullying and Harassment Policy [229-232];

It was noteworthy that the Policy adopted the Equality Act definition of harassment (paragraph 4.1 [229]).

5.7 In evidence, the Claimant said that he did not access or read the policies beyond the Safeguarding Policy and the Code of Conduct. He did not, for example, access or read the Gender Reassignment Policy until he was suspended in March 2022. That evidence was subsequently thrown into doubt (see paragraph 5.86 below).

The Claimant's philosophical beliefs and the Respondent's ethos

5.8 The Claimant's philosophical belief, that "*sex is binary, immutable and a biological fact and should not have been conflated with gender identity*" was accepted by the Respondent as a belief that was capable of protection under the Equality Act (paragraph 4.2 [188]).

5.9 It was clear that the Claimant considered that the Respondent "*had a philosophy of encouraging female children in its care to embark on medical pathways that require the permanent use of testosterone and unnecessary surgical intervention*" (paragraph 6 of his witness statement). He considered that the Respondent required staff and students to celebrate "*students who had been persuaded to take wrong sex hormones*" (paragraph 7) and likened the social transitioning of a child to the illegal act of performing FGM (paragraph 12). In paragraph 110, he asserted that the Respondent "*had embraced an absurd set of lies… that girls can become boys, that their lives will be improved once they do so, and that it must be done as quickly as possible.*" In his closing submissions, C2, he drew on historic references to Dr Menegele's experiments and cited the 10 – point Nuremberg Code on human experimentation because, he alleged, "*the College is an active and willing participant in the medical experiment*" (paragraph 40).

5.10 He clearly found the Respondent's supportive approach to students who were transitioning, as embodied by the Gender Reassignment Policy, problematic. He specifically stated that he considered that Appendix 6 positively encouraged children to transition. In his email to Miss Spanswick on 14 February [311-313], in interview with Mrs Best on 17 February [322-7] and in interview with Mrs Davison on 7 March [463-478], he made it clear that he considered that most outcomes from gender transition were negative; students underperformed, they suffered mental health problems, physical disfigurement from surgery and an inability to integrate socially.

5.11 The Claimant accepted in evidence that the holding of his gender critical views did not prevent him from treating those who were or had transitioned with respect. The two were not mutually exclusive. What he took issue with was the Respondent's perceived demand upon him to socially transition children who were unable to make an informed decision. He said that he did not impose his views on anyone else, ever. Student A, he said, had done so upon him. Whilst the student had a right to have been treated as they wanted, he considered that they could not compel others how to behave.

5.12 Ms Kitching disputed that the Respondent held a 'pro-gender affirmative' philosophy, as the Claimant had alleged. Whilst recognising that the issue of gender identity and transition was complex and attracted strong views, she asserted that the College's Gender Reassignment Policy broadly accorded with those of other colleges and best practice within the sector at the time. Government guidance for the further education sector had been anticipated, but had been slow to arrive. Draft guidance was only published in December 2023 for the first time and the consultation process has closed last week. That, she thought, "*illustrated how hard it had been to find an agreed pathway through these issues which appropriately recognises the rights, beliefs, choices and responsibilities of all involved*" (paragraph 7 of her witness statement).

5.13 Ultimately, it was not necessary for us to determine whether the Respondent had been particularly pro-gender affirmative. There was no range for comparison. We had no evidence about how other equivalent colleges approached the issue. There was no way of determining where, on any spectrum, this Respondent fell. Ms Kitching's evidence about the source of the Gender Reassignment Policy in particular was compelling and strongly suggested that the College was not out of step with others at the time.

Student A

5.14 Student A commenced A-level studies at the Respondent at the start of the 2020/2021 academic year. At the start of the following academic year, the student was taught by the Claimant for the three options which had been chosen.

5.15 On 2 September 2021, the student emailed the Claimant and asked to be known by a different, male name. The email read as follows [258];

"*Hi Kevin, I was wondering if during class you could refer to me as* [word deleted] *and changing my name on the challenge question on the one note. The rest of the class know about my preferred name and it would be helpful if teachers could use the same thing.*"

5.16 He did not respond to the email, but he did change the student's name in accordance with their expressed wishes on the Respondent's One Note system that the class used to communicate with him about their work.

5.17 The Respondent's internal 'Promonitor' system (also referred to as EIRP, an internal electronic learning record for each student) also enabled the students to have been identified by a particular name/pronoun but any change in that respect had to be affected by the Respondent's administrators. Student A was to say that they approached the College to make a change to one of its systems in September [274] but it was clear that Promonitor still showed their old name until the matter came to a head in February 2022.

5.18 Not a great deal was gleaned about Student A's gender transition from the evidence. It was clear that they had wanted to identify as male since September 2021 at least, and to have been identified as such by others. He was presenting as male by February 2022 at least (paragraph 8 of Mrs Best's witness statement). There was no evidence that the student was contemplating or undertaking hormone treatment or surgery. It was reasonably clear that the student's mother was supportive of their decision, given the content of her subsequent email communication with the College ([480] and paragraph 5.93 below).

5.19 The following day, 3 September, the Claimant raised queries by using the 'My Concern' safeguarding portal [260]; with reference to Student A's email, he asked whether the student's parents were in agreement with the "*college complying with her wishes*". He asked whether the student had received the "*requisite counselling to allow her to make a decision of this magnitude*" and whether the College had considered the impact of the student self-medicating and its drug policy. In evidence he accepted that he did not know whether the student had had parental support for their transition at that time.

5.20 Ms Murphy, a member of the Safeguarding Team, then met with Student A. No concerns were aired by them about drug therapy and advice was given about how the name change would be dealt with under the Gender Reassignment Policy and how counselling could have been accessed.

5.21 On 7 September, Ms Murphy, met with the Claimant. Although she did not herself give evidence, the Respondent's position in respect of their interactions was based upon her subsequent account in her emails to Ms Alexander [558-560]. She said that she had reassured the Claimant that, having spoken to Student A, there were no concerns that she had. She did, however, have concerns about the language that the Claimant had used and advised him to access and read the Gender Reassignment Policy, having told him where it could have been found.

5.22 The Claimant said that he and Ms Murphy were involved in a 'heated debate'. He denied that he had been referred to the Gender Reassignment Policy. He said that all he was told was that it was 'College policy not to tell the parents'.

5.23 For reasons explained below (paragraph 5.86), we considered that the Claimant probably had considered the contents of the Gender Reassignment Policy, although probably even before he had spoken to Ms Murphy.

5.24 He accepted that, somebody without gender critical views who might have made the same safeguarding complaint (for example, Employee C) would probably have been dealt with in the same manner.

5.25 Ms Murphy updated the 'My Concern' report to reflect her actions [259].

5.26 The Claimant was clearly unhappy with the response from Ms Murphy, but he did not escalate it to senior management, a more senior person in Safeguarding or his line manager.

Claimant's interactions with Student A after September 2021

5.27 Despite the guidance within the Gender Reassignment Policy, the Claimant admitted that he found it difficult to refer to use the name and/or pronoun that had been requested by Student A. He said that he adopted a gender neutral communication style by gesturing rather than using the student's given birth name (otherwise referred to throughout the evidence as 'deadname') or preferred name. He accepted in cross examination that was upsetting for the student.

5.28 A particular issue arose in relation to an all-female Maths Olympiad towards the end of September 2021. Student A had asked in class about their eligibility to participate in light of their gender transition. The Claimant said that he "*she could because she was a girl*" (paragraph 22 of his statement). He considered that to have been a factual response. He accepted that he wrote the student's previous female name on list of entrants on the whiteboard in front of the class. He did not consider that that was likely to have caused upset.

5.29 The student stayed back after the class had ended that day to speak to the Claimant further. He accepted in evidence that they were upset then. He said that he then explained that their decision to transition was 'irreversible' and that "*taking testosterone is likely to cause long-term medical problems and she would be reliant on the NHS, and the services could not be guaranteed for the future*" (paragraph 25 of his witness statement). He said that he had expressed his concerns because of the duty of care he owed to the student (paragraph 27), who he referred to as an "*excellent young lady*" in an attempt to console them.

5.30 He accepted that he had also referred to a family member who had attempted to take their own life through an incident of alcohol misuse. The context, he said, was that the individual had not appeared to address the root reason for their attempted suicide, which he considered was analogous to Student A's inability to address what might have been the real reason for their desire to transition.

5.31 Student A did enter Olympiad by going to the exams office to do so. Mr Stevenson completed the administrative enrolment.

5.32 A very poor score was achieved in the competition, which the Claimant considered was an attempt to send a message, although he shied away from Ms Shepherd's suggestion in cross-examination that the message had been that the student had never really wanted to have participated in the first place.

5.33 As the year progressed, the Claimant accepted that Student A's attendance fell away. The evidence showed that their attendance had deteriorated a

little in the first month of 2022 when compared to the attendance over the entire year. The attendance rate was worse for those classes taught by the Claimant than the Tutor Group sessions which were led by a different member of staff [318].

5.34 On 24 January 2022, Student B waited after class to speak to the Claimant. She was concerned about his failure to use Student A's preferred name and pronouns. She indicated that she would complain if he did not. He informed her that he would not do so and explained his reasons (paragraph 32 of the Claimant's statement).

Student complaint

5.35 Later that same day, Student B did make a complaint to the Respondent's Student Services Department about the Claimant's treatment of Student A [268]. She complained that, despite their wish to have been referred to by their preferred male name and pronoun since the start of the academic year, the Claimant had failed to do so and had used their given birth name 'deadname' instead. She further asserted that he had enlisted Student A in the female only maths competition and made hurtful comments about their gender transition, saying that it was "*invalid*". As a consequence, it was alleged that "*my friend won't attend his lessons because of the discrimination he is experiencing which is having a large effect on his education*". It was further alleged that Student A had been in tears and had been too afraid to report the behaviour himself.

