EMPLOYMENT TRIBUNALS

Claimant:	**Mr J Brelsford**
Respondent:	**St Wilfrid's Primary School, A Catholic Voluntary Aided Academy**
On:	**15 and 16 September 2021 7 October 2021**
Before:	**Employment Judge McAvoy Newns**
Heard at:	**Leeds Employment Tribunal**
Appearances:	
For the Claimant:	**In person**
For the Respondent:	**Mr G Probert, Counsel**

REASONS

Background

1. These reasons follow the Judgment, sent to the parties on 14 October 2021, dismissing the Claimant's claim for unfair dismissal.

2. The Claimant requested written reasons. These reasons have been provided as soon as practicable following his request.

3. This was a remote hearing which was not objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Issues

4. The issues were set out by Employment Judge Wade on 13 July 2021 and were as follows:

    a. What was the reason for the Claimant's dismissal? Was it related to the Claimant's conduct? Was it as a result of personal animosity or vendetta towards the Claimant (because similar conduct of others was not so investigated or treated)?

    b. Was a previous final written warning manifestly unjust or made in bad faith?

    c. Did the Respondent hold a reasonable belief based on reasonable grounds in misconduct?

    d. Did the Respondent carry out such investigation as was reasonable into the alleged misconduct?

    e. Was there a reasonable disciplinary process?

    f. Did the Respondent act in all the circumstances reasonably in treating its reason as sufficient reason to dismiss the Claimant? Was dismissal within the band of reasonable responses of a reasonable employer?

Evidence

5. The Claimant served a witness statement and was cross examined on that statement. The Claimant also served witness statements for James and Claire Wragg and June Nelson who were each cross examined on their statements. It was acknowledged that an extract of a conversation with the Claimant's former colleague, referred to as TM, handed to me with the other witness statements, was not to be treated as a witness statement. The Claimant confirmed that TM was not attending the hearing to give evidence.

6. The Respondent served witness statements for Andrew Truby, Daniel Fenoughty and David Kelly and each were cross examined on those statements.

7. I also had sight of a large bundle of documents. I informed the parties that I would only be reading those documents that were specifically brought to my attention during the evidence.

8. Having considered the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities.

Findings of fact

Background

9. The Claimant commenced employment with the Respondent, a Catholic Primary School (Academy Trust), in September 2008. At the time of his dismissal, on 21 April 2021, the Claimant was employed as a Higher Level Teaching Assistant and had been since 2009. He taught a full range of subjects including maths and PE. It is not in dispute that the Claimant was a popular member of the Respondent's staff, with pupils, parents and other staff members.

10. The Respondent's disciplinary policy and procedure acknowledges that sometimes potential disciplinary issues can be resolved informally [45]. It states that where the Investigating Manager considers that it is appropriate to suspend an employee, this will be done for a period of up to ten working days [45]. This period may however be extended subject to a review every 10 working days [46]. It acknowledges that suspension is not intended to be disciplinary action. It states that if an investigation is to be commenced, the Respondent will notify the employee in writing of the fact of the investigation and the allegations made [49]. It states that a first written warning will remain live for 12 months and a final written warning will remain live for 24 months [52]. It states: *"Dismissal on contractual notice would be given for a disciplinary offence (other than an act of gross misconduct) committed or discovered during the currency of a live final written warning (even if the final written warning related to a different type of misconduct, if appropriate in the circumstances)"* [52].

11. Between September 2008 and February 2017 there is no evidence of the Claimant being subjected to any disciplinary proceedings, neither formal nor informal.

12. In September 2016, Mr Truby was appointed as the Headteacher of the Respondent. Two years later, Mr Truby was appointed as the Executive Head of the Respondent and several other schools. At this time, Mrs Delia Evans was appointed as the Headteacher for the Respondent. Mrs Evans did not attend this hearing as she was on maternity leave.

13. The Respondent had a Behaviour Policy and a Staff Code of Conduct which the Claimant received training on.

Questionnaire

14. At 2.14pm on 10 February 2017 Mr Truby circulated a questionnaire. In his cover email he stated: *"One of the areas in the school development plan is about improving the culture in the school and this is hard to measure so there is a question about this".* He asked people to be honest when completing the questionnaire so that an accurate picture could be created.

15. The Claimant's evidence was that he completed the questionnaire at some point between receipt of the questionnaire at 2.14pm on 10 February and 13 February 2017.

16. In his reply, the Claimant said that he disagreed that he had access to appropriate training. He also left some feedback about teaching assistants and teachers being separated at an inset day and them being treated differently in other ways.

17. On 13 February 2017 Mr Truby emailed the Claimant to let him know that he needed to arrange a meeting with him to discuss a number of issues that had been raised. The Claimant asked for an agenda and said *"I hope this is not as a result of my questionnaire".* Mr Truby responded immediately and said: *"The meeting is not a result of the questionnaire, although I must say I am very disappointed by that"* [147]*.* He then went on to say that, during a parents evening which had taken place the previous week, a number of parents had expressed concern about things that the Claimant had said to children and some of the Claimant's approaches in the classroom. In a subsequent email, which Mr Truby sent on 16 February 2017, he said that he was *"extremely disappointed with the way that [the Claimant] perceived things"* when referring to the Claimant's questionnaire replies [153].

18. Mr Truby's evidence was that, at the parents evening which led to the above mentioned email to the Claimant, parents had approached the teachers (rather than vice versa) in order to discuss the Claimant.

19. Mr Truby emailed a parent on Monday 13 February 2017 stating, *"It was really good to talk to you at parent's evening last week".* Although no specific date for this parents evening was confirmed in evidence, given that this took place on a school day (therefore, a week day), I expect it is likely to have been between Monday 6 and Friday 10 February 2017.

