



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Aquilina

Respondent: Kent Catholic Schools' Partnership

Heard at: London South

On: 8 to 10 August 2022

Before: EJ England

Representation

Claimant: Ms Breslin, Counsel

Respondent: Mr M Selwood, Counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal succeeds.
2. The claim for wrongful dismissal does not succeed and is dismissed.
3. The parties are encouraged to agree the remedy calculation and directed:
 - a. To confirm to the Tribunal with a joint statement by 4pm on 20 October whether they still require the remedy hearing on 24 October.
 - b. If the remedy hearing is required, the parties are required at the same time to provide an agreed set of directions for the remedy hearing.
 - c. If the parties are not able to provide such a statement or they will not be ready to deal with remedy then they should state this, provide proposed directions and dates to avoid for the next six months.

REASONS

CLAIMS

1. The Claimant had been employed as a Headteacher and was dismissed on 6 October 2020. The Respondent alleged that the reason for dismissal was conduct.

2. By an ET1 dated 05/01/21, the Claimant issued claims for unfair dismissal (relying on s.98 Employment Rights Act 1996 (ERA)) and wrongful dismissal (in respect of unpaid notice pay). The ET1 included a helpful cast list at the back.
3. The claims were defended and, in summary, the Respondent's ET3 stated that the Claimant had been dismissed for "gross misconduct" arising from the inappropriate distribution of sensitive and confidential emails.
4. The hearing had been listed in December 2021 but was relisted after an agreed application arising from greater time required for the hearing and the procedure around witnesses abroad.
5. There had been no preliminary hearing and the parties had not produced a list of issues. At the hearing, I discussed with the parties the issues and they were agreed as per the following list. The majority I had identified from the ET1 and ET3, some were added on behalf of the Claimant and then re-ordered to fit within the list and the Respondent agreed the issues were all live and none were a surprise in light of the ET1. The issues were agreed as follows:

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct arising from the inappropriate distribution of sensitive and confidential emails. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

1.1.1 The Claimant highlighted para. 31 of the 'claim statement to accompany ET1' and stated that the two reasons suggested by the Claimant were

1.1.1.1 Hostility towards the Claimant and her husband Canon Aquilina; or

1.1.1.2 To enable the Respondent to move the school to an Executive Leadership model

1.2 If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide, in particular, whether:

1.2.1 there were reasonable grounds for that belief;

1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation. In particular the Claimant raises the following issues:

1.2.2.1 The disciplinary panel did not investigate: (1) whether Canon Ivan is a "third party" (i.e. unconnected with the Academy), and (2) the reasons and appropriateness for sharing data (claim statement para.34).

1.2.2.2 The investigation and disciplinary panel did not look for evidence that may support the Claimant and

instead sought evidence that was highly likely against her.

- 1.2.2.3 The investigation was in breach of the disciplinary policy.
- 1.2.3 The respondent otherwise acted in a procedurally fair manner. In particular the Claimant raises the following issues:
 - 1.2.3.1 The fact and length of suspension (claim statement para. 36).
 - 1.2.3.2 The Claimant was not informed of the full accusations made against her and also did not have an opportunity to prepare her case and receive a fair and impartial hearing (claim statement para. 35).
 - 1.2.3.3 The investigation and decision to dismiss was prejudged (claim statement para. 37).
 - 1.2.3.4 The decision to dismiss rested heavily on the evidence of witnesses known not to be independent.
 - 1.2.3.5 The appeal process was flawed and failed to engage with the reasons for appeal.
 - 1.2.3.6 The Claimant was not allowed to be represented by her brother at the disciplinary hearing and appeal
- 1.2.4 Dismissal was within the range of reasonable responses.
- 1.3 Remedy issues would be considered separately if necessary but the following would be considered at the liability stage:
 - 1.3.1 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?
 - 1.3.2 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's basic or compensatory award? By what proportion?

2. Wrongful dismissal / Notice pay

- 2.1 It was agreed the Claimant had not been paid for her notice period. What was the claimant's notice period?
- 2.2 Was the claimant guilty of gross misconduct? / Did the claimant do something so serious that the respondent was entitled to dismiss without notice?

6. In the hearing the parties provided an agreed bundle of over 800 pages, including all of the pages added after pagination. The ET3 form itself was not completed and I expressed my view that ET3 forms should be completed, noting that it is the common practice for some firms to leave them blank.

7. The following witnesses provided statements and attended to give evidence on behalf of the Claimant:
- a. The Claimant;
 - b. Canon Ivan Aquilina;
 - c. Ms Clare Copeland; and
 - d. Ms Michele McQueen

For the Respondent, the following similarly appeared:

- e. Ms Michelle Boniface (investigating officer; attending by video because she now lives far away from London); and
 - f. Mr Michael Powis (chair of the disciplinary panel).
8. At the end of the hearing, Counsel for the Claimant produced written submissions and added to them orally. Counsel for the Respondent provided oral submissions. Throughout the hearing, both Counsel were very helpful in focusing on the issues and very competently on top of the large volume of documentation.
9. Unsurprisingly given the length of documentation and number of witnesses, it was not possible to provide an oral judgment within the three day time allocation and therefore a reserved judgment has been necessary. The judgment has been produced as soon as possible.
10. References in square brackets are to pages of the agreed bundle with a colon indicating a paragraph number. References to two letters followed by a number refers to a paragraph of a witness statement indicated by initials.