5.36 This email, in our judgment, contained eloquent and powerful testimony and raising the complaint was a brave thing for Student B to have done for her friend.

5.37 There may have been an attachment to the email. Although mentioned in the body of the text, no attachment was indicated in the header. Whether it was or not, it seems that the 'list of hurtful things' came to Mrs Best later in any event (see paragraph 5.45 below).

Investigation into student complaint

5.38 A Quality Investigation was initiated into Student B's complaint on 28 January. Mrs Best, the Student Experience Manager, was the investigator. The Claimant recognised in evidence that it had been incumbent upon the Respondent to investigate the complaint.

5.39 Six students from the Claimant's class were invited to be interviewed; A and B and four others who they said would have been able to comment because they thought that they may have overheard the comments. The invitation was made during a period of College closure, due to adverse weather conditions, in order to try to keep the interviews and the investigation as private as possible, Mrs Best said. Two students failed to respond.

5.40 Students A and B were interviewed first on 1 February [274-7]. Student A had been somewhat reluctant and had wanted Student B present for support when the questions had been asked. Mrs Best dealt with them both

together but identified which response came from which student. The process, she said, was not meant to have been inquisitorial.

5.41 Student A referred to the email which had been sent on 2 September and asserted that the Claimant had failed to use their chosen male name thereafter such that both students had to remind him. Student B said that there had been "*plenty of warnings*" [276] but the Claimant had said that he had "*not agreed with it*".

5.42 Student A also complained of having been enrolled by the Claimant into the Maths Olympiad and that the Claimant used their previous, female name on the board in front of the class for that purpose. When the student had asked to be removed from the Olympiad, the Claimant had refused.

5.43 Student A also said that the Claimant had expressed clear views about his transition which were disapproving. He shared a personal story about a family member's suicide attempt with alcohol in order to highlight how NHS resources ought not to have been misused, the implication being that the student's transition would have involved a similar misuse.

5.44 The student made it clear that they had avoided going into classes which the Claimant had taken and stated that they would return if he referred to him by his preferred pronouns and name. Other students had offered their support and had said "*ignore him he's being a prick*" [276]. Student A said that they had just wanted the Claimant to stop. Given the amount of times that it had been raised, Student B asked whether the Respondent could better educate the Claimant on transgender issues [277].

5.45 Student B said that she had stayed behind to speak to the Claimant. Student A had gone home "*as he couldn't take Kevin using his incorrect pronoun & name*" [276]. The things which the Claimant had reportedly said were listed and the sheet was photographed and retained by Mrs Best [339]. The comments included;

- That Student A's transition was a "*disaster situation*" and that A was "*going down the drug route* [would] *and ruin her life*". He said that "*she can't change her gender to try to fix all her problems*" and that it made him uncomfortable that "*she wants to be called he*";
- That Student B had a "*duty as her friend to discuss it with her and talk her out of it*";
- That he would "*never accept a woman as a man*".

In evidence, the Claimant accepted the accuracy of all the comments recorded and that he had made them.

5.46 Another student, C, corroborated their accounts in a short email, following a telephone conversation with Mrs Best [310]. The student said that Student A had looked confused and "*uncomfortable*" when the Claimant had used their 'deadname'. When the student had questioned their eligibility to enter the all-female Olympiad, the Claimant had replied '*you're a girl, of course you can*'.

5.47 A further student, E, accused the Claimant of 'disregarding' or having been 'unable to accept' Student A's identity change since he still used the 'deadname'. E accused the Claimant of "*not treating or regarding* [A] *as an equal to other students (ignoring* [A]*, pointing when speaking to him instead of saying his name)*".

5.48 The Claimant was himself interviewed on 17 February [322-7]. He said that he found it "*incredibly difficult to call her he*" and was "*extremely uncomfortable about this gender transition as a fashion*". He considered that gender transitioning students underperformed, as too was Student A. When discussing the student's enrolment in the maths Olympiad, the Claimant encouraged the student "*to be critical in her decision about transitioning.*"

5.49 The Claimant accepted that he had talked about the wider impact of the student's decision upon the NHS and about what he considered was the student's "*bad decision*". He said that he had spoken to Student B to see if she could make her friend '*see sense*'. He said that he considered it part of his job to educate to encourage students to rethink what he considered to be poor choices. He referred to Student A by their previous, female name throughout the interview.

5.50 On 18 February, Student B emailed Mrs Best ([340-1] and [342-356]). She said that another maths teacher had drawn attention to one of the Claimant's maths tweets. When it had been accessed, a number of other "*really upsetting and hurtful posts*" were found and a number of examples of what were described as the Claimant's "*hateful comments online*" were provided [328-338]. It was pointed out that many of them had been posted after the Student A had emailed him in September 2021.

5.51 Mrs Best submitted a written summary of her findings on 18 February [363-7] which included issues relating to a staff CPD session which had been conducted a few days previously and the Claimant's social media presence (see, further, below). She upheld the student complaint and made it clear that she had concerns about the effect of the Claimant's actions upon Student A's well-being and educational outcomes. She was also concerned that his actions could have been discriminatory and could have represented a safeguarding risk to the student. She recommended that HR investigated potential allegations of discrimination and that the Safeguarding Lead should have considered a referral to the LADO "*relating to right wing Transphobic views and behaviour"*.

5.52 The Tribunal did not consider that Mrs Best's suggested allegiance between alleged transphobia and a particular political ideology was helpful, but nor did we ultimately consider it to have been relevant to any issue in the case. Mr Lister did not cross-examine Mrs Best about it.

<u>The Claimant's social media posts</u>

5.53 Soon after Student B had highlighted the Claimant's tweets to Mrs Best, later that same day (18 February), a member of staff and a parent of a student at the College, Mr Eggleton, also raised a complaint about the

nature of some of his social media posts [358-360]. He raised it to Mr Young, the Safeguarding Lead, and Ms Kitching, the Principal.

5.54 He said that the matter had been brought to his attention by his daughter who had been distraught and that he had found one particular tweet very offensive. He stated that it was his understanding that allegations had been made against the Claimant, although the source of that knowledge was not given.

5.55 The Claimant accepted in evidence that the particular tweet referred to by Mr Eggleton had contained "*quite inflammatory language*" [360]. He accepted that he could see why he might have been upset by it, but he nevertheless said that he should have been told that that complaint had been made.

5.56 Although the tweets included statements in relation to transgender issues, many extended beyond that, into issues of same-sex surrogacy, same-sex marriage and other LGBTQ issues, such that;

- Sexual orientation was a choice, like whether one might want to play golf;
- Gay relationships were not 'as valid' as straight ones "*by definition*";
- The NHS had better things to do than spend its money on same sex couples who wanted to have a child and he questioned the right to 'inflict' a gay relationship on child and stated that such couples had no 'right' to children and or to 'commoditise'.

5.57 One post at least appeared to include a photograph of the Claimant, so that he was capable of being identified [338].

5.58 With particular reference to Student A's position, the Claimant posted this on 29 October 2021 [329];

"*@NEUnion now #transgender legislation makes it illegal for adults to encourage children to transition or when the school is trans-affirmative?*"

5.59 And this on 14 October [333];

"*I am not going to call my #transgender students by their preferred name. To do so, support them killing the person they were. To call them by their preferred name is like telling a potential #suicide victim to jump off a cliff.*"

5.60 Further, on 4 December, he stated that he was so concerned about being required to normalise gender transitioning that he was considering leaving the profession, having been a teacher for 25 years [329] and that trans-rights activists had been guilty of grooming young children [331]. On 12 February 2022, he reacted to a photograph of a woman breastfeeding and expressed the hope that society would have admire breasts and "*not encourage young girls to have them chopped off*".

5.61 In evidence he said that he recognised that his Twitter feed could have been read by students to indicate that he was a transphobic bigot. He accepted that it was incumbent upon the College to investigate the content

in order, at least, to consider whether references had been made to students and/or the College directly.

CPD

5.62 On 2 February, the Claimant attended an online Mental Health Awareness session with colleagues. In the online chat box during the session, the Claimant asked whether 'trans*'* should have been added "*to the list of mental health issues*" [280]. It was a comment which provoked a strong reaction from some other attendees [281]. Mr Young, the Safeguarding Lead, messaged Miss Spanswick separately. He asked whether she had seen the Claimant's comment. She said that she had and had asked him to stop commenting. Mr Young clearly approved [566].

5.63 On 9 February 2022, the Claimant attended a voluntary CPD session on transgender and gender identity issues. He had been encouraged to do so by Miss Spanswick due to views which he had expressed to her about being uncomfortable about using students' preferred names and pronouns. It was one of a number of optional sessions that staff were able to choose to attend. It was delivered by a colleague of 17 years' standing, Employee C, who spoke about her experience of her own child's transition and the fact that she had supported other students who had [285-305].

5.64 It was alleged that the Claimant made comments during the session which had been upsetting and inappropriate and which subsequently featured as part of the disciplinary investigation. Specifically, it was alleged that he had said that transitioning should have been considered a mental health issue and that some decisions had been poorly thought out. One member of staff who had transitioned had left the session because of the comments.

5.65 The Claimant accepted that he interrupted Employee C and asked about the "*risk of a false positive given the consequences were irreversible"* (paragraph 44 of his statement). He accepted that he became frustrated by the presentation and considered that the material was exclusively from the transgender lobby, advocating one point of view. He described it as "*transgender ideology indoctrination*" (paragraph 47 of his witness statement). He specifically referred to the nature of surgical interventions involved; a double mastectomy for women and castration for males.