Disciplinary investigations

20. Between February 2017 and the Claimant's dismissal in January 2021, there were multiple disciplinary processes initiated in respect to the Claimant's alleged failure to follow the Respondent's Behaviour Policy and/or Code of Conduct. As a result of the legal test I am required to consider, most of these have only limited relevance to the Claimant's claim and therefore I have summarised these briefly as follows:

    a. In February 2017, a number of reports were made to the Respondent from parents about the Claimant. These included allegations that the Claimant had undermined their child's confidence by publicly collecting test scores, commenting that the child did not know their times tables and/or saying that it was "pathetic" if a child did not receive double figures in their test. It was also alleged at around this time that the Claimant had "screamed" at a child and mimicked their behaviour. An investigation meeting took place during which the Claimant accepted some of the allegations. The Claimant was asked to keep the matters confidential but accepted in evidence that he had not done so as he had spoken to a parent about one of the allegations. On 7 March 2017, the Claimant was invited to a disciplinary investigation meeting [155]. A letter confirming

that no formal action would be taken, but setting out the Respondent's advice to the Claimant in respect to the incidents, was provided to the Claimant shortly afterwards [162]. In this letter the Respondent expressed its disappointment with the Claimant's responses to some of the concerns raised during the investigation meeting. It explained that the ethos of the school was one of nurturing and valuing any contribution that a child makes, instilling the core values of effort and aspiration, fostering a growth mindset. It went on to state, *"we expect you to build on this ethos and going forward this should be a priority of yours in the way you interact with the children in school".* It also explained that a support plan would be put in place which included a session with Mr Truby to go over the school's expectations, three optional sessions of CPD and ongoing monitoring and feedback by the senior leadership team [162];

b. On 13 November 2017 a child reported to their class teacher that the Claimant had hurt their hand by squeezing it. The Respondent referred this to the Local Authority Designated Office (**LADO**). The Claimant accepted in evidence that it was appropriate for the Respondent to do so. The Respondent's evidence was that LADO referrals were needed from a safeguarding perspective for any incident involving a child and the referral to LADO did not necessarily imply guilt or wrongdoing. A letter confirming that no formal action would be taken, but setting out the Respondent's advice to the Claimant, namely, to be mindful of physical interactions with children, was provided to the Claimant shortly afterwards;

c. On 4 December 2017 a parent reported orally and then in writing [187] to the Respondent that their child was a bit upset about something which happened in class. This concerned a lesson that the Claimant ran on the Vikings. A child in the class with red hair had been teased by his classmates and become upset. The background to this was that there had been a discussion regarding the types of phobias people may have which included a discussion on Gingerphobia, the fear of red/ginger hair. After the oral report from the parent, Mrs Evans met with the child concerned. She asked questions such as *"Can you tell me what happened", "What happened then"* etc [179]. The child relayed to Mrs Evans that people had laughed at him, he didn't like it so he just covered his ears up. Mrs Evans also met with the class teacher and asked her a number of questions about what happened during that lesson. During that interview Mrs Evans asked the teacher specifically whether she had ever felt uncomfortable about the way that the Claimant had spoken to a child following which the teacher provided an example concerning how the Claimant conducted the register, which was a matter that the two of them had addressed before. On the day this incident occurred, Mr Truby had walked around the Claimant's classroom when children were misbehaving. The Claimant maintained that one of the children was making seal noises but Mr Truby could not recollect this. This led to the Claimant raising his voice at the children concerned following which another allegation was added, namely that he had shouted at a child. Mr

Truby was concerned about both of these incidents and decided to suspend the Claimant pending an investigation. Part of the Respondent's reasons for suspending the Claimant were that the Claimant had breached confidentiality in respect to one of the February 2017 incidents mentioned above. The Respondent considered it necessary to suspend the Claimant in order for a fair investigation to be undertaken. The Claimant was therefore suspended on 4 December 2017 [180]. A referral to LADO was made on the basis that the child may have suffered emotional harm but the Council concluded that the LADO threshold had not been reached. In this regard, the Council replied: *"my view is that it comes nowhere near LADO threshold"* [188]. The Claimant was unhappy with the Respondent's decision to suspend him and for the Respondent's approach to the investigation. He believed that the suspension was pre-determined, should have been executed at the end of the school day rather than part-way through it and was unnecessarily delayed. He also believed that insufficient information was provided to him about the allegations that were being considered against him at the investigation stage. He was also concerned about Mr Truby's conduct prior to the suspension in that, during the earlier mentioned walk around, he had failed to provide the Claimant with support despite the children in the class behaving badly. In cross examination, Mr Truby said that if he thought the Claimant needed support, he would have provided it, noting that he did not wish to undermine the Claimant. He said that sometimes walking around and doing nothing, adding the senior presence to the room, is enough to settle the misbehaving children. There was a delay in dealing with the investigation. The Claimant alleged that this delay was caused by the Respondent's failure to appoint a HR representative between 6 and 14 December 2017. The Respondent alleged that this was caused by the Claimant's ill health. An investigation meeting took place on 14 December 2017. Subsequent to this, on 8 January 2018, the Claimant was invited to a formal disciplinary hearing. He was told that the purpose of this hearing was to consider allegations that, on 21 November 2017, he made inappropriate and unprofessional comments to children in his class and, on 4 December 2017, he shouted at a child [210]. During the hearing, which took place on 25 January 2018, the Claimant's trade union representative informed Mr Truby that he was not permitted to conduct the meeting as he was a witness to the second allegation. This second allegation was withdrawn from the disciplinary proceedings and considered separately [245]. Following the disciplinary hearing, the Claimant was issued with a first written warning which would remain live for 12 months In the outcome letter the Respondent stated: *"It is clear that you exercised poor judgement in choosing to search on the internet in front of children the definitions of what it would be called to be scared of ginger hair and bald people. Your actions resulted in a child being teased by other children causing the child to feel embarrassed and upset".* It referred to the management advice that the Claimant had received before and stated: *"I am not convinced you have modified your behaviour nor fully understand the inappropriateness of your actions".* He was informed of the consequence of future misconduct, offered a further support plan and the right to appeal [221-222]. On 30