FINDINGS OF FACT

Background

11. The parties gave evidence about a number of matters and this judgment will not make findings on all. It is not the Tribunal's function to record all of the evidence presented and this judgment does not attempt to do so. Although all evidence has been considered, the findings focus on those matters that are material to the issues.
12. The Respondent is a Catholic education trust, comprising 19 primary and five secondary academies in Kent. St Thomas' Catholic Primary School ("the School") is one of the Respondent's academies and serves children from three parishes: St Thomas Sevenoaks, St John the Baptist Westerham and St Lawrence Edenbridge.
13. The complexities of the Respondent's structure caused me to ask for an agreed structure diagram. Further complexity was created by an inconsistent use of language to refer to different parts of the structure. The Respondent produced two documents which I have treated not as evidence but judicial aids. The

Claimant broadly agreed them but provided some comments, in particular to note the change to the executive leadership model in 2020.

14. The blank ET3 does not state how many people were employed by the Respondent but focusing on the structure at the time of the Claimant's employment:
 - a. The members of the company included the Archbishop of Southwark, heading up the Archdiocese of Southwark. The Director of Education for the Archdiocese was Dr Simon Hughes.
 - b. The "key organ" was the Board of Directors, as stated by Mr Powis in supplemental evidence, of which he was the Chair. [MP4] explains his history within and outside the Respondent, including having been a governor since 1995, a 14 year period as a Chair.
 - c. The Respondent's Company Secretary and Data Protection Officer was Ms Boniface.
 - d. The acting CEO was Mr Mark Harris (from May 2020), also the Claimant's line manager upon appointment.
 - e. There was a Governance Committee specific to the School, also referred to as a Local Governing Board. Ms Copeland and Ms McQueen were Governors appointed to this Committee/Board.

15. The Claimant was employed by the Respondent as the School's Headteacher from September 2015 until 13 October 2020. This was her first appointment as a headteacher.

16. It was agreed that the Claimant was the Designated Safeguarding Lead within the school [CA12] but the Claimant disputed the Respondent's assertion that she was the School's data lead in respect of the School's GDPR and data protection obligations [33:5, CA13]. Other than Ms Boniface's assertion in the disciplinary hearing, maintained in the tribunal hearing, that Mrs Aquilina was the data lead, there did not appear to be any evidence to suggest she was the data lead. In cross examination, Ms Boniface accepted that her view was because "most headteachers are" and although shown the blank template that referred to a data lead [314A], she asserted that there was a list at the back that she had seen that listed Mrs Aquilina (which was not before the Tribunal) and added "at no point did any one inform me she was not a data lead for St Thomas".

17. Mr Powis explained in cross examination the disciplinary panel's view about whether Mrs Aquilina was the data lead, stating "we found the whole thing troubling" and I share his discontent that there was no clear answer to this point. There seemed to be an assumption from Ms Boniface that the Claimant was the data lead even though this was not stated in a document nor seemingly had she been informed. In light of the Claimant's dispute on the point and the dearth of evidence produced by the Respondent, I have doubts that Mrs Aquilina was the data lead. However, the matter is peripheral because Mr Powis agreed in cross examination that the disciplinary panel did not reach a conclusion on the

point because they “tried to be fair to Mrs Aquilina”, which I accept and note it is consistent with their decision letter [359].

18. Canon Ivan Aquilina is the Claimant’s husband and a Catholic Priest, at the relevant time the Parish Priest of St John the Baptist Church in Westerham. He was the recipient of the emails sent by the Claimant that formed the subject of the disciplinary procedure and therefore his role within the school was a key issue. Canon Aquilina’s position was that he was “appointed to support a chaplaincy role at St Thomas” [IA1] although the bulk of his evidence went further to assert that he was not just supporting but undertook “the role of chaplaincy”.
19. Canon Aquilina accepted that there was no document that appointed him as Chaplain or even referred to him as such but said that he had been asked to complete the role in early 2015 when the previous Parish Priest of St Thomas had become frail and asked him to take on the role. I accept that explanation as it was not gainsaid by KCSP but nevertheless found the absence of documentation insightful as to the level of involvement within the school. Both parties within the tribunal hearing sensibly recognised that the issue was not so much one of a label, i.e. ‘Chaplain’ or other label, but the more relevant issue was the substance of Canon Aquilina’s role and what he actually did, therefore the evidence often focused on a more general topic of Canon Aquilina providing ‘pastoral support’, which I similarly adopt as my focus in the evidence.
20. He further stated that he was operating under a document produced by The Education Commission from the Catholic Diocese of Southwark entitled “The role of the Clergy and Religious in the Catholic Primary School” [sic.], dated September 2015 [307]. This included sections on ‘Aims for Clergy and Religious visiting and implementation in the Catholic Primary School’ [311] and ‘Suggested ways in which Clergy and Religious can be involved in the life of the Catholic Primary School’ [312].
21. In the academic year 2017-18 Canon Aquilina assisted with religious education lessons on Wednesday afternoons. His witness statement refers to him providing ‘cover’ but he explained in cross examination that “There was always teachers there, I taught religious education always while the teacher was present in case there was a disciplinary issue”. The length of this assistance was unclear. It was put in cross examination to Mr Powis that it was for 6 months and he explained his understanding that it was for approximately 6 weeks.
22. Ongoing and regular duties included conducting assemblies and on Wednesdays in particular Canon Aquilina would attend the school and provided a general presence during school break times and at the school gates [IA10-12; CC11]. He would answer questions and assist staff, pupils and parents with any topic raised. [MM14] explains that Canon Aquilina was popular with students at the school and I accept that evidence.