5.66 On 10 February, Employee C raised concerns to her line manager, Mr Gilbert, about the 9 February session and referred to a member of staff who left because they had become upset [307-8]. Although she considered that one of the Claimant's comments had been 'inappropriate', the focus of the email was not about that but on how the Respondent should best support transitioning students and those who questioned their gender identity.

5.67 On 14 February, the Claimant emailed Miss Spanswick in relation to 9 February session [311-3]. He expressed his 'deep concern' that there was 'a major safeguarding issue' which placed the 'college in a dangerous legal and moral position.' His specific concern was that the speaker, Employee C, had indicated that she had supported four students through their transitions

yet the "*facts of transgenderism*" indicated that the majority of those who transitioned experienced negative outcomes in terms of their integration into society, their mental health and physical disfigurement. He stated that the email was not meant to have been transphobic and declared that he would not "*ever discriminate against a transgender student*", but he nevertheless wanted the Respondent to take a safeguarding approach that ensured the safety of students "*as a matter of extreme urgency.*"

5.68 On 20 February, the Claimant's concerns were referred to the Head of Safeguarding, Mr Young, since Miss Spanswick had taken the email to have been a safeguarding issue. Mr Young acknowledged it on the 22nd [570]. Having considered the matter, however, he concluded that the concerns which the Claimant had raised did not raise safeguarding issues in respect of Employee C. Rather, he thought that they reflected a difference of views. He did not feedback to the Claimant before he was suspended the following week (see below).

5.69 When questioned about this issue during the hearing, the Claimant accepted that he had no idea what 'support' Employee C had provided to the transitioning students.

LADO referral

5.70 Mr Young made a referral to the LADO on 21 February about the matters raised in Mrs Best's report as she had suggested [370-1]. He set out the background; that a student complaint had been investigated, that the Claimant had made comments at CPD sessions about transitioning and mental health, that he had raised his own safeguarding concern about another CPD session (which was being investigated) and that a colleague had raised a complaint about his tweets, which had been raised to him by his daughter. Mr Young expressed concern that there may have been emotional damage caused to a student by the Claimant's views.

5.71 The Claimant accepted that the Respondent had had to make a referral if there was any concern of harm that had been sustained to a child under 18, but he considered that the significant cause of the referral had been the alleged transphobic tweets. He considered that Mr Eggleton's complaint had been a device used to refer him to the LADO.

5.72 Although the tweets were undoubtedly referred to, we considered that the focus had been upon Student A, as it ought to have been given that the referral could only have been made on the basis of actual or potential harm.

5.73 Although he considered that GDPR had been 'violated' (paragraph 4.3.7 [189]) by the referral, he did not explain how or in what respect and he admitted that he did not know of the Department of Education guidance in that respect. Ms Kitching indicated that Keeping Children Safe in Education ('KCSIE') specifically stated that data protection legislation did not prevent the sharing of information for the purposes of keeping children safe and promoting the welfare (paragraph 28 of her witness statement). That part of

her evidence was not challenged, nor did the Claimant himself know about the guidance.

5.74 The LADO did not seek to take steps himself at that stage, but condoned the Respondent running an internal investigation of its own [378].

Disciplinary investigation

5.75 Miss Spanswick compiled a Risk Assessment in relation to the Claimant [444-9]. She assessed there to have been a very high risk of the harm to the students and/or safeguarding as a result of the Claimant's refusal to use their chosen pronoun and "*his desire to persuade the student that they should not transition*" which, it was felt, could have been 'harmful'.

5.76 The Claimant was therefore suspended on 28 February and the following day he was notified that a disciplinary investigation had commenced which Mrs Davison, Assistant Principal - Lifestyle and Society, had been appointed to lead as the investigating officer, with Ms Moore, an HR BP, in support [456-7].

5.77 The Claimant was interviewed by them on 7 March. He was supported by an NEU representative, Mr Smith, and a designated notetaker was present, the notes of which were commented upon extensively by him [463-478].

5.78 At the start of the meeting, the Claimant stated that everything that he had done had been in the best interest of Student A and that he had not wanted to cause upset. Nevertheless, he 'unreservedly apologised' [464].

5.79 He accepted that he had "*refused to call the learner by* [their] *preferred name and he/him pronoun sounded transphobic*" but was not [465]. He further indicated that he had gesticulated rather than use their preferred name and accepted that it had not been appropriate to have done so. He accepted too that his failure to use their chosen name was "*not a good situation*" for the student [470]. He acknowledged that he had treated Student A differently because they were transitioning but stated that it was not a situation that he was happy with. His actions had been out of concern, he said; he was concerned about the risks of transition and how he ought to have approached the situation.

5.80 He also accepted that he had made all of the comments attributed to him by Student B [339], as he did in evidence before the Tribunal. He accepted that they appeared to portray him as 'homophobic' and, although an odd description given the comments themselves, it was not one which he altered when he commented upon the minutes in other respects [467].

5.81 He further admitted that he could have handled the issue over the maths Olympiad differently and acknowledged that Student A had been emotional and "*extremely upset*" [465]. He said that it had been "*incorrect to publish names*" on the board as he had [464]. He referred to having reassured the student by referring to them as an "*excellent young lady*" and accepted that

that type of comment may have been upsetting for someone in their position [468].

5.82 He was asked by Mrs Davison if he had made the comment that "*having a gender change would waste NHS time*" [468]. He did not dispute that he had but, rather, tried to explain it on the basis that NHS resourcing could not have been guaranteed in the long term. He talked about the wider impact on the NHS of a "*bad decision*" and the "*extra pressure*" that might have caused. Mrs Davison asked him whether he thought that the student GP might have been better placed to have had that type of conversation. He did not resile from what considered to have done; simply provide helpful, factual advice about the risks involved in the student's transition.

5.83 He accepted that he had not taken advice beyond the events of September 2021 and accepted that, with hindsight, he should have done so. He accepted that he could have spoken to HR [464] and/or the Assistant Principal in his area [466] but did not.

5.84 The interview covered the February CPD session. The Claimant expressed concern at comments made by the speaker and said that he felt that her support for students who were transitioning indicated that she had been pushing them into it.

5.85 As to his social media presence, he asserted that his comments on Twitter were protected by his freedom of speech that they were not likely to cause reputational harm to the Respondent, although he acknowledged that they made him sound like a "*transphobic bigot*". When referred to specific posts, he acknowledged that some had been '*unnecessary*', '*inappropriate*' and/or an '*unpleasant choice of language*'. He denied, however, that the comments were homophobic, although he acknowledged that they might have appeared as such [469].

5.86 The following day, the Claimant provided Ms Moore with a lengthy document in which he set out his views on the College, his interactions with Student A, training and social media posts [482-493]. He stated that he *had* referred to the 'transgender guidance policy' when he had made his first safeguarding concern (i.e. in September 2021; see paragraph 5.19 above) [484]. That stood very much against his account in evidence before the Tribunal, which he accepted during his closing submissions. Given his interest in such matters, we were not at all surprised that he *had* looked at the Policy as he had suggested and/or as required under his contract.

5.87 He concluded his statement by acknowledging that he had treated the student differently and expressed upset about the distress which had been caused. He stated that the Respondent's guidance on transgender issues had been poor, that he lacked confidence in his line manager and was concerned about his own liability were a 'detransitioning' student to take action against him at a later stage in life.

5.88 Mrs Davison pointed out that the Claimant did not indicate that he considered that Student A had been in imminent danger, either during interview or in his subsequent written submission.

5.89 Others were approached about the CPD sessions in February; Employee C said that she had been 'alarmed' by the comment made by the Claimant in the chat box on 2 February and that she felt that comments made on the 9th had been 'inappropriate' [503]. Employee D, who had been identified as the member of staff who had left the 9 February session, provided an email about his experience, referring to the Claimant as having been "*fixated on surgery*" and who equated being transgender or non-binary to having a mental illness [496]. Ms Howe said that she had been 'upset' by the Claimant's comments at the session [506].

5.90 Mrs Davison contacted Mr Broyd, the Safeguarding Manager, who confirmed the guidance within the Gender Reassignment Policy regarding the use of names and pronouns [512].

5.91 She also followed up the Claimant's contention that it had been Mr Stevenson who had enrolled Student A into the Maths Olympiad who confirmed that he had been responsible for the administration of the entry [270] and that particular aspect of the investigation was not pursued further by her and the allegation was dropped.

5.92 In relation to the student, she obtained a copy of the relevant attendance data, as set out above (see paragraph 5.33 above). She also examined communications between the student and the Claimant and on Promonitor, which showed that a mix of the student's previous female name and chosen male name had been used [314-6]. She also reviewed the social media posts.

5.93 On 8 March, Student A's mother raised concerns to Mrs Best about aspects of the Claimant's conduct [480-1]. She expressed "*shock and horror*" at the comments which the Claimant had made to her child, to others and on social media which had been reported to her. She was upset that the College had not been in contact with her and she wanted recognition that it viewed the behaviour as unacceptable and an apology. She stated that she was "*deeply uncomfortable*" at the thought of the Claimant continuing to teach her child and aired concerns about the personal and emotional impact that the conduct had had.

5.94 Miss Spanswick said that she had spoken with Student A's mother and the student on multiple occasions. She saw no reason for the Claimant to have been concerned about a lack of parental consent since the student's mother had been fully supportive of the choices which had been made.

5.95 Having concluded her investigation, Mrs Davison considered that there was a case to answer [513-520]; she concluded that seven of the eight matters that she had been asked to investigate were supported by the evidence in whole or in part. The one allegation that she only 'partly upheld' concerned

the CPD sessions; she was not clear that the evidence on that issue was conclusive (namely, that he had expressed views that had necessarily been transphobic). Her report was submitted to HR on 19 March.