January 2018 Claimant requested an appeal [223] which was heard on 3 May 2018 by a panel of governors. That appeal was unsuccessful. The outcome letter was sent on 8 May 2018 [262];

d. It was alleged that on, 7 November 2018, when the first written warning mentioned above was still live, the Claimant had shouted inappropriately at a Year 2 pupil and had used the word "stupid" to that same pupil, allegedly causing them to be upset [271]. The report of the Claimant's conduct was received from the Year 2 teacher [274]. The child was interviewed and he said that the word "stupid" was used and he felt sad because he felt that the Claimant had isolated him when others in the class had also misbehaved [278]. The Claimant accepted that he had used the word "stupid" and to do so was inappropriate. However he said that he had told the child to stop "acting stupid", not that the child was stupid. This distinction was supported by what the child said during his interview. The Claimant also denied shouting at the child but accepted that he raised his voice to emphasise that he was not impressed with the child's behaviour. One of the adults present had recorded that they were uncomfortable with the way the child had been spoken to by the Claimant. Another child said that the Claimant had shouted [278]. Mr Truby recommended that the Claimant be dismissed [279]. He accepted in evidence that he had considered this appropriate but respected the overall recommendation of the HR consultant (considered later), given their greater experience. An investigation meeting took place on 14 November 2018. An investigation report was produced by an independent HR consultant [293]. The recommendation was to consider taking further disciplinary action against the Claimant up to and including a final written warning [299]. Dismissal was not considered proportionate by the HR consultant, given certain mitigating factors. On 7 December 2018 the Claimant was invited to a disciplinary hearing. He was reminded of the allegations and his right to be accompanied. He was informed that the hearing would be conducted by a panel of three school governors. Following the hearing, which took place on 13 December 2018, the Claimant was given a final written warning to remain on his file for 24 months [306]. The Claimant was offered a right of appeal against this decision but did not request an appeal or otherwise challenge this sanction. As part of these proceedings he said that he did not do so because, drawing upon his experience from appealing the first written warning, he considered doing so would have been futile. However, there is no evidence of the Claimant saying this at the time. Mr and Mrs Wragg, the child's parent, gave evidence at this hearing that they were not aware of this matter at the time, save that their son had discussed it with them on their journey home that night. Their evidence was that their son was not upset by this incident and had accepted that he had been "acting up" and the Claimant acted appropriately in what he said and did; and

e. On 3 July 2019, a written complaint was submitted by a parent against the Claimant about his behaviour at a Sports Day which followed a discussion on 28 June 2019 [310]. It was alleged that the Claimant had allowed too many runners to run in a race, allegedly resulting in children

being at risk of getting hurt. It was also alleged that the Claimant's conduct when presented with the complaint from the parent on the Sports Day was also inappropriate. The Claimant disputed this and raised a concern about how the parent had spoken to him [312]. A letter confirming that no formal action would be taken, but setting out the Respondent's advice to the Claimant, was provided to the Claimant shortly afterwards [314].

21. As part of the above mentioned warnings in particular, the Respondent said it provided the Claimant with a support plan, to enable the Claimant to develop self-awareness, and understanding of emotional intelligence and a positive and calm communication style. This involved the Claimant completing training modules on behaviour management, the provision of CPD sessions and discussions with a mentor. The Claimant said that further support ought to have been provided, e.g. teaching observations and/or support in the classroom. He also said that the mentorship he was provided with was insufficient.

Incident leading to dismissal

22. The incident which gave rise to the Claimant's dismissal occurred on 15 October 2020. At this time the Claimant had a live final written warning which he had not challenged at the time.

23. On 15 October 2020, an incident took place involving the Claimant and children participating in a PE lesson.

24. It was alleged by the Respondent that the Claimant had spoken to the children in an unprofessional manner which resulted in children feeling upset or humiliated and one vulnerable male child (referred to as G) crying. G had ADHD.

25. The Claimant had allegedly separated the children into boys and girls teams but, because there were insufficient girls, he asked some of the boys to act as girls. In doing so he gave the boys "girls names" which upset G. It was alleged that the Claimant had subsequently called G a "baby" which caused his classmates to laugh resulting in him becoming more upset. The Respondent considered this to amount to a breach of its School Behaviour Policy and Code of Conduct.

26. There was no class teacher or other adult present during the incident but a class teacher arrived towards the end and provided a statement to the Respondent. That statement also covered the teachers discussion with G's parent, who had raised concerns about the incident, and who had said that G would have found the situation difficult to deal with [319].

27. Some of the children were also interviewed. They said that the Claimant had called G by a girl's name and that G seemed upset. At least one said that the Claimant had said G was being a baby [321-322].

28. The Claimant's version of events in relation to this incident were broadly consistent with the Respondent's charges. He accepted that he had given the

boys in the group "girls names", and that G had become upset, causing other children in the group to laugh. He accepted that he told G not to pull a baby face to the rest of the class.