23. A particular issue explored in cross examination was whether other staff had sent him emails along the lines of the content or sensitivity sent by the Claimant. I was troubled by the answers given because at times he seemed to suggest that no emails were sent but in other answers said that emails were sent but deleted. It was pointed out to him in cross examination that this point about other staff emailing him and then him deleting their emails was not put in his witness statement and he said he did not see the need, which I found surprising given its importance and although he was keen to emphasise the confidentiality of communications with him, this would not have prevented him from stating that the emails existed. On balance I accept that emails would have been sent to him by other staff and note that his evidence of deleting other staff emails is consistent with what his witness statement says was his practice in respect of emails from Mrs Aquilina [IA24].
24. Of more relevance though was the content of such communication. I asked him about the content and was told, 'it varied, personal matters about what was going on in their families, how should we say this issue, there was a lot of emails about how we should use the catechism in religious education, and questions about what this word means, there was a panopoly, not only staff but also parents'. This did not suggest that other staff saw his role as providing pastoral support that involved sharing emails containing the level of confidential and sensitive information included within those sent by Mrs Aquilina.

Background Disciplinary: April - June 2020

25. Following the outbreak of the covid-19 pandemic in 2020 and the various 'lockdown' restrictions, Mrs Aquilina was supporting one family in particular who had "a complicated family background" [CA.App.3:2]. She agreed with the mother to have one of the children in her home for 5 days to provide respite and support.
26. After investigation, Mrs Aquilina was suspended for allegations broadly relating to inappropriate conduct, a failure to maintain appropriate boundaries and a failure to disclose the relevant information. A disciplinary panel was chaired by Mr Julian Gizzi, Vice-Chair of the Board and after a hearing in July 2020 the charges of misconduct and gross misconduct were upheld [120]. Nevertheless and in my experience very exceptionally, Mrs Aquilina was not dismissed but received a final written warning based on her mitigation. There was no suggestion of physical or mental harm caused or that Mrs Aquilina had acted in any way beyond what she saw as the best interests of the child.
27. Following this decision, Mr Powis in his role as Chair of the Board was copied in to various emails between Dr Hughes and Mr Gizzi in which Dr Hughes expressed his views in very forthright terms about the fact Mrs Aquilina had not been dismissed. Dr Hughes' emails second guessed the decision of the panel and Mr Gizzi replies explained the decision but emphasised that the critique

explored by Dr Hughes was “a matter for the panel” [135]. Mr Powis view stated in cross examination before even being asked a question about Dr Hughes’ email, “Can I say I thought that email was totally inappropriate” and I accept that as a genuine expression of frustration with what he perceived as inappropriate and unnecessary interference.

28. On 27 July 2020 Mr Powis was then emailed directly by the Archbishop, who sought to understand the decision further and expressed some concerns [131]. Mr Powis replied and explained the decision, ‘standing-up’ for the disciplinary panel and its role. Of particular significance stated in relation to a Teaching Regulation Agency referral he wrote:

“The TRA processes do not so far as we can see cover this situation. A referral would not seem either possible procedurally nor justifiable for KCSP as an organisation given our own processes have concluded she is safe to work in our school. However, the Deputy Chief Executive and myself were minded to inform them of the case and decision in view of its unusual nature and the likely reaction of some parents and possibly the LADO. That was challenged by our HR adviser on the basis it could be seen as prejudicial to the Headteacher. We sought legal advice but that has been slow in coming as it seems not to be a situation Winkworths have come across before. We have not yet made the formal report to the LADO but informal contact suggests their referring it to the TRA is a distinct possibility. In the light of that, we have decided we should write to the TRA ourselves and the Deputy Chief Executive is doing that. In the circumstances we think that is probably in the Headteachers best interest also to get the issue finally confirmed one way or the other”.

I do not consider the decision to make a TRA referral on 13 August [152] shows a pre-determination by Mr Powis but instead a balanced decision reflecting the difficult and exceptional situation KCSP found itself in, as explained in his email.