5.96 The Claimant did not seek to challenge Mrs Davison's findings when he cross-examined her only briefly. He only addressed sections 2 (in relation to the student's attendance) and 5, neither of which ultimately contributed to his dismissal.

5.97 On 24 March, the Claimant was provided with a copy of the report. He was invited to a disciplinary hearing on 31 March to face seven allegations [527-8];

- That he had subjected a gender transitioning student to trans-phobic discrimination;
- That he had subjected a gender transitioning student to harassment which led to a decline in attendance;
- That he had refused to use a gender transitioning student's name and chosen pronouns;
- That he had expressed trans-phobic views in a staff training session;
- That he had posted trans-phobic views online publicly, thereby risking reputational damage to the Respondent;
- That he had posted trans-phobic views regarding the Respondent's students online, thereby risking reputational damage;
- That he had posted homophobic views online thereby risking reputational damage to the Respondent.

5.98 The hearing was to have been chaired by Ms Denham, Vice Principal – Curriculum Development and Quality, supported by Ms Moore.

5.99 The Claimant was then injured in a cycling accident. The disciplinary process was paused as he was off work until May. But that did not, however, prevent him from launching multiple complaints and concerns in the meantime;

- He complained to the police on 20 March [521-5];

- He raised a complaint to the Department for Education on 24 March [532-3], which was subsequently dismissed on 22 December [795-7]. The Department considered that the Respondent had followed its Safeguarding Policy and that the Claimant's concerns that Employee C had "*groomed students down a transgender pathway*" were unsubstantiated;

- He raised a concern to the Swindon Multi Agency Safeguarding Hub ('MASH') on 25 March [529-531]. The matter was referred to the LADO who the Claimant also contacted directly on 4 April [391]. On 7 April, he contacted the LADO again (copying in the relevant local MPs) and raised safeguarding concerns regarding vulnerable students within the College and the nature of the training that have been

delivered which he considered to have been trans-affirmative. It was clear from the interactions with the Claimant and the Respondent that the LADO was keen to keep an open mind and consider the counter allegations which the Claimant had made. There was, however, an internal process on foot at the time and there was clearly a reluctance to interfere or upset that [392-8];

- He raised a concern to the Education Schools Funding Authority ('EFSA'), the College's funding agency [535-7];

- He subsequently raised a complaint to Ofsted on 14 July [656-9].

Grievance and whistleblowing concern

5.100 On 5 April, the Claimant issued a grievance [549]. He complained that the concerns which he had raised in September 2021 via 'My Concern' had not been adequately addressed, which had left him disadvantaged in that he had been "*unable to improve my professional practice*".

5.101 On the same day, he also launched a complaint under the Whistleblowing Policy [548]. He said that he had not had the queries which he had raised about the "*validity of the contents*" of the February CPD session addressed adequately.

5.102 Both matters were overseen by Ms Alexander, an HR BP. She conducted a meeting in which the matters were discussed with him on 10 May [579-583].

5.103 On 23 May, the Claimant's grievance was dismissed [594-5]. It was concluded that his concern had been addressed and that any lack of detail provided to him was because of the confidential nature of the conversations that had taken place between Student A and the relevant Safeguarding team member.

5.104 Also on the 23rd, the Claimant's whistleblowing complaint was rejected; it was found that his concerns about the CPD session had been properly investigated at the time and had not been found to have warranted further action [592-3].

5.105 On 1 June, the Claimant appealed both the grievance and whistleblowing outcomes ([597-9] and [601-2]).

5.106 On 28 June, the Respondent's Head of Governance, Ms Scaife, reviewed the whistleblowing outcome and dealt with the Claimant's appeal, which was rejected [624-5].

5.107 On 30 June, a grievance appeal meeting was conducted. Ms Kitching, the Respondent's Principal, chaired the meeting and was supported by Mr Burrow from HR and a notetaker [631-5]. As part of his case, the Claimant called Ms Fuschia Hyde, from the Bayswater Group, to give evidence. She spoke to issues of gender transition in general and her personal

experience as a parent of a son who identified as transgender. She did not address the particular circumstances of Student A.

5.108 The Claimant's grievance appeal was also rejected by a letter dated 7 July [653-4]. Ms Kitching concluded that Ms Alexander's response to his grievance had been accurate and informed and that, whilst he had been entitled to raise safeguarding concerns about a student, the Safeguarding Team had taken the matter over and it had been appropriate for them not to have shared details of their discussions with Student A with him. His complaint that he had been discriminated against because of his views was also rejected as it was considered that the student's request to have been called by their chosen name did not impinge upon his views in a manner which was discriminatory and/or different.

5.109 Despite lengthy cross-examination of Ms Kitching, the details of her appeal outcome was not put to her or challenged by the Claimant.

Disciplinary process

5.110 The disciplinary hearing was rescheduled for 18 August 2022. Three days before it, on the 15th, the Claimant submitted a lengthy document in further support of his position (85 pages, an extract of which was in R1 [661-714]).

5.111 The hearing was chaired by Miss Plested, Vice Principal, who was supported by Ms Moore again and a notetaker [715-730]. The Claimant was supported by Ms Lawson.

5.112 The investigating officer, Mrs Davison, presented evidence in relation to each allegation and the Claimant had an opportunity to respond. He did not challenge the accuracy of Mrs Davison's findings in respect of his interactions with Student A.

5.113 His views on gender transition were explored during which he stated that the Respondent expected him to believe that a girl was a boy. He asserted that there was no legal obligation upon him to use what he considered to have been an incorrect pronoun in relation to a transgender student. He was asked whether he was prepared to use Student A' s preferred name in the future, but he said that he was not and asserted in his subsequent comments upon the notes that the Policy appeared to have been 'illegal' [725-6]. He used female pronouns in relation to the student during the hearing as well.

5.114 The Claimant was asked to consider his comments during the February CPD training and on Twitter and how they might have been perceived by others. He contended that the Respondent was attempting to curtail his right to free speech and he did not accept that his social media posts could have caused reputational damage.

5.115 Miss Plested indicated that she would reflect on the evidence and deliver her decision in writing. The Claimant was satisfied that he had had a fair hearing [723].

5.116 Her decision was sent to the Claimant on 9 September [744-752]. We considered it to have been a well crafted and detailed letter. We did not share the Claimant's characterisation of it within paragraph 113 of his statement, that "*every sentence of it was a lie*".

5.117 She recognised that the issues in the case had been complex and were focused upon an area within further education which was evolving. She also recognised that students at the College were of an age when they were still vulnerable to harmful influences and, therefore, that the Claimant and his colleagues had important duties towards them in terms of their welfare and safeguarding.

5.118 Nevertheless, she pointed to the Respondent's Gender Reassignment Policy which ought to have guided the Claimant's conduct towards Student A. Whilst she accepted the Claimant's right to hold a philosophical belief that biological gender could not have been changed, she had to balance that against "*the rights of trans-students to access education in an environment that was no less favourable than their peers and did not violate the dignity*" [745];

> "*Holding gender critical beliefs does not give the holder of those beliefs impunity to misgender trans persons and they, like everyone else, will continue to be subject to the prohibitions on the discrimination and harassment of individuals protected by the Equality Act.*"

5.119 She seemed to understand her task clearly;

> "*What I have had to determine is whether your alleged actions towards the student and the comments made by you during the training/awareness CPD sessions and on social media were acceptable, non-discriminatory manifestation of a protected belief or whether they went beyond acceptable boundaries to infringe the protected rights of others and/or brought the reputation of the College into disrepute.*"

5.120 She concluded that, in relation to the Claimant's interactions with Student A, the first three allegations were all either fully or partially made out. His actions were found to have constituted discrimination and/or harassment which could not have been justified on the basis of the views which he had himself held. His failure to use the student's preferred name, his gesticulating instead of addressing the student by name, the insensitivity which had been shown around the Maths Olympiad and the other comments which had been about the student [339] indicated a breach of the Staff Code of Conduct and harassment and/or discrimination.

5.121 In relation to the student's attendance, whilst Miss Plested considered that the Claimant's creation of a "*hostile learning environment*" had probably

contributed to the record of poor attendance, she noted that it had not picked up after his suspension and therefore only partially upheld that allegation [749].

5.122 The following important parts of Miss Plested's evidence in relation to the Claimant's interactions with the student were not challenged in evidence (paragraphs 37 and 38);

> "*There was sufficient commonality in the accounts for me to find that Student A's interpretation of the conversation was that the Claimant disapproved of his decision to identify and present as male and was actively seeking to discourage him based on his own views. I concluded that the conversation was not approached without bias and felt that there was evidence to suggest emotionally manipulative behaviour on the Claimant's part. I considered this a further cause for concern in terms of placing Student A at risk of emotional harm…*
>
> *Whilst I found that the conversation may have been motivated by genuine concern, it was clearly informed by the Claimant's personal views on gender reassignment.*"

5.123 The fourth and fifth allegations concerning the CPD session were dismissed. Miss Plested did not consider that there was insufficient evidence to indicate that the Claimant had necessarily expressed views which were transphobic during the session, although some clearly been upset by the comments.

5.124 The remaining allegations concerned the Claimant's social media posts, none of which were upheld either. Miss Plested considered that the key question was whether the views aired online impacted upon the Claimant's suitability to work at the College, compromised his professional reputation and/or the Respondent's reputation. Because the Twitter account was not expressly linked to the College (the only link having been by the Claimant's name and photographs which had been removed) and because the views expressed were personal and did not identify students or the Respondent directly, the risk of harm was considered 'low'. Although the posts had been accessed by students and although they were considered to have been "*provocative and offensive to some*", the link between the account and the Respondent was not considered sufficiently strong to have represented "*a tangible risk to reputation by association"* [751].