29. On 16 October 2020, the Claimant was invited to an investigation meeting. He was told that it had been alleged that he had spoken inappropriately to a child and humiliated him in front of his classmates, resulting in the child becoming upset and complaining to his parents. He was told that the investigation would be conducted by Ms Evans [323].

30. Ms Evans produced an investigation report in which she concluded that the allegations were substantiated. She stated: *"I am concerned that John doesn't see that his conduct is unprofessional and what he is doing wrong, despite previous training and warnings".* She recommended that the case should be considered further at a formal disciplinary hearing [341].

31. On 12 January 2021 the Claimant was invited to a disciplinary hearing in writing. The letter listed the allegations being considered, reminded the Claimant about his right to be accompanied and informed the Claimant that the outcome of the hearing might be his dismissal. He was informed that the disciplinary hearing panel would comprise of three governors [354-355]. The Claimant had confirmed that he would not be attending the hearing and so was requested to submit written representations, which was granted.

32. The disciplinary hearing took place on 25 January 2021.One of the points raised by the Claimant was that he had been investigated on eleven different occasions and this evidenced the Respondent's conspiracy to remove him. The panel were informed that the Claimant had been investigated on eleven occasions but that only three of these had been formal investigations, the remainder largely resulted in advice letters. The panel noted that the Claimant did not present any evidence of the above mentioned conspiracy, only a suggestion of there being a 'personal agenda'.

33. As part of these proceedings, the Claimant alleged that the Respondent had intentionally required him to provide additional support to G in order to set the Claimant up, bearing in mind that he was on a live final written warning which was, at this point, due to expire. The Claimant also raised concerns about the manner of the investigation in that the Respondent interviewed children without a minute taker and allegedly using closed questioning techniques.

34. The outcome of the disciplinary, which was communicated to the Claimant on 26 January 2021, was that the Claimant was issued with a further written warning. As the Claimant had a live final written warning, this additional warning resulted in a cumulative dismissal. The Claimant was dismissed with notice which was confirmed to the Claimant in writing. He was offered a right of appeal.

Appeal against dismissal

35. Following the Claimant's request for an appeal against his dismissal, a panel was appointed to conduct a rehearing of the allegations as well as to consider the Claimant's specific grounds of appeal. That appeal panel was chaired by Father Cooke.

36. Prior to Father Cooke's appointment as the chair of the panel, the Claimant contacted him and pastoral support was provided. As part of this claim, the Claimant complained that Father Cooke was insufficiently independent. However, the Claimant did not raise this at the time. The Claimant recorded the appeal hearing without the Respondent's knowledge or consent. In evidence he said he did so because he had lost trust in the Respondent.

37. The Claimant complained that the Respondent initially tried to prevent him from attending the appeal hearing. He also complained that the Respondent provided false information to the appeal panel in that they told the appeal panel that there had been three formal investigations. The Claimant contended that there had been many more than three formal investigations and the Respondent had intentionally mislead the appeal panel into thinking there had been less so as to avoid the appeal panel finding that the Claimant had been unfairly targeted.

38. The appeal panel found that the evidence from the investigation demonstrated that the Claimant's conduct had caused upset and humiliation in particular to G who had expressed that he felt upset. The appeal panel were also concerned that some of the Claimant's responses suggested that he had not appreciated or understood the potential impact of what had happened or that he did not have the self-awareness they would expect of someone carrying out his role. The appeal panel decided that dismissal was the appropriate sanction bearing in mind the previous incidents, the fact that he had a live final written warning, had received support and the fact that the Claimant did not appear to appreciate the impact of his actions on children. This indicated to the appeal panel that the Claimant's conduct was unlikely to improve in the future. The decision to not uphold the Claimant's appeal was communicated to him, in writing, on 3 March 2021 [453].

Alleged inconsistency

39. The Claimant compared his treatment, in being dismissed, to the treatment of two former colleagues, referred to in these Reasons as TM and PD.

40. After tripping, TM aggressively kicked over a child's water bottle in anger in a Year 5/6 class causing a child to become scared. The child's mother, Miss Nelson, made a complaint that her son was upset and frightened to the extent that he was too scared to ask TM for help with a piece of writing. Miss Nelson gave evidence at this hearing regarding the upset her child felt because of this incident and her understanding that no action had been taken against TM. The Respondent agreed that no formal disciplinary action was taken against TM but referred to a letter which was sent to TM, setting out the Respondent's advice

to TM about this incident. TM had sent a formal written apology and agreed to apologise to the child in person [177].

41. The Claimant said he had witnessed PD call a child "stupid". However, the Claimant did not report this formally, in writing, despite being asked to do so if he wished for the matter to be investigated. As such, the Respondent said it could not formally investigate it. Nevertheless, as there had been a previous incident in which a volunteer had reported that she was uncomfortable about language PD had used, this was discussed with PD. A letter confirming that no formal action would be taken, but setting out the Respondent's advice to PD, was provided to PD shortly afterwards.

The Law

42. The relevant parts of s.98 Employment Rights Act 1996 (**ERA**) state:

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *a. the reason (or, if more than one, the principal reason) for the dismissal…*
> *(2) A reason falls within this subsection if it—*
> *(b) relates to the conduct of the employee;*
> *(3) …*
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *b. shall be determined in accordance with equity and the substantial merits of the case.*

43. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in ***Burchell 1978 IRLR 379*** and ***Post Office v Foley 2000 IRLR 827***. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (***Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563***).