29. Dr Hughes then sent Mr Powis a lengthy and impassioned letter further explaining his astonishment about the outcome of the disciplinary panel, as well as other broader topics such as that “I think it unlikely that there are many better qualified than me to judge the quality of RE” [142-145]. [MP21] explains “I was dismayed by the content and tone of his email/letter of 30 July to the extent I have never replied to it” and I accept this was his view as it is consistent with his reply to the Archbishop and his evidence in cross examination that, “frankly I ignored it, I thought long and hard what should I do with such an intemperate rant and I thought best thing to do was pretend it did not exist and ignore it”. I also note that although Dr Hughes declares in his letter he cannot remain part of KCSP’s Board any more, MP21 is at pains to point out that Dr Hughes did not have a formal position on the Board.

30. I was impressed at the independence of mind maintained by Mr Powis despite strong views and pressures from Dr Hughes, and a resolute adherence to his role as Chair and the independence in decision making that his role requires.

Mr Powis was very focused on the legal and official status of the Board and its role as decision maker, that emphasised the contrasting absence of material power that Dr Hughes' role allowed. When asked about Dr Hughes' view that he had a formal role on the Board from which he could resign, Mr Powis explained in cross examination, "Yes and he was wrong as I explained to him on several occasions...When he took over I explained this to him, he accepted the point and we did discuss it once or twice when particular issues came up, particularly 11+ issues Ms McQueen referred to...[he was] very involved and had to have a discussion about respective roles of board and diocese, he could flip between understanding his role and not understanding his role...he would occasionally in discussion forget it and think he had more status than he had".

August 2020 and second disciplinary matter

31. In August 2020 Ms Boniface was reviewing a SAR made by a parent. In the process she discovered three emails that Mrs Aquilina had sent to Canon Aquilina which contained personal data relating to at least one pupil [MB6]. This included a Court Order [757] and correspondence relating to the school's decision to prevent a child being collected. MB's view was that this was done "for no apparent reason other than for his opinion/comment" and I agree that was the purpose although recognise that this is what Mrs Aquilina would class as "pastoral support".
32. Ms Boniface emailed Mr Harris on 11 August 2020 expressing her view that "this is a data breach" [201] and asking how he would like her to proceed.
33. Following a separate SAR made by Canon Aquilina of the Archdiocese, Ms Boniface was contacted to determine what data the school held that would be relevant to the SAR [283]. In conducting a search to assist with this SAR, Ms Boniface then discovered further emails exchanged between Mrs Aquilina and Canon Aquilina.
34. On 19 August 2020 she emailed Mr Harris with a summary of her findings [202]. Mrs Aquilina had not been consulted at this stage. Ms Boniface's email contained a table referring to 61 documents and although in her view "all of these appear to be valid data breaches", nine she classified as a high data breach risk, 13 as medium and the rest low. Her email included the following:

"I may wrong in my assumptions but I see no valid reason for such data sharing, the emails make it clear that the sharing is based on an opinion/comment/guidance being sought. Our Privacy Notice (from 2018) states that we may share data with Diocesan Officers "for the purpose of receiving educational support" – I do not feel that this is the reason these emails have been shared and therefore, these are potential data breaches some of which may be reportable to the ICO.

In fact, it leads me to believe that Fr.Ivan has been acting as de facto headteacher.

...Masses and religious correspondence could well be valid and justified given the nature of Fr.Ivan's role".

35. Mr Harris appointed Ms Boniface to carry out a formal disciplinary investigation and she interviewed Mrs Aquilina on 28 August 2020 [290]. She went on to interview Father David Gibbons, the Parish Priest of St Thomas and a Governor (also referred to as a Foundation Committee Member) at the school [302] as well as Dr Hughes [304]. Mrs Aquilina was suspended on 28 August.

36. Ms Boniface collated her findings in an investigation report date 10 September 2020 [183] and Mrs Aquilina was thereafter invited to attend a disciplinary hearing by invitation of 22 September [334]. The invitation articulated the allegations as:

“Allegation 1 – Inappropriately shared personal sensitive and confidential data with a third party

Allegation 2 – That your actions breached statutory data protection obligations and Trust policies including the Trust's Data Protection Policy, Child Protection & Safeguarding Policy and Staff Code of Conduct.”

The invitation letter also informed Mrs Aquilina that one outcome could be dismissal and informed her “You are entitled to be represented by your trade union representative or a workplace colleague” and “You may wish to call your own witnesses. Please note that it is your responsibility to ensure that your witnesses attend on the relevant date”.

37. The disciplinary hearing took place on 6 October 2020 [362] with Mr Powis acting as the Chair. The Claimant was accompanied by her brother and the panel heard evidence on behalf of KCSP from Ms Boniface, Dr Hughes and Fr. Gibbons and on behalf of Mrs Aquilina from herself, Canon Aquilina and Ms McQueen.

38. The hearing lasted most of the day and Mrs Aquilina was informed at the end that the allegations were upheld and she was to be dismissed with immediate effect [410]. This decision was then confirmed in writing by letter of 13 October 2020 [351].

39. By letter of 20 October 2020, Mrs Aquilina appealed the decision to dismiss, relying on “unfairness of decision” and “significant procedural irregularities”. An appeal hearing took place on 9 November 2020 and was chaired by Dr Jane Overbury, a Foundation Director. Mr Powis attended the appeal hearing to explain the Panel's decision [543]. The appeal panel's decision was to dismiss the appeal, stated at a reconvened hearing on 13 November 2020 [529] then confirmed in writing by letter of 18 November [534A].