5.125 Despite only three of the seven allegations having been proved (those relating to his interactions with Student A), the nature of the discriminatory actions that the Claimant had committed, the harm that it had caused to the student and his failure to reassure the panel that he would comply with the Gender Reassignment Policy going forward, led Miss Plested to conclude that dismissal was the appropriate sanction. He was also informed that the Respondent would liaise with the LADO over a possible DBS referral.

5.126 The Claimant complained that there were procedural failings in the disciplinary process in that he was denied two classes of document before of the hearing;

5.126.1 Communications between Swindon Borough Council/the LADO and the College;
The Claimant had ultimately been able to obtain the documents through a SAR; the referral [370] and a series of communications [372-440].
There was no suggestion that Miss Plested had this evidence and that he did not at the time. Further, the relevance of the communications to the allegations of misconduct which he faced was not made clear. The issue was not even covered in the Claimant's witness statement;

5.126.2 Ms Alexander's working notes in relation to his grievance and whistleblowing complaints [586-591];
Again, these were not before Miss Plested nor were their supposed relevance to the disciplinary issue made clear.

5.127 The Claimant appealed on 22 September [753-4].

5.128 The appeal was heard by Mr Horrobin, the Deputy Principal - Finance, who was supported by Mrs Fry, the Head of HR, on 4 November. A notetaker was also present, but the Claimant was unaccompanied. The notes [772-6] were subsequently commented upon by the Claimant [777-780].

5.129 During the appeal hearing, the Claimant said that he had never been told to use the Gender Reassignment Policy. His actions, he said, had been motivated by his desire to protect the student and comply with the Safeguarding Policy. He did not allege that his dismissal had been an act of discrimination on the grounds of his protected beliefs.

5.130 Mrs Fry gave evidence to the Tribunal. The Claimant did not seek to challenge any aspect of the appeal process and/or hearing.

5.131 On 20 November, the Claimant emailed Mr Horrobin and further specifically asserted that his dismissal was unfair on health and safety grounds because of Student A's risk of accessing cross-sex hormones without parental consent [783-5]. That had not been an issue which had been raised within the appeal itself. The Claimant said that he had read the Employment Rights Act by then and considered that s. 100 might have been applicable. The matter was then considered by Mr Horrobin and addressed in the ultimate outcome letter (see [793] specifically).

5.132 An appeal outcome was sent on 2 December [786-794]; the appeal was rejected.

Subsequent events

5.133 The Respondent referred the Claimant to the Disclosure and Barring Service ('DBS') on 13 January on the advice of the LADO [802-11]. He was subsequently barred from participating in regulated activities with children [836-9]. Within its reasoning, the DBS referred to the views that he had expressed to it, which included that transgenderism was a 'cult' and that parents of children who transitioned ought to have been "*investigated for Munchausen by proxy - thus enforcing their beliefs.*"

5.134 In relation to Student A, the DBS concluded that the Claimant's conduct had "*caused emotional harm to a child*". It was concerned that, in the future, "*you would…impose your views onto a child, irrespective of their choice, or whether your contributions… or invited by them. You would likely have a serious lack of regard for how this would impact children in your care.*"

6. Conclusions

6.1 We considered the issues as they had been set out in the Case Summary of 3 January 2024 [185-190], as refined in paragraph 4.1 above, but it made sense to tackle them in a slightly different order, as with Ms Shepherd's Closing Submissions, R5.

Direct discrimination; relevant legal principles

6.2 The Claimant had raised twelve complaints under s. 13 of the Equality Act 2010:

"*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.*"

6.3 The protected characteristic relied upon was his philosophical belief, which was not in dispute (paragraph 4.2 [188]).

6.4 The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

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

6.7 We approached the case by applying the test in *Igen-v-Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(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."

6.8 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor

may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of his belief, because of his belief.

6.9 The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (*Network Rail-v-Griffiths-Henry* [2006] IRLR 856, EAT).

6.10 In situations where the burden did shift, we needed to find cogent evidence in support of the Respondent's non-discriminatory explanation for the treatment focussing, as suggested in *Bennett-v-MiTAC Europe Ltd* [2022] IRLR 25, on the mind of the putative discriminator.

6.11 If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply.

6.12 When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see *Fraser-v-Leicester University* UKEAT/0155/13/DM). In *Shamoon-v-Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself. The issue could essentially boil down to down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others.

6.13 The Court of Appeal in *Owen and Briggs-v-James* [1982] ICR 618, CA, held that, while the protected characteristic need not have been the only reason for the treatment, it must have been a substantial reason. The EAT went one step further in *O'Neill-v-Governors of St Thomas More RCVA School and anor*, [1996] IRLR 372, EAT and expressed the view that the protected characteristic need not even have been the main reason for the treatment, so long as it was an 'effective cause'. The EHRC Employment Code

confirms this, noting that 'the [protected] characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause' - para 3.11.

6.14 As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se but *less* favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Law Society-v-Bahl* [2004] EWCA Civ 1070).

6.15 The situation faced in this case represented a particular problem given the nature of the protected characteristic that was relied upon since caselaw indicated now that there was a distinction to be drawn between conduct which was done under s. 13 because of the belief itself and conduct which was done because of a manifestation of it, to which objection could justifiably have been taken; so called "objectionable manifestation". The approach to the latter type was recently clarified by the EAT in *Higgs-v-Farmor's School* (No. 3) [2023] EAT 89.

6.16 The Court of Appeal reviewed the case law in this area in *Page-v-NHS Trust Development Authority* [2021] ICR 941 and pointed out that the central issue in such a case was whether the act complained of was done 'because of the protected characteristic' (whether the protected characteristic itself had been the 'reason for' the treatment). It was thus necessary in every case properly to characterise the putative discriminator's reason for acting. But in a case where the reason was that the claimant had manifested his belief in some particular way to which objection could reasonably be taken (an 'objectionable manifestation' case), different questions arose.

6.17 In the latter type of case, in *Eweida-v-United Kingdom* (2013) 57 EHRR 8, the European Court of Human Rights explained that it could not be said that every act which was in some way inspired, motivated or influenced by a claimant's belief necessarily constituted a 'manifestation' of it. So, for example, acts that did not directly express the belief concerned or which were only remotely connected to a precept of it, were not to have been regarded as a 'manifestation' of it. In order to count, the act in question must have been intimately linked to the belief. The existence of a sufficiently close and direct nexus between the act and the underlying belief held by the individual concerned must have been determined on the facts of each case. An assessment had to be undertaken in respect of the beliefs held by the Claimant, not how they had been interpreted or understood by the Respondent.

6.18 In a case in which the connection between the belief and the manifestation of it could be demonstrated and a claimant was able to show that the detrimental treatment had been the result of that manifestation, but in a manner which the respondent alleged was objectionable in some way, the decision in *Higgs* provided the most recent and useful guidance.

6.19 The EAT found that the Tribunal should have determined whether the claimant's actions had amounted to a manifestation of a belief (the *Eweida* question, above) and, if it was so satisfied, it would then have been necessary to have determined whether the school's response had been a proportionate limitation of his rights. For the purposes of a s.13 claim, the employer could not rely upon a distinction between the objectionable manifestation of a belief and the holding or manifestation of the belief itself if the action taken was not a proportionate means of achieving a legitimate aim. If the employer's action could have been justified, and was found to have been by reason of the objectionable manner of the manifestation, a tribunal could permissibly find that the reason why a respondent had acted had not involved the belief, but only its objectionable manifestation.

6.20 The EAT set out some basic principles that it considered ought to underpin the approach when assessing the proportionality of any interference with rights to freedom of religion and belief and freedom of expression:

(i) The freedom to manifest belief and to express views relating to that belief are essential rights in any democracy whether or not the belief is popular, mainstream or even if its expression may offend;

(ii) Those rights are qualified. The manifestation will be protected but not where the law permits restriction to the extent necessary for the protection of rights and freedoms of others. Where such restriction is objectively justified given the manner of the manifestation, that is not action taken by reason of the belief, but by reason of the objectionable manner of the manifestation;

(iii) Whether a restriction is objectively justified will always be context specific. Different considerations apply depending on the nature of the employment;

(iv) It will always be necessary to ask:

- Whether the objective the employer seeks to achieve is sufficiently important to justly the restriction on the right in question;
- Whether the restriction is rationally connected to that objective;
- Whether a less intrusive restriction may be imposed without undermining the achievement of the objective;
- Whether, balancing the severity of the restriction on the right of the worker concerned against the importance of the objective, the former outweighs the latter;

(v) In answering those questions regard should be had to:

- The content of the manifestation;
- The tone used;
- The extent of the manifestation;
- The worker's understanding of the likely audience;
- The extent and nature of the intrusion on the rights of others and the consequential impact on the employer's ability to run its business;
- Whether the worker has made clear that the views expressed are personal or whether they might be seen as representing the views of the employer and whether that represents a reputational risk;
- Whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon;
- The nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients;

- Whether the limitation imposed is the least intrusive measure open to the employer.

6.21 In relation to (i) and (ii) above, the qualifications to Articles 9 and 10 were to be found within the articles. Article 9 (2) sets out the circumstances under which the qualification applies; the qualification must (a) be prescribed by law and (b) be necessary in a democratic society, or for the protection of public order, health, morals or before the protection of the rights of others.

6.22 As noted by Eady P in *Higgs,* it was established that "law" as referred in article 9 (2) had an extended meaning, requiring that the impugned measure should have some basis in domestic law and be accessible to the person concerned, who must be able to foresee its consequences, and compatible with the rule of law. Accessibility required that the measure must be such that "*it must be possible to discover, if necessary with the aid of professional advice, what its provisions are … it must be published and comprehensible*"; foreseeability meant that it must be possible for a person to foresee the consequences of the law for them.