44. In ***Davies v Sandwell Metropolitan Borough Council 2013 IRLR 374,*** the Court of Appeal set out the approach Tribunals should take when considering unfair dismissal claims where the employee was dismissed having had a live final written warning on file, as follows: First, the starting point should always be S.98(4) of the ERA, the question being whether it was reasonable for the employer to treat the conduct reason, taken together with the circumstances of the final written warning, as sufficient to dismiss the Claimant. Secondly, it is not for the Tribunal to reopen the final warning and consider whether it was legally valid or a nullity. And thirdly, the questions of whether the warning was issued in good faith, whether there were prima facie grounds for imposing it, and whether it was 'manifestly inappropriate,' are all relevant to the question of whether dismissal was reasonable, having regard, among other things, to the circumstances of the warning. Lord Justice Beatson confirmed that only rarely would it be legitimate for a Tribunal to 'go behind' a final written warning given before dismissal. Where there has been no appeal against a final warning, there would need to be exceptional circumstances for a Tribunal to, in effect, reopen the earlier disciplinary process.

45. In ***Wincanton Group Plc v Stone [2013] I.R.L.R. 178***, the Employment Appeal Tribunal held that the Tribunal's focus should be upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for dismissal. If a Tribunal was satisfied that the earlier warning was issued for an oblique motive, was manifestly inappropriate, was not issued in good faith or with prima facie grounds for making it, then the warning would not be valid and could not be subsequently relied upon. However, where the Tribunal was not satisfied of any of those matters, the earlier warning would be valid and: (a) the Tribunal should take into account the fact of that warning; (b) the Tribunal should take into account any proceedings that could affect the validity of that warning, usually an internal appeal; (c) to find that a warning should not have been issued, or should have been downgraded to some lesser category of warning, would be to go behind the warning. A Tribunal should not go behind the warning unless satisfied as to its invalidity; (d) it was not going behind a warning to take into account the factual circumstances giving rise to the warning. A degree of similarity between the circumstances giving rise to the first warning and those currently being considered would tend to favour a more severe penalty, whereas dissimilarity would tend the other way; (e) a Tribunal could take account of the employer's treatment of similar matters relating to other employees prior to the instant dismissal; and (f) a final written warning always implied that any further misconduct of whatever nature would usually be met with dismissal, subject only to the individual terms of a contract, and it would be an exception where that did not occur.

46. In ***Hadjioannous v Coral Casinos [1981] I.R.L.R. 352*** it was held that the treatment of other employees in similar circumstances was relevant (1) if there is evidence that the dismissed employee was lead to believe he would not be dismissed for such conduct; (2) where the other cases give rise to an inference that the employer's stated reason for dismissal is not genuine; or (3) if, in truly parallel circumstances, an employer's decision can be said to be unreasonable in a particular case having regard to decisions in previous cases. It held that

arguments based on disparity should be scrutinised carefully and would rarely be properly accepted.

47. In ***Thames Water Utilities Ltd v Newbound [2015] EWCA Civ 677*** on the facts of that case the Court of Appeal found that the Tribunal was entitled to conclude that there had been a disparity between the employer's treatment of the claimant and his manager. The claimant had worked for the employer for 34 years. His role involved working in sewers in extremely hazardous conditions. He had entered a Class C sewer without breathing apparatus. The manager in charge had checked gas readings and found that there was a good level of oxygen in the sewer, and had not objected to him entering the sewer without the apparatus. A new risk assessment form and method statement required breathing apparatus to be used in such conditions. The form had been completed by the claimant's manager and read to the claimant, who had countersigned it. The claimant claimed that he merely skim read the risk assessment and had never been trained on its importance. He was dismissed for gross misconduct for breaching the employer's health and safety policy. The employer had treated its manager differently and justified that difference on the basis that he was inexperienced and had felt pressured to "get the job done" by the claimant, and the manager had shown remorse for his actions whereas the claimant had not. The manager had received a final written warning.

48. In ***Post Office v Fennell [1981] I.R.L.R. 221***, the Court of Appeal held that the employee's dismissal was unfair because the Post Office had acted out of line with the course of conduct they had adopted in comparable cases in the past; the word "equity" comprehends the concept that employees who behave in much the same way should have meted out to them much the same punishment. In this case, the employee was summarily dismissed after assaulting another employee in the works canteen. He complained of unfair dismissal, drawing attention to other employees who, in the past, had assaulted other members of staff but had not been dismissed.

Submissions

49. Both parties provided skeleton arguments which were supplemented by oral submissions. They are not set out in detail in these reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

What was the reason for the Claimant's dismissal?
Was it related to the Claimant's conduct?
Was it as a result of personal animosity or vendetta towards the Claimant (because similar conduct of others was not so investigated or treated)?

50. The Respondent submitted that conduct was the reason for the Claimant's dismissal. Although the Claimant accepted that the Respondent dismissed him for the matters set out above (considered later in these Reasons), the thrust of

his case was that the personal animosity or vendetta against him, led by Mr Trudy and Mrs Evans, had led to his dismissal.

51. It is understandable why the timing of the Claimant's submission of the questionnaire and Mr Truby's email of 13 February 2017 would make the Claimant suspicious that Mr Truby's subsequent treatment of him was related to the feedback that he left on that questionnaire. This is particularly the case given that there is no evidence of any concerns having been raised with the Claimant during his fairly lengthy period of employment beforehand. To add to the justification for such suspicion, Mr Truby said that he was *"very disappointed"* by the Claimant's questionnaire and in evidence stated that he considered the Claimant's attitude to be *"rather negative".* He also later said that he was *"incredibly disappointed"* by the Claimant's comments.