The Law

40. There was no significant dispute on the law between the parties. The claim of unfair dismissal relied upon s.98 ERA 1996:

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

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

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

...

(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”.

41. In closing submissions, the Respondent highlighted para. 54 of *Propsect v Hajee* UKEAT/0313/16 October 2017, which emphasises that when looking at the “equity and substantial merits of the case”, as required by s.98(4) ERA, the Tribunal has to “look at the question in the round and without regard to a lawyer’s technicalities”, whereas it was said that the Claimant here has ‘over scrutinised’ the process conducted by the Respondent. The Claimant’s written submissions also referred to specific legal principles at paras. 26-33 to which I have also had regard.

42. The familiar case of *British Home Stores Limited v Burchell* [1980] ICR 303 provided a framework for issues specific to this case because the Respondent relied on conduct, as reflected in the list of issues. The further issues within the list of issues also reflect important legal issues, notably that it is not for me to put myself ‘in the shoes’ of the employer when considering the unfair dismissal claim and that it is instead principally a question of whether the relevant actions and decisions fell within the range of reasonable responses open to the Respondent.

43. The legal issues concerning the wrongful dismissal are of course different. Written submissions on behalf of the Claimant correctly state, “The question is whether, objectively, C committed a repudiatory breach of contract”.

CONCLUSIONS

44. The following section addresses the Tribunal's conclusions on the issues and makes further findings of fact where necessary.

What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

45. These issues require me to scrutinise the mindset of Mr Powis and in doing so I was struck reading his contemporaneous written documentation as well as hearing his live evidence how resolutely he stated and demonstrated his independence as well as support for Mrs Aquilina. This was particularly clear regarding his response to the first disciplinary decision. In his communication with the Archbishop [130] and in full knowledge that he was speaking against the views of Dr Hughes, he defended the appropriateness of the decision not to dismiss Mrs Aquilina, for example stating:

“It is correct that a finding of gross misconduct would normally lead to dismissal, with or without notice pay, but this is not automatic. There are a number of factors a Panel has to consider and other outcomes are possible such as that decided on in this case... It is important to remember neither I nor Simon was at the hearing. The Panel were and they reached a judgement on what they read and heard. As experienced and professional people I believe they are entitled to have their actions and thinking respected whether we agree with their decision or not - or have to cope with the consequences. For what little its worth, my immediate reaction on reading the initial outline email of the decision was that it was a fair outcome, a view already shared by some parents, possibly a majority”.

46. Consistent with this view, Mrs Aquilina herself explains, “In a telephone conversation with me on 12 August 2020, Mike Powis expressed clearly that he thought the outcome was fair and just” [CA23] and similarly Ms Copeland explains “On 28 July 2020 I received a telephone call from Mike Powis... He informed me that he was pleased that the Claimant had been reinstated – he believed it was the right outcome and he fully supported her return” [CC25]. It would be surprising if Mr Powis had shifted from such a supportive stance regarding Mrs Aquilina to then dismiss her shortly later without a genuine belief in the misconduct.

47. Moreover, his witness statement and live evidence was consistent about the seriousness and gravity of the situation perceived by the panel and as the judgment will go on to address, there were reasonable grounds for the belief in misconduct. In the appeal hearing he stated of his decision “It is even harder when it is someone I know and like and until recently respected professionally” [569] and I accept that was genuinely how he felt.

48. Against this, Mrs Aquilina says that one of the reasons for dismissal was “hostility towards the Claimant and her husband Canon Aquilina”. There undoubtedly was such hostility, as I understood was agreed between the parties. Mr Powis' email to the Archbishop explains:

“other contentious debates within the local catholic community of which you will be aware but has manifested itself in a welter of social media comment on the Headteacher, some of it very unpleasant and mostly very ill-informed. Parental opinion at the school is very divided and polarised. Neither faction seems to see any substance in the perceptions of the other. Supporters of the Head are as vocal as her critics and, in my judgement, probably in the majority”.

49. In cross examination, Mr Powis’ view appeared to be one of frustration with such polarisation and the “ill-informed” speculation of many, which he saw as getting in the way of what KCSP was really there to achieve. The hostility was not shared by Mr Powis, who I treat as reflecting also the views of the disciplinary panel.
50. The second point made by Mrs Aquilina is that the reason for dismissal was “to enable the Respondent to move the school to an Executive Leadership model” and makes the forceful point that this is exactly what happened shortly after Mrs Aquilina’s dismissal, whereas this was more difficult to achieve with her in post without substantial changes to her role.
51. Again, I find the reaction of Mr Powis and the Board more generally to the first disciplinary matter to be insightful. It is in my experience exceptional for someone to be found guilty of gross misconduct and not dismissed, yet this is what KCSP did and therefore rejected the opportunity to move then to the executive model.
52. On this issue it was once again Dr Hughes who was a driving force ‘against’ Mrs Aquilina and on 1 May 2020 Dr Hughes wrote [66B]:

“I want to make a formal request that the KCSP Board consider a move to apply the Executive Governance and Executive Principal models with effect from September. Much of this has come about due to the lack of confidence the parents have in her leadership and in the governing body to hold her to account properly”

53. Although Mr Clive Webster, previous CEO, suggested the topic would be placed on an upcoming Board meeting agenda, after discussion with Mr Powis and Ms Boniface, Dr Hughes was told that his suggestion would in fact not even be discussed at the meeting, let alone actioned. In cross examination, Mr Powis stated this was an “excellent example” of the Trust taking its own decisions rather than blindly accepting those of Dr Hughes and further explained the reasoning that a move to the new model was not appropriate at that time because it would cause a detriment to the Claimant, particularly regarding her salary. I do not therefore accept that this alternative reason was the reason, or a factor, in the decision to dismiss.