6.23 As to the aims within (b) in paragraph 6.21 above, a proportionality assessment was required. As Lord Bingham emphasised in *R-v-Shayler* [2003] 1 AC 247 , "*necessary*" in this sense "*is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' … One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient …*".

6.24 Lord Reed in *Bank Mellat-v-HM Treasury (No 2)* [2014] AC 700 explained that this required a four-stage analysis: (i) was the objective of the measure sufficiently important to justify the limitation of a protected right; (ii) was the measure rationally connected to the objective; (iii) could a less intrusive measure have been used without unacceptably compromising the achievement of the objective, and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

6.25 In respect of article 10, the limitations are a little more detailed (article 10 (2));

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

6.26 The article 10 right "*carries with it duties and responsibilities. Amongst them…may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an*

infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs …" (*Giniewski-v-France* (2006) 45 EHRR 23 at paragraph 43).

6.27 The balancing of competing rights was something that was been considered by the higher courts in number of cases in a domestic setting before *Higgs*. In *Ladele-v-London Borough of Islington* [2010] ICR 532, CA, the court addressed a situation in which a Christian registrar refused to conduct a same-sex union on the grounds that it conflicted with her belief in relation to God's law. The Court of Appeal agreed with the EAT that the Council had not discriminated when it had threatened her with dismissal. It specifically considered the extent to which her right to manifest her religious belief under article 9 conflicted with her employer's concern to ensure equal treatment across the community which it served.

6.28 Similar conclusions were reached by the EAT in *McFarlane-v-Relate Avon Ltd* [2010] ICR 507 in relation to a relationship counsellor who had refused to provide services to homosexuals because of his Christian beliefs. Arguments which were advanced under article 9 were also rejected.

6.29 In the realm of goods and services, the line has been consistent. In *Bull and another-v-Hall and another* [2013], UKSC 73, SC, Christian hoteliers refused to let a double-bedded room to two homosexual men. In relation to the hoteliers' argument under article 9, Lady Hale observed that the rights and freedoms of others (article 9 (2)) ought to have been broadly interpreted to include their ordinary legal rights, not just rights under the Convention. As to whether limitations were "*necessary in a democratic society*", that required consideration of whether there was "*a reasonable relation of proportionality between the means employed and the aim sought to be achieved*" and was therefore closely aligned to the test of justification under s. 19. The multi-faceted guidance in *Higgs* maybe regarded as an interpretive extension to that.

6.30 A similar conflict arose in a non-employment situation in *Lee-v-Askers Baking Co Ltd* [2018] IRLR 1116, SC, widely referred to as the 'gay cakes case'. The claim involved a bakery which had refused to bake a cake with an overtly pro-gay marriage message on it because of their Christian beliefs. In the Supreme Court, Lady Hale again gave the unanimous judgment, but she found that the key difference there was the fact that the refusal to provide the cake was not because of the customer's sexual orientation or manifestation of it but, rather, the message itself, which was considered to have been dissociable from him. People could support gay marriage who were not, themselves, gay.

6.31 In *Mackereth-v-DWP* [2022] IRLR 721, the Christian employee believed in the truth of the Bible and refused to use chosen pronouns of transgender service users and, consequently, was subjected to disciplinary action. The EAT found that that had not been because of their belief but, distinct from that, their failure to meet the Respondent's requirements in terms of the manner of their interaction with service users. Any employee not prepared to refer to service users by their preferred form of address would have been treated in the same way, regardless of whether they shared the same belief.

The Tribunal had drawn a permissible distinction between M's belief and the particular way in which he wished to manifest it.

6.32 For reasons that will be clear below, it was necessary to consider Student's A's status. Was Student A in possession of a protected characteristic of gender reassignment under s. 7?

6.33 Section 7 indicates that someone is protected 'If the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex'. The definition, significantly extended from that under the 1975 Act, was broad enough to cover people who had done nothing, but merely proposed to. An individual did not need a Gender Recognition Certificate to be covered. The words 'other attributes' were very broad.

6.34 In *Taylor-v-Jaguar Land Rover* 1304471/2018, the Claimant had made it clear that they had no intention to undergo surgery, but was still protected;

> "*Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum. That would be so whether they described themselves as "non-binary" i.e. not at point A or point Z, "gender fluid" i.e. at different places between point A and point Z at different times, or "transitioning" i.e. moving from point A, but not necessarily ending at point Z, where A and Z are biological sex."* (at paragraph 178).

6.35 The ECHR Code supported that position. Gender reassignment described a process of moving from one's birth sex, rather than a medical procedure.

Direct discrimination; discussion and conclusions

6.36 Before approaching the allegations individually, there were two points which were clear to the Tribunal and which guided much of its deliberations.

6.37 First, that the Respondent had policies in place which existed to assist and protect those within it, both staff and students, yet the Claimant failed to follow them in several key respects, in particular the Gender Reassignment and the Safeguarding Policies. With regard to the latter, once he had passed the issue to the Safeguarding Team, he had done his job. It was up to them to investigate and determine any further steps. If he had been unhappy with the standards adopted within the Team, there was a clear route for him; the senior leadership team (see paragraph 5.6 above). He did not follow it.

6.38 Secondly, none of the policies prevented the Claimant from holding his beliefs, nor were they applied to him, or people with his beliefs, in a way which was different to those who did not hold them. Mrs Davison had the point at the forefront of her mind; "*he had very strong views on gender identity and transition in young people. The question really was whether it was appropriate to share his personal beliefs with students or to manifest them in a way that could amount to discrimination or harassment of a transgender student.*" (paragraph 12 of her witness statement).

6.39 As to the allegations themselves (adopting the numbering in the Case Summary [188-9];

4.3.1 and 4.3.11

In closing submissions, the Claimant asserted that his first concern had not been investigated by Ms Murphy because of a manifestation of his beliefs and his second concern, to Miss Spanswick, was not explored because of his beliefs themselves.

Taking the second of those first, the Claimant accepted in cross examination that, if Employee C for example, who had not shared his beliefs, had raised a similar complaint, it would have been dealt with in the same way. We could not see why it was therefore alleged that his concerns about the content of 9 February CPD session had been rejected because of the beliefs which he held.

The reason why the Claimant's concerns were not upheld or validated in respect of Employee C was because Mr Young did not view them as safeguarding issues. There was no suggestion that her 'support' to the students had been coercive, persuasive or cajoling in nature. There had been an exchange of views at the CPD session and he could see no reason to take the matter further (see paragraphs 5.68 and 5.69 above).

As to the Claimant's first safeguarding concern concerning Student A on 3 September (paragraph 5.19 above), this issue was investigated by Ms Murphy. Whilst, again, it might not have resulted in his views having been validated, that was not the same thing. Ms Murphy met with the student, explored the support and any concerns around drug therapy that they had and was satisfied of their safety and wellbeing.

As an allegation that there had been a failure to investigate because of a manifestation of the Claimant's beliefs, this was not understood. Although it was understood how the Claimant's registration of a 'My Concern' might have been spawned by his beliefs, it was not understood how the alleged failure to investigate had arisen from that manifestation. That was a non-sequitur.

As to the further allegation that he had no advice on how to proceed, the Gender Reassignment Policy contained the necessary advice and guidance that he needed, particularly within Appendix 3, which he did not question.

Both allegations therefore failed.

4.3.2 and 4.3.8

The Claimant alleged that it was a manifestation of his beliefs that caused Employee C to report his conduct at the 9 February CPD session to Mr Gilbert, which in turn lead to disciplinary proceedings.

The Tribunal could accept that there was sufficient nexus between his beliefs and the comments which were expressed on 9 February in the *Page* and *Eweida* sense.

But there was also a legitimate reason for Employee C to have raised the issue with Mr Gilbert; she had seen Employee D leave because they had been upset by the Claimant's comments, one of which she considered to have been 'inappropriate'. But, as stated in paragraph 5.66, she appeared to have been more concerned about the Respondent's support for students who were transitioning going forward.

Everybody is permitted to express their views in a free and democratic society, but not to the extent that others are upset, distressed and/or harassed. The individual who was upset, Employee D, subsequently described why he had been upset; that the Claimant had been fixated on surgery (the Claimant accepted that he had spoken about mastectomies and castration) and had equated being transgender or non-binary to having a mental illness [496]. It was understandable that some people might have found those comments upsetting and/or offensive, particularly if they had undergone gender reassignment themselves. It was accepted that Employee D had.

Accordingly, the comments *may* have created a hostile or intimidating environment and *might* have been considered to have constituted harassment under s. 26. They were a *potentially* objectionable manifestation of his beliefs. That was, perhaps taking the comments at their highest but, unless or until they were investigated and properly evaluated in the *Higgs* sense (see paragraph 6.20 above), the Respondent did not know whether it ought to have acted to have restricted that manifestation of the Claimant's beliefs.

There was therefore a legitimate reason for the matter to have been investigated at the disciplinary stage. The fact that the allegation was not ultimately proved, indicated that the Respondent did not seek to restrict, sanction or curtail what the Claimant did on 9 February. It felt that the balance fell in favour of him having been allowed to express his views in what was then an open, learning environment.

These allegations were dismissed.

4.3.3 and 4.3.4

The nature of the investigation referred to in the allegation within paragraph 4.3.3 was not clear. Student B's complaint was notified to the Claimant on 15 February [321], two days before he was interviewed about it. It was reasonable to assume that he had anticipated what it was to have been about because of Student B's stated indication that she was going to complain on 24 January.

We could not see why it was incumbent upon the Respondent to have notified the Claimant about the detail of the complaint before the students themselves or he was interviewed. In our experience, employers often interview people who might have been involved in incidents 'cold' and without warning, preventing them from pre-preparing their responses. As an

allegation, we could see no evidence that the lack of notice had been because the Claimant held gender critical views and/or because of the manner in which they had been manifested.