52. However, Mr Truby had invited constructive feedback from colleagues and therefore it is reasonable to conclude that Mr Truby may have expected to receive some. Additionally, and crucially, based on the findings I made earlier, it appears as though Mr Truby had reasons to be concerned about the Claimant's conduct before even reading the Claimant's completed questionnaire. In this regard, the parent's feedback about the Claimant, provided during the parents evenings, is likely to have been known to Mr Truby before he read the Claimant's completed questionnaire.

53. I considered the Claimant's complaint about the Respondent's handling of his suspension and the investigation process following the Viking incident in late 2017 / early 2018 as being relevant to this allegation. My conclusions in relation to the Claimant's key complaints in this regard are as follows:

54. The Claimant believed that it was inappropriate for the Respondent to suspend him following this incident and the fact that Mr Truby did so demonstrated the vendetta. On the other hand the Respondent believed that the matter was sufficiently serious for suspension to be appropriate given that the matter had come to the Respondent's attention through the parent of the child concerned and that the Respondent needed to undertake an investigation. The Claimant had accepted that he had previously disclosed a confidential matter concerning an investigation to a parent in the past and therefore the Respondent was concerned that the Claimant would do so again, should he not be suspended.

55. I concluded this was a perfectly reasonable approach for the Respondent to take in circumstances such as this, where the employee concerned has previously accepted that they have broken confidentiality. It is understandable why the Respondent would consider it necessary for the Claimant to be absent from the premises to ensure the integrity of the investigation.

56. The Claimant also complained that the Respondent did not inform him of the specific allegation being considered against him until the investigation meeting took place. Although I acknowledge that this combined with the suspension mentioned earlier, clearly caused the Claimant a significant amount of stress, this is commonplace for investigations such as this. The Claimant asserted that this amounts to a breach of the ACAS Code but in doing so the Claimant was

confusing an employer's obligations prior to an investigation meeting to their obligations prior to a disciplinary meeting, which are different. An employer is obliged to clearly set out the allegations before a disciplinary hearing takes place, to ensure the employee has a sufficient opportunity to prepare and respond. The same obligation does not apply in respect to investigations and indeed it is common for less information to be given before investigation meetings, to ensure the integrity of the investigation process.

57. The Claimant also complained about Mr Truby's insistence on chairing the disciplinary meeting concerning the Viking incident, despite being a witness to the second charge being considered at that hearing. Although I agree that a reasonable employer would not have allowed Mr Truby to consider both of these allegations at this disciplinary hearing, Mr Truby's decision to chair the hearing does not support the Claimant's assertions regarding there being a vendetta. Mr Truby listened to the advice he received and remove this allegation from the scope of the disciplinary hearing so that it was not determined by him. He issued the Claimant with a first written warning which the Claimant unsuccessfully challenged. The appeal panel who dismissed the Claimant's appeal were independent and there is no evidence of their decision making being influenced by Mr Truby.

58. The Claimant also complained about Mr Truby's decision to recommend that he be dismissed following the 7 November 2018 incident. He said this showed that Mr Truby was desperate to dismiss him. I agree that this demonstrates a lack of patience towards the Claimant on Mr Truby's part. It is likely to be considered unreasonable for an employer of the Respondent's size and resources to dismiss an employee in these circumstances where the employee only has a live first written warning on their record. However, Mr Truby accepted the recommendation of the HR consultant and there is no evidence before me of Mr Truby seeking to interfere with the decision making of the disciplinary hearing panel who heard this allegation.

59. Considering how the issues have been set out in this case, I have addressed the Claimant's allegation that he was treated inconsistently here. I set out my findings earlier regarding the two comparators relied upon by the Claimant: TM and PD. I have compared the Respondent's decision to dismiss the Claimant against its decision to issue no disciplinary warnings to either TM or PD to ascertain whether any difference in treatment gives rise to an inference that the Respondent's stated reasons for the Claimant's dismissal were not genuine.

60. Considering TM first, his conduct was plainly sufficiently similar if not more serious than the Claimant's was on 15 October 2020. Although both incidents left children upset, TM's conduct was physically aggressive and the child concerned felt too scared to even ask him a question about a piece of work. However, to compare the incident involving TM to the incident involving the Claimant on 15 October 2020 in isolation would be to ignore the fact that the Claimant had a final written warning on his record at the time, whereas there is no evidence before me of TM having any formal disciplinary sanctions at all. Although the Respondent treated TM more leniently than it treated the Claimant

in circumstances where a reasonable employer may have issued TM with a formal warning, such difference in treatment alone does not allow me to infer that the Respondent dismissed the Claimant because of a vendetta. The Respondent had placed significance on TM's remorse and decision to formally apologise to the child in question when deciding not to issue him with a warning. He had an unblemished record. The Claimant, on the other hand, had been involved in numerous similar incidents involving children and had been repeatedly warned both formally and informally of the Respondent's expectations regarding his conduct. Some of the statements made by the Claimant suggested to the Respondent that he did not appreciate the severity of his conduct.

61. Considering PD, although the Claimant's evidence was that he heard her call a child "stupid" he did not report his concerns formally meaning that the Respondent was unable to investigate them. The matters leading to the Claimant's disciplinary sanctions had been initiated by a formal complaint, raised by either a member of staff or a parent.

62. In the cases of both TM and PD, there were isolated incidents and there is no evidence before me of either TM or PD having any formal disciplinary sanctions at all. The Claimant and TM or PD were not in 'truly similar or sufficiently similar' circumstances. The cases of ***Newbound*** and ***Fennell*** can be distinguished. In ***Newbound***, the circumstances involved two employees who were involved in the same incident but treated disparately. In ***Fennell***, the claimant referred to comparators who had committed precisely the same offence and had not been dismissed. The Claimant was in an entirely different situation. Having already received several management advices, when he had a first written warning on his record, had been warned that any further misconduct on his part would likely result in his dismissal. This led to the implementation of a final written warning and, while that warning remained live, the Claimant committed a further act of misconduct.