Were there reasonable grounds for the belief in misconduct?

54. Mrs Aquilina accepted from the outset that she had sent all of the relevant emails. The emails as a whole contained personal, sensitive and confidential information about pupils. Focusing on some examples Ms Boniface categorised as high risk, these contained:

- a. Description of a parent's "concerns about the action taken following incidents in St Thomas' School where your daughter was inappropriately touched by another pupil" [654].
- b. References to a pupil accused of misconduct, their potential exclusion and their position as "a Senco plus statement child" [672].
- c. A parents' email about their daughter's feelings of being "ashamed, embarrassed and humiliated" after kicked and sworn at by another child [693].

Although redacted in the Tribunal's copy, there was no redaction in the original emails sent by Mrs Aquilina and the above emails included parent and pupil names.

55. A central plank of Mrs Aquilina's case that there were no reasonable grounds concerned the status and role of Canon Aquilina and to what extent he constituted "a third party" in relation to data sharing because of his pastoral role. MP39 explains the panel's view that "the Claimant had created a free flow of personal data sharing with her husband and could not see this was for anything other than personal advice and support" and I consider this to be a reasonable view regarding the emails sent. The purpose of sending the emails appears clearly to obtain a second pair of eyes on the emails, particularly focusing on seeking advice in how Mrs Aquilina should respond. Canon Aquilina's replies typically provide editorial suggestions for replies, "methinks you need to write something similar" [654] or whole draft emails [726] or simply supportive affirmations of Mrs Aquilina's draft emails, "just great" [716], for example. My first question to Mrs Aquilina at the end of her evidence was whether she had been a headteacher before because her emails to Canon Aquilina came across very much as stemming from a lack of confidence and seeking a second opinion on her work.

56. Further to my findings above regarding Canon Aquilina's role, I do not therefore consider Mrs Aquilina's argument that he was providing pastoral support to be compelling because I do not consider the sharing of such sensitive data to come within this role. I accept Canon Aquilina had an established presence and role within the school but the sharing of the emails could not be justified by relying on this role. As outlined above, Canon Aquilina's position was that he was operating under the 2015 guidance but the 'Suggested ways in which Clergy and Religious can be involved in the life of the Catholic Primary School' [312] contained examples very different to what Canon Aquilina was performing as the recipient of the emails and I further note that no other staff sent Canon Aquilina emails with similar personal information. In this context, I consider that he was a "third party" within the meaning of the allegations and the policies alleged to have been breached.

57. On the Claimant's behalf, various other criticisms were made of the argument that there were reasonable grounds. In particular that there was overlap in which pupils and issue were involved, the collection of emails were sent over a long time period, consent was likely present to share some data, not all were

of a high or medium data risk and there was no specific breakdown of these in the dismissal letter and that nearly all the high risk emails were within a specific time period when Canon Aquilina was more involved due to his assistance with teaching RE. All of these I considered valid points but risk the danger that *Prospect* highlights of losing the wood for the trees when conducting such a detailed scrutiny. Despite the detailed critique conducted of the investigation during the trial, the highest it appeared for the Claimant is that the process could have been better but the fundamental grounds remained, for example consent was not present for all of the emails even on the Claimant's evidence and even considering the overlap with the period in which Canon Aquilina was assisting with RE classes this did not appear to require or justify the sharing of the emails. The panel were entitled to consider the emails as a whole, whilst considering specific evidence and emails as they did, and in doing so I consider there to have been reasonable grounds to consider that Mrs Aquilina had committed the misconduct of which she was accused.

At the time the belief was formed had the respondent carried out a reasonable investigation?

58. I consider that there were material failings in the investigation stage of the disciplinary process. Firstly, the strong animosity from Dr Hughes was known of yet he was one of two witnesses relied on by KCSP:

- a. Ms Boniface confirmed in cross examination that she "worked closely" with Dr Hughes and further that she was present when Dr Hughes attended his first meeting after appointing himself as a governor in which he explained the concerns of the Archdiocese [CC40]. Ms Boniface was also involved in some of the relevant correspondence involving Dr Hughes, including the discussion over a move to an executive model. In this context and given the strength of Dr Hughes' views and his willingness to share them very plainly and directly, I consider that it was likely Ms Boniface did know of Dr Hughes' animosity towards Mrs Aquilina.
- b. I consider that it was outside the range of reasonable responses to have relied on Dr Hughes as a witness in the investigation stage. He had very strong views 'against' Mrs Aquilina and moreover it is difficult to understand why he was chosen as a witness in any event given the disciplinary issues were very specific about Mrs Aquilina sending emails in breach of data protection and I did not understand that he had any specific expertise to bring to those issues.
- c. Mr Powis plainly knew of Dr Hughes' position regarding Mrs Aquilina, as he accepted in cross examination. He stated in cross examination of the two Trust witnesses that 'their evidence was an important element of determining whether Canon Aquilina was fulfilling a pastoral role' but when I probed this further he explained, "in terms of his evidence to panel we did not find it very helpful beyond the statement made to Boniface, I tried extremely hard to put outside of mind all that" and when I suggested that Dr Hughes' bias may have infected his evidence Mr

Powis answered, “I think it was to a degree and tried to put aside, Fr. Gibbons was more persuasive in a way because of his experience in other parishes”. On balance, I am satisfied that Mr Powis and the panel placed little weight on the evidence of Dr Hughes because of Mr Powis’ staunch beliefs in the independence of the Board and independence of mind.

- d. I considered whether the little weight placed on Dr Hughes’ weight meant that there was no material unfairness, accepting that the disciplinary hearing is still part of the investigation process. However, I consider that such a consideration would miss the point that the investigation was outside of the range of reasonable responses, that there was enough material prejudice created by the inclusion of Hughes’ evidence and that the relevance of this error also overlaps with other failings in the investigation procedure.

59. Linked to the inclusion of Dr Hughes evidence are broader points about the collection of evidence:

- a. Fr. Gibbons was the other witness relied upon by KCSP and again appears far from impartial. Although there is much less evidence within the bundle compared to that concerning Dr Hughes, there appeared to be an agreement between the parties of what Dr Hughes refers to in May 2020 regarding Canon Aquilina as “the difficult relationship between the two priests” [83].
- b. As well as collating two witnesses whose evidence was unlikely to be neutral, Ms Boniface accepted in cross examination that she did not ask Mrs Aquilina whether she had any witnesses that should be interviewed, explaining “I did not think it was necessary”. This appeared to be a fairly fundamental error of not inviting the accused to prove their innocence and moreover was a breach of the Discipline and Conduct policy [216] that expressly provides for Mrs Aquilina to have had this right. I do not accept KCSP’s submission that this error in policy falls within the *Prospect* point, particularly in the context of which witnesses had been collated by KCSP. I also do not accept that this error was mitigated because Mrs Aquilina had the opportunity to call witnesses for the disciplinary hearing because by that point the damage had been done, the report was complete and the panel’s initial considerations did not have this further witness evidence.
- c. There was a failure within the investigation stage to adequately consider the role of Canon Aquilina within the school. Ms Boniface explained in cross examination that she did not understand that he had a material role at the time and further said, “If the archdiocese and justice and education commission – Hughes - are not aware then it is not happening, if they are not aware that someone is acting as a chaplain and the trust itself is not aware then for all intents and purposes it is not taking place...I wanted to know as a parish priest was it reasonable for him to receive that information. My investigation was not on the route of whether he provided a particular role at the school”. I consider this to be

a narrow view of the investigation's role because Canon Aquilina's role was fundamental to determining whether it was appropriate for him to be sent the emails. It is further surprising that Ms Boniface took this view when the basis for discovering the emails was an enquiry from the archdiocese about his role and involvement in the school.

60. On the basis of the above, I consider that the conduct of the investigation was outside the range of reasonable responses and there was not as much investigation as was reasonable in the circumstances. Turning to the specific issues identified by the Claimant, I consider the following to be satisfied, "the investigation and disciplinary panel did not look for evidence that may support the Claimant and instead sought evidence that was highly likely against her" and, "the investigation was in breach of the disciplinary policy". This latter point about policy also relies upon the prior involvement of Ms Boniface, below.

61. The Claimant further asserted, "the disciplinary panel did not investigate: (1) whether Canon Ivan is a "third party" (i.e. unconnected with the Academy), and (2) the reasons and appropriateness for sharing data". I consider this satisfied regarding the investigation stage prior to the disciplinary hearing, as considered above regarding the reasonableness of the investigation, but do not accept that the disciplinary panel committed this error. These matters were discussed at length in the disciplinary hearing and the dismissal letter records Mrs Aquilina's position as well as a detailed analysis of why this was rejected.

Did the respondent otherwise act in a procedurally fair manner?

62. The Claimant asserts, "the investigation and decision to dismiss was prejudged". I do not accept this was the case regarding the decision to dismiss and I have outlined in detail above the independence of mind that I consider Mr Powis had and his long-standing respect for Mrs Aquilina that I accept were maintained upon appointment to chair the disciplinary panel.

63. I do consider that Ms Boniface had prejudged the investigation stage and this was not only effectively accepted by her but it is not surprising given her initial involvement. Her initial report on 19 August 2020 has a clear view that there has been a data breach, accepted in cross examination, and she also accepted that she made the report to the Information Commissioner's Office on 27 August 2020 because there was "not a potential breach but a breach".