The alleged extension to a 'transactivist teacher' was said to have been a reference to Mr Eggleton. That had been the Claimant's case when he gave his evidence but, in closing submissions, he alleged that it had been Employees C and/or D.

Mr Eggleton had sent an email on 18 February about the Claimant's tweets [358-360], but only after they have been brought to Mrs Best's attention by Student B (see paragraphs 5.50 and 5.53 above). Although Mr Eggleton's email featured in the investigation (no doubt because of his concern and/or that of his daughter), the investigation had not been 'extended' to encompass the tweets because of the email. They were already in view. Nor was it extended to the tweets in the circumstances where it would not have been so extended had somebody tweeted in the same manner, but not held the same beliefs.

As to the alternative angle, that of manifestation, we repeat our comments in respect of the allegations under paragraphs 4.3.2 and 4.3.8 above; the Respondent acted legitimately in investigating the tweets and the potential nexus between them and the College and/or students and staff, as the Claimant had accepted in evidence. It was ultimately considered that his freedom of expression triumphed and there was no sanction or restriction imposed upon it. The allegations were not proved.

As to the discrete allegation within paragraph 4.3.4 that the Claimant ought to have been told that Mr Eggleton had written his email, it was not clear why the identity of the author was important. What was important was the content of the tweets and the original source of that information had been Student B. Further, there was no evidence to indicate that the Claimant was not notified of the second complainant at the time had because he held the beliefs and/or because of the manner in which they had been manifested.

These allegations were dismissed.

4.3.5-4.3.7

These allegations all concerned the LADO referral and or actions taken because of the manifestation of the Claimant's beliefs, he said. But he also accepted that the Respondent had had to make a reference to the LADO if there was any concern about harm having been suffered to a student under the age of 18. Here, there was.

Mrs Best had suggested that consideration be given to referring the Claimant to the LADO because of what she had uncovered when investigating Student B's complaint. Her use of the words 'right wing' was not, in our judgment, important to her reason for making the recommendation. Mr Young's actual recommendation did not include Mrs Best's label. At the heart of it was the potential emotional harm that Student A might have been exposed to [370-1].

Were the Claimant's interactions with Student A a result of the manifestation of his beliefs? Again, in our judgment, they were; there was a sufficiently proximate nexus between them in the *Page* and *Eweida* sense.

But was it appropriate for the referral to have been made? Again, in our judgment, it was. The Claimant's evidence in interview with Mrs Best, during the disciplinary investigation with Mrs Davison and before Miss Plested, contained substantial admissions in respect of the allegations which Student B had originally raised. We agreed with the Respondent that Student A was protected under the Equality Act under the broad definition of gender reassignment (see paragraphs 5.18 and 6.33-6.35 above). The interactions had clearly caused upset and potentially constituted harassment under s. 26 and the Respondent's Bullying and Harassment Policy (paragraph 5.6 above). The clear concession that the Claimant had treated the student differently, by failing to use their chosen name and gesticulating, had also been potentially discriminatory.

By referring the Claimant to the LADO, the Respondent was not directly seeking to restrict the manifestation of his beliefs. That might have been a subsequent consequence. But even if it was, it was justified in doing so in a *Higgs* sense; the Respondent was justified in seeking to protect the welfare of the student and to prevent further harm and/or the risk of further harm. The manifestation of the Claimant's beliefs had been extensive, blunt and clear (see the admitted contents of [339] for example) and there was a significant power imbalance between him and the student. Comments had been made to the student and/or in front of their peers which may have had the effect or intention of making the student feel guilty (the references to the NHS). Others had also been affected; Student B and Student A's mother.

As to the discrete allegation about GDPR (paragraph 4.3.7), the 'violation' was never clearly identified to the Tribunal but nor did the Claimant counter the evidence of Ms Kitching in that respect (see paragraph 5.73 above).

The allegations within paragraphs 4.3.5 and 4.3.6 were the only ones in which the Claimant sought to compare his position with that of an actual comparator, Employee C (see paragraph 4.1 (iii) above). Employee C was not in the same or a similar position. A student complaint had not been made against her. Although the Claimant had expressed concern about her 'support' of students who had or were transitioning, there was no evidence as to the nature of that support and/or whether anyone had been exposed to harm or the risk of harm.

These allegations all therefore failed.

4.3.9

The Claimant accepted that he had not been subjected to disciplinary proceedings for enrolling Student A. Mrs Davison's investigation had revealed that Mr Stevenson had done that [517] and this allegation also failed.

4.3.10

The Claimant believed that it was likely that all members of staff had had the same contract. The clause's existence in his contract could not, therefore, have been because he held gender critical views and/or because of the manner in which they were manifested.

What we understood from this allegation was that the Claimant was asserting that he ought not to have been dismissed because, in part, he had breached the Gender Reassignment Policy, since the Policy was non-contractual. That allegation was best considered within the broader context of the allegation within paragraph 4.3.12 below.

4.3.12

The Claimant was clear that he was advancing his case on the basis that he had been dismissed because he had manifested views which were protected philosophical beliefs.

That issue was well understood by Ms Kitching who said in evidence that she understood that his beliefs were strongly held and protected, but that Student A's views and requests ought to have been respected also. What she did not understand was why, when the Claimant had been confronted by that conflict, he had not sought assistance for so long; from the date of his feedback meeting with Ms Murphy in September 2021 until February 2022. Instead, he had simply not adhered to the student's request. Had he sought assistance, she felt that a way though the problem could have been found; a proportionate and reasonable manner of respecting both parties' views ought to have been capable of having been brokered.

Accordingly, there were really two reasons why the Claimant had been dismissed, inextricably linked within Miss Plested's dismissal letter [744-752]; his failure to adhere to the Respondent's policies (she specifically identified the Code of Conduct and the Gender Reassignment Policy) and his interactions with Student A. The former, in isolation, would have exposed any member of staff to sanction irrespective of their views and/or irrespective of whether it was alleged that the conduct was said to have been an objectionable manifestation of them. The latter, of course, fell into the same category as the matters discussed under paragraphs **4.3.5 to 4.3.7** above; the Respondent was justified in seeking to limit and/or restrict the manner in which the Claimant had manifested his views.

Did it do so in a proportionate way? Were there other ways in which it might have done so effectively, which fell short of the drastic measure of dismissal (the last of the *Higgs* questions)? The difficulty there was the Claimant's indication that that his behaviour would not have changed going forward [725-6]. What other steps could the Respondent therefore have taken to avoid the risk of further incidents of harm, discrimination and/or harassment? Dismissal was justified in the *Higgs* sense on the facts.

Accordingly, the Claimant's dismissal was not an act of discrimination.

Indirect discrimination; relevant legal principles

6.40 In relation to the claim of indirect discrimination, we considered and applied the wording of s. 19 of the Act and approached the case by applying the test recommended to us in *Igen* as set out above. The provision, criterion or practice ('PCP') was not in dispute here; the application of clause 4.1 of the Gender Reassignment Policy [196] (see paragraph 4.1 (iv) above).

6.41 As to the question of disadvantage under s. 19 (2)(b) and (c), that required us to ask two questions; first, whether people with the Claimant's characteristics were exposed to a particular disadvantage as a result of the PCP and, secondly, whether the Claimant himself was exposed to that disadvantage.

6.42 As to the first question, it was permissible for us to take judicial notice of matters which may have led to a conclusion in relation to the group disadvantage (*Dobson-v-North Cumbria Integrated Care NHS Foundation Trust* UKEAT/2021/0220); it may have been inferred, for example, from the fact that there was a particular disadvantage in the individual case, depending upon the facts, including the nature of the PCP and the disadvantage faced, but that was going to have been more difficult when the disadvantage to the individual was because of a unique or unusual set of circumstances. Whether or not group disadvantage could have been discerned from evidence of individual disadvantage *'will depend not only on the quality and reliability of the evidence in question, but also on whether any meaningful conclusions about the group picture may be drawn from it'* (paragraph [55]).

6.43 The word 'disadvantage', as used in s. 19, set a relatively low threshold. We bore in mind, in particular, the Equality and Human Rights Commission's Code of Practice from 2011 (paragraph 4.9).

6.44 Then there was the question of justification. If the Claimant was able to demonstrate the essential elements of the test within s. 19 (1) and (2)(a)-(c), the Respondent had a defence if it could show that the treatment was "*a proportionate means of achieving a legitimate aim*". (s. 19 (2)(d)). Proportionality in that context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). The test was not as loose, however, as the range of reasonable responses test (*Scott-v-Kenton Academy Schools* UKEAT/0031/19/DA, paragraph 58).

6.45 If a respondent relied upon the rationale for a policy or practice, it had to justify the manner in which it was applied to a claimant in order to meet the

defence in the section. It was also important to remember that justification had to be considered against the PCP's impact upon the business generally, not just the individual employee (*City of Oxford Bus Services Ltd-v-Harvey* UKEAT/0171/18/JOJ) and that the section required a tribunal to make its own '*critical evaluation*' of the evidence against the statutory test.

Indirect discrimination; discussion and conclusions

6.46 First, there was no evidence upon which the Tribunal could properly conclude that those who shared the Claimant's protected characteristics were put at a disadvantage by the Policy (paragraph 5.4 [190]). As set out within that paragraph of the Case Summary, the clause of the Policy did not require an employee to accept that the biological sex of an individual had changed if they had transitioned. The facts in this case did not enable us to assume or infer the group disadvantage as anticipated in certain circumstances in *Dobson*, in paragraph 6.42 above.