63. In relation to other matters raised by the Claimant, I do not conclude that the Respondent's decision to refer the matters outlined above to LADO suggests that the Respondent had a vendetta against the Claimant. The Respondent explained, clearly and cogently in evidence, the importance from a safeguarding perspective of raising all matters of potential pupil harm to the LADO, even if they were not considered serious. I also do not conclude that the Respondent's questioning of pupils was inappropriate. Although some closed questions were asked, these were not inappropriate. The majority of the questions were also open. I also do not believe that the Claimant was provided with insufficient support following the warnings or that this is suggestive of the Respondent having a vendetta against him. The Claimant was offered a package of support measures, some of which he decided not to utilise because he did not consider them necessary.

64. The Claimant accepted in evidence that the disciplinary panel led by Mr Fenoughty made the decision to dismiss and the appeal panel led by Mr Kelly made the decision to uphold his dismissal on appeal. He accepted that these panel members did not have a personal vendetta against him. He accepted that

there was no evidence of Mr Truby and/or Mrs Evans influencing the decision making of those panels.

65. At no point did the Claimant raise a grievance alleging that either Mr Truby or Mrs Evans held a vendetta against him. Had he genuinely believed this was the case from 2017 onwards, bearing in mind the number of conduct issues which were raised from February 2017 onwards, I find it is reasonable to expect him to have done so.

66. In conclusion, I find that the Claimant was dismissed for conduct and not because Mr Truby or Mrs Evans held a personal vendetta towards him. Although, as can be clear from the conclusions drawn above, there are some suggestions that Mr Truby was losing patience with him a long time before January 2021, had there been such a vendetta, I find that it is likely that they would have escalated the dismissal process much more quickly than they did. In this regard there were a significant amount of incidents concerning the Claimant from February 2017. These concerned the Claimant's behaviour towards children, in particular, the way he spoke to or interacted with them, the majority of which the Claimant accepted and then subsequently agreed to change his behaviours. I do not believe that this suggests that the Respondent was desperate to find a way to remove him from the organisation or that the Respondent sought to conceal this from the disciplinary panel, when it told them that there had only been three formal investigations concerning the Claimant prior to this date. If it was the case that Mr Truby and Mrs Evans really wanted to dismiss the Claimant, they would have done so much earlier, in reliance on one of these earlier allegations. The Respondent could have quite easily and reasonably given the Claimant formal warnings rather than management advices and, had they done so, the Claimant is likely to have been dismissed much sooner than he was.

67. Consequently, I conclude that the Respondent did have a fair reason for the Claimant's dismissal, namely his conduct.

Was a previous final written warning manifestly unjust or made in bad faith?

68. On 15 October 2020, when the incident giving rise to the Claimant's dismissal occurred, the Claimant had a live final written warning on his record. This warning followed the incident on 7 November 2018 when the Claimant had raised his voice to a child and referred to the child as "stupid" which the Claimant accepted was inappropriate. An issue in this case is whether it was reasonable for the Respondent to rely upon this warning when deciding to dismiss the Claimant.

69. As is clear from the case law quoted above, as a general rule, it is not for the Tribunal to sit in judgment on whether a final warning was reasonably given, but instead it has to consider whether the warning was issued in good faith and whether there were prima facie grounds for it. In particular, if there is anything to suggest that the warning was issued for an oblique motive or if it was manifestly inappropriate, the Tribunal could take that into account in determining the fairness of a later dismissal in reliance on that warning.

70. Although the Claimant did not challenge the imposition of the final written warning at the time, he subsequently stated that he considered it to be inappropriate. Additionally, the pupil's parents (Mr and Mrs Wragg) gave evidence at the hearing that the pupil was not upset following this incident and they were not asked to give a statement to the school regarding it. Finally, the Claimant said he did not appeal against the final written warning because he considered the process to be futile, drawing upon the experience that he had when appealing against the first written warning.

71. However, the Claimant accepted that he had used the word "stupid" (albeit he told the pupil to stop acting stupid rather than calling the child stupid) and recognised that the use of this word was inappropriate. He also accepted that he raised his voice to the child. Irrespective of the evidence of Mr and Mrs Wragg, the evidence provided by the child at the time made it clear to the Respondent that the child was impacted by the Claimant's behaviour. The Claimant accepts that, at the time that this final written warning was issued, he had a live first written warning. Whilst he sought to challenge that first written warning at the time, such challenge was unsuccessful after being considered independently.

72. In circumstances where:

    a. an employee has a live first written warning when the incident giving rise to the final written warning occurs;

    b. that employee accepts some of the allegations leading to the imposition of the final written warning; and

    c. that employee then chooses to not appeal against that warning or otherwise make it clear that he considers the same to have been wrongly imposed,

    there would have to be truly exceptional circumstances for me to find that final written warning was manifestly inappropriate. Clearly the factors at (a) and (b) above demonstrate prima facie grounds for the Respondent to impose the final written warning. The factor at (c) demonstrates that, at the relevant time, the Claimant did not have reason to believe that the warning was issued in anything but good faith. Furthermore, the investigation was conducted by an external HR consultant and the disciplinary hearing panel comprised of three governors.

73. Although it might appear to the Claimant that the use of the word "stupid" to the child was very minor and indeed commonplace within school settings, this was clearly a serious matter for the Respondent. It was also relevant to the numerous discussions the Respondent had had with the Claimant from February 2017 onwards regarding his behaviour and interactions with pupils.