6.47 But the further difficulty faced by the Claimant here was establishing the link between the PCP and the personal disadvantage alleged. His contention was that his two safeguarding concerns were not advanced because of the PCP which, he said, contained a positive approach to reassignment. The Tribunal did not accept that clause 4.1 [196] proactively encouraged, persuaded, cajoled or advocated gender reassignment. It contained a statement that it 'celebrated' diversity and sought to outlaw discrimination, harassment or victimisation. The fact that it sought to go beyond the Equality Act was not, by and of itself, a statement advocating gender reassignment. The clause was of a general aspirational nature. The actual mechanics of it were to have been found elsewhere.

6.48 Annex 3, for example, contained the approach which the Respondent advocated in respect of the use of names and pronouns. Did that exceed the protection of the Equality Act? Whilst it was not central to our determinations in the case, we did not think that it did. If a protected member of staff or student had not been named in accordance with their wishes under the Policy, we could well imagine that they might argue that such a failure could have violated their dignity and/or created a hostile environment within the meaning of s. 26. The Policy did not seek to break new ground or extend legal rights.

6.49 The reasons why the safeguarding concerns were dealt with as they had been, were considered at length already (see the findings in respect of paragraphs **4.3.1 and 4.3.11** above). The Tribunal did not accept that clause 4.1 of the Policy had caused them not to have been upheld and/or advanced further.

6.50 The defence of justification was not even engaged. If, we were wrong, we were nevertheless satisfied that the Policy was issued in pursuit of legitimate aims, namely those within paragraph 5.6 of the Case Summary

[190], underpinned by the requirement to provide protection for those who qualified under s. 7 of the Equality Act. As to proportionality, the material parts of the Policy did not appear to exceed that which was necessary for that protection to have been created (see, in particular, paragraph 6.47 and 6.48 above).

Unfair dismissal; relevant legal principles

6.51 In cases involving dismissals for reasons relating to an employee's conduct, the tribunal had to consider the three stage test in *BHS-v-Burchell* [1980] ICR 303; had the Respondent genuinely believed that the Claimant was guilty of the misconduct alleged, was the belief based upon reasonable grounds and was there a reasonable investigation prior to it reaching that view? Crucially, it was not for the tribunal to decide whether the employee had actually committed the acts complained of.

6.52 In terms of sanction, we were asked to consider that too. We were not permitted to impose our own views of the appropriate sanction but, rather, had to ask whether it fell somewhere within the band of responses available to a reasonable employer in the circumstances (*Foley-v-Post Office, HSBC-v-Madden* [2000] ICR 1283 and *Graham-v-Secretary of State for Work and Pensions* [2012] EWCA Civ 903). A tribunal had to consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the it's own subjective views, whether the employer had acted within a band or range of reasonable responses to the particular misconduct found of the particular employee.

6.53 An employer ought to have considered any mitigating features which might have justified a lesser sanction and the ACAS Guidance was also useful in this respect; factors such as the employer's disciplinary rules, the penalty imposed in similar previous cases, the employee's disciplinary record, experience and length of service were all relevant. An employer was entitled to take into account both the actual impact and/or the potential impact of the conduct alleged upon its business.

6.54 Section 98 (4)(b) of the Act required us to approach the question in relation to sanction "*in accordance with equity and the substantial merits of the case*". A tribunal was entitled to find that a sanction *was* outside the band of reasonable responses without being accused of having taken the decision again; the "*band is not infinitely wide*" (*Newbound-v-Thames Water* [2015] EWCA Civ 677).

Unfair dismissal; discussion and conclusions

6.55 The Tribunal was satisfied that the Claimant was dismissed for a reason which related to his conduct (paragraph 2.2 [186]). Subject to the point that his conduct was a manifestation of his belief, that was not in dispute.

6.56 As to the *Burchell* question, it was not suggested that the Respondent's belief in respect of the Claimant's misconduct had not been genuine but this case, like so many others, hinged upon the reasonableness of the conclusions drawn from the evidence which it gathered. Here, since the Claimant's concessions in relation to his interactions with Student A had been so extensive, the Tribunal concluded that the determinations expressed within the dismissal letter had been ones which a reasonable employer could have reached on the basis of the evidence before it, critically those covered by Allegations 1-3 [745-9].

6.57 In relation to the extent of the Respondent's investigation, the Claimant made a valid point when he cross-examined Mrs Best; that only a small number of students had been interviewed and, since they had been identified by Students A and B, it was likely that they would have had sympathetic views. That would have been a strong point had the conduct in question been in dispute. Since it was largely not contested, it was not.

6.58 Then there was the issue of sanction (paragraphs 2.4 and 2.6 [186]). Here, we repeat our findings in respect of paragraph **4.3.12** (above); the Claimant's lack of contrition, the harm suffered to Student A, the concerns raised by Student B and the student's mother and the Claimant's indication that his behaviour would not have been modified all led Miss Plested to a conclusion which was, in our judgment, within the band of responses available to a reasonable employer. The fact that that decision has been endorsed to some extent by the DBS decision assisted the Respondent. As Mrs Fry put it in paragraph 6 of her statement (in respect of the appeal); "*I was satisfied that this* [dismissal] *was a reasonable sanction in circumstances where a teacher had been found to have discriminated and harassed a student because of their transgender status*."

6.59 As to the particular points raised within paragraphs 2.6.1 to 2.6.5, his clean record was not in dispute (2.6.1), but his behaviour had amounted to discrimination which was an example of gross misconduct under the Disciplinary Policy (paragraph 3.20 [221]) (2.6.4). The assertion that the Claimant had not received management guidance (2.6.2) was rebutted on the basis that the Gender Reassignment Policy clearly had indicated the manner in which he ought to have behaved following the student's request in September 2021. After Ms Murphy fed back to him about his 'My Concern' that month, he sought no further guidance until Student B's complaint was lodged.

6.60 The Claimant raised two procedural issues during the hearing (see 2.5 [186] and paragraph 4.1 (i) above). These were both addressed within paragraph 5.126 above. We did not consider that any further findings were necessary. The matters were of no consequence to the disciplinary outcome. They had not even been covered in the Claimant's witness statement.

6.61 We did not need to make any findings in respect of *Polkey* since the dismissal was not procedurally unfair. Nor did we have to make findings under ss. 122 (2) and/or 123 (6). Had we been required to, it is likely that we would have concluded that the Claimant had substantially contributed to his dismissal by his conduct on the basis of the evidence which he gave before the Tribunal.

Health and safety dismissal (s.100 (1)(e)); relevant legal principles

6.62 An employee who is dismissed for one of the reasons set out within s. 100 (1), shall be regarded as having been unfairly dismissed without more. The particular provision relied upon (s. 100 (1)(e)) required several elements to have been met;

- There needed to have been 'circumstances of danger', which were not limited to the circumstances of the claimant himself (*Von Goetz-v-St George's Healthcare NHS Trust (No. 1)* EAT 1395/97);
- The circumstances needed to have been 'serious and imminent';
- The employee needed to take, or propose to take, steps to protect himself or others from the danger;
- The steps needed to have been 'appropriate';
- The employee needed to have been dismissed as a result.

6.63 Since the Claimant had two years' service, the burden of proof lay on the Respondent to demonstrate a fair reason for dismissal (*Maund-v-Penwith DC* [1984] ICR, 143, CA)

Health and safety dismissal (s.100 (1)(e)); discussion and conclusion

6.64 The Claimant's case was put on the basis that he considered that Student A was in serious and imminent danger from the risk of taking cross-sex hormones (paragraph 3.2 [187]). There was no evidence that the student was in such a danger. The Claimant accepted during cross examination that he had no evidence that the student was taking, or was considering taking, such drugs. Accordingly, there was no evidence that the danger was 'serious and imminent' either.

6.65 The steps which he said that he took were set out in paragraph 3.4 [187];

(i) He spoke to Student A; the nature of those conversations, however, was not shown to have included discussions about the risk of cross sex hormones;

(ii) He raised a safeguarding concern;

(iii) He raised the matter during training, which Miss Spanswick saw; during his evidence, he referred to the comment which he had made in the chat box during 2 February training session [280] as a possible motivation for his dismissal, but he acknowledged that Miss Spanswick had no way of knowing that he had been referring to Student A at the time. He also acknowledged that he did not even have the protection of the student in his mind specifically when he had made the comment.

6.66 Although the steps which he took may have been 'appropriate' had there been the risk of serious and imminent danger, there was simply no evidence that the Claimant was dismissed because of the steps that he said that he had taken. The Respondent discharged the burden upon it to demonstrate that the reason for the Claimant's dismissal was his misconduct, as discussed above.

Time; discussion and comment

6.67 The claim had been issued on 14 December 2022. The relevant ACAS dates were 1 November (date A) and 13 December (date B), which was a period of 6 weeks. The last day within the limitation period would therefore have been 6 weeks before 15 September 2022, being 4 August. All but one of the discrimination complaints would have been out of time (4.3.12 [189]). The complaint of indirect discrimination would also have been out of time, but the complaints of unfair dismissal were in time.

6.68 Had we been required to do so, we would have considered the complaints of direct discrimination to have been part of the same course of conduct; they had all emanated from the Respondent's investigation and sanctioning of his conduct in respect of Student A, even though many of them had been perpetrated by different people and/or were of a different nature. Further and in any event, had any element been out of time, we thought it likely that we would have exercised our discretion to have determined all matters on the merits because it would have been just and equitable to have done so under s. 123. The Respondent was able to deal with each of the allegations. There was no obvious evidential prejudice in it doing so late. Although no reason for the Claimant's tardiness was specifically advanced in his witness statement, neither did Ms Shepherd address the issue in her closing submissions at all.

Employment Judge Livesey
Date 27 March 2024

Judgment & reasons sent to the Parties on 27 March 2024

For the Tribunal Office