74. Although this point was not put to the Respondent's witnesses, I did observe that the Claimant's final written warning was imposed for 2 years. As this was

consistent with the Respondent's policy I do not conclude that this suggests that the Respondent had an oblique motive for imposing it.

75. I therefore conclude it was reasonable for the Respondent to rely upon the final written warning when dismissing the Claimant.

Did the Respondent hold a reasonable belief based on reasonable grounds in misconduct?

76. Mr Fenoughty gave evidence that he and, to his knowledge, the rest of the disciplinary panel held a genuine belief that the Claimant committed the allegations that he was alleged to have committed on 15 October 2020. Mr Kelly gave similar evidence in respect of the decision making of the appeal panel. Additionally, the Claimant accepted the majority of such allegations and did not challenge Mr Fenoughty or Mr Kelly on the genuineness of their beliefs. He sought to do so in his submissions but it is not possible for the Claimant to make submissions on points that have not been put to witnesses in evidence. At the outset of his cross examination, the Claimant accepted that this was not a point that he was challenging. He also accepted that there was no evidence of Mr Fenoughty or Mr Kelly (or their respective panel members) being influenced by Mr Truby or Mrs Evans when receiving their decisions. I therefore conclude that the Respondent had a genuine belief that the Claimant committed the act of misconduct that he was alleged to have committed on 15 October 2020.

77. In terms of whether the Respondent held these beliefs on reasonable grounds, again, the Claimant accepted that the majority of the incidents occurred. Again, the Claimant did not challenge Mr Fenoughty or Mr Kelly on the reasonableness of their respective beliefs. As above, the Claimant sought to do so in his submissions but it is not possible for the Claimant to make submissions on points that have not been put to witnesses in evidence. As above, at the outset of his cross examination, the Claimant accepted that this was not a point that he was challenging. In any event, the unchallenged evidence of Mr Fenoughty and Mr Kelly was that they and their respective panel members considered all of the evidence presented to them before reaching their decisions. They also gave cogent unchallenged evidence about their rationale for the findings that they made. I therefore conclude that the Respondent did have reasonable grounds for believing that the Claimant committed the act of misconduct that he was alleged to have committed on 15 October 2020.

Did the Respondent carry out such investigation as was reasonable into the alleged misconduct?

78. Prior to the disciplinary hearing which led to the Claimant’s dismissal, the Respondent had undertaken an investigation which involved interviewing the children in the lesson on 15 October 2020. A written statement was also provided by a teacher. Although the teacher was not a witness to the events themselves, they did see the reaction of the children soon afterwards. The evidence corroborated the allegation that the Claimant had named the vulnerable male child a girl's name and that the Claimant had referred to him as being a baby. The majority of these allegations were accepted by the Claimant.

The Claimant did not challenge Mr Fenoughty or Mr Kelly on the reasonableness of their investigations. He challenged the Respondent's approach to its investigation, namely the decision to interview children without another adult present. There was nothing improper in the Respondent's decision to do this and to do so was not contrary to the Respondent's disciplinary policy, the relevant policy to the process being undertaken. Furthermore, the evidence of the children was to a large extent consistent with the concessions made by the Claimant himself. I therefore conclude that the Respondent did undertake a reasonable investigation.

Was there a reasonable disciplinary process?

79. Prior to dismissing the Claimant, the Respondent invited the Claimant to a disciplinary hearing, informed the Claimant of the allegations and reminded him that because he had a live final warning at the time of the incident, if a formal warning was given, it could be classed as cumulative misconduct and could lead to dismissal.

80. The disciplinary hearing took place in the Claimant's absence on 21 January 2021 with the Claimant's agreement. The Claimant submitted written representations which the Respondent considered. The Respondent confirmed the outcome of that hearing in writing.

81. The Claimant was offered a right of appeal against his dismissal and attended an appeal hearing. Father Cooke's involvement in the appeal process was not appropriate given the exchanges he had had with the Claimant prior to the appeal hearing taking place. However this was not a matter raised by the Claimant until after the appeal meeting had taken place, despite the Claimant being made aware that Father Cooke would be chairing the meeting. Furthermore, he was not the sole decision maker and indeed one of the other decision makers gave evidence about such decision during this hearing.

82. I therefore conclude that the Respondent undertook a reasonable disciplinary process.

Did the Respondent act in all the circumstances reasonably in treating its reason as sufficient reason to dismiss the Claimant? Was dismissal within the band of reasonable responses of a reasonable employer?

83. Relevant to whether dismissal was within the band of reasonable responses is the Claimant's prior disciplinary record which I have addressed earlier.

84. Relevant also is length of service and remorse. The Claimant accepted that he should not have called the vulnerable male child a girl's name and that it was naive for him to split the girls and boys up in the way that he had. Had this been an isolated incident where the Claimant did not have previous warnings, and had the Claimant expressed the same remorse, dismissal would have been outside of the band. However, this was not an isolated incident; the Respondent had had numerous discussions with the Claimant about his behaviour with pupils and had issued warnings in accordance with its disciplinary process.

Although none of the incidents giving rise to the disciplinary warnings were precisely the same, they all followed the same theme and concerned the Claimant's conduct with children which the Respondent considered to be inappropriate.

85. I conclude that the Respondent did act reasonably when treating the Claimant's conduct as a sufficient reason to dismiss the Claimant. I also find that dismissal was within the band of reasonable responses of a reasonable employer.

86. Accordingly, the Claimant's unfair dismissal claim is not well-founded and has been dismissed.

Employment Judge McAvoy Newns

13 December 2021