64. I also note that Ms Boniface's initial report asserts "it leads me to believe that Fr. Ivan has been acting as de facto headteacher". This is not only quite a leap if based on the emails alone but also remarkably similar to concerns expressed by others, again involving Dr Hughes. One parent wrote of their view of "her husband as back street driver" [79C] and then in an email to Dr Hughes another or the same parent refers to online teaching, stating:

“gives a flavour of how much control and influence he has over things.

Fr and Mrs A seem to have now given up any pretence that he is the back seat driver; he is now signing off things directly

Thoughts obviously welcome in confidence!

Have a holy Holy Week”

To which Dr Hughes’ reply includes, “I need a parent other than you, or a close relative, to send this to me...I just can’t make this look like a middle class witch hunt.” [79D, April 2020]. The similarity in view of Canon Aquilina as “back seat driver” compared to Ms Boniface’s view of the emails further supports my finding that she more than likely was well aware of Dr Hughes’ views on Mrs Aquilina and her husband.

65. I consider that Ms Boniface did pre-judge her investigation and doing so was acting outside the range of reasonable responses. This prejudgment may well have been the reason for some of the basic errors committed. Ultimately she should not have been appointed because of her prior involvement (contra. as a witness) and this is recognised by the relevant policy which expressly provides “The investigating officer will not have had any prior involvement in the case” [216], which was therefore breached.
66. Other aspects of procedural unfairness raised by the Claimant I do not consider demonstrate unfairness:
- a. “The fact and length of suspension”
 - i. This point was not addressed in any detail by the Claimant’s evidence or closing submissions.
 - b. “The Claimant was not informed of the full accusations made against her and also did not have an opportunity to prepare her case and receive a fair and impartial hearing”.
 - i. This point again is not developed or made out by the evidence or submissions. The Claimant received a written statement of the allegations against her, she was interviewed by Ms Boniface and appeared at the disciplinary hearing and she had an opportunity to provide written evidence and witnesses for the disciplinary hearing (the latter of which she did).
 - c. “The decision to dismiss rested heavily on the evidence of witnesses known not to be independent”.
 - i. I do not consider that Dr Hughes’ evidence had a ‘heavy’ influence but accept Fr. Gibbons did to an extent, as explained above. Although I accept Fr. Gibbons was not at the high threshold of being “independent”, I do not consider that reliance on his evidence alone made the procedure unfair but it is relevant

in the context of the other flaws regarding the analysis of evidence as outlined above.

- d. "The appeal process was flawed and failed to engage with the reasons for appeal".
 - i. KCSP did not call any of the appeal panel and therefore this matter was largely addressed in submissions. I agree the appeal panel was flawed to the extent that it did not identify or correct the errors outlined above but do not consider that this adds anything to the unfairness already identified.
- e. "The Claimant was not allowed to be represented by her brother at the disciplinary hearing and appeal".
 - i. The Claimant was accompanied by her brother, which was an extension of KCSP's normal policy. There is no compelling evidence to demonstrate that she was not allowed to be represented by her brother any differently to any other employee who had representation. The one example from Mrs Aquilina's closing submissions of her brother passing her a note [404] demonstrates that he was able to confer and support Mrs Aquilina, as the policy envisages.

Was the dismissal within the range of reasonable responses?

67. Based on a flawed investigation, I cannot conclude that dismissal was within the range of reasonable responses.

Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

68. I consider that the Claimant could have and would have been dismissed at the same time if a fair procedure had have been followed with a 100% chance of likelihood:

- a. A fair procedure would have excluded Dr Hughes as a witness and although Fr.Gibbons may have remained a witness, this would have been considered alongside Canon Aquilina's evidence obtained at the same time prior to the disciplinary hearing. Ms Boniface would not have been the investigator but likely would have been a witness.
- b. Considering this hypothetical I consider there to be a 100% chance of dismissal because this collection of fair evidence would not have changed the fundamentals of the content of the emails and the role of Canon Aquilina. These two aspects alone established the allegations and that an act of gross misconduct had occurred by inappropriate sharing of data. Ms Boniface's role as a witness would have added compelling further evidence.
- c. In the alternative, even without a finding of gross misconduct, I accept the evidence at MP56, "it is worth noting that, even if the Panel had concluded the Claimant's conduct only amounted to misconduct (not

gross misconduct), she would almost certainly have been dismissed in any event, since she had a live final written warning on her file". I agree with KCSP's submissions that it was "inevitable" that a finding of at least misconduct would have been made and coupled with the final written warning issued just a few months earlier that dismissal would have followed.

- d. Against this the Claimant's oral submissions emphasised that there was nevertheless a discretion as to how to treat the warning and the fact that the majority of emails were sent before the warning means that the discretion would have been exercised to not dismiss. I considered that the fact the misconduct was only discovered after the final written warning would not have prevented the panel from dismissing. Such a possibility of not dismissing is contrary to MP56 and would mean after the exceptional circumstance of being found to have committed gross misconduct and not been dismissed in the first disciplinary matter that Mrs Aquilina would have been in another exceptional circumstance of being subject to a final written warning then receiving a further warning or extension of final written warning rather than dismissal, which is inherently unlikely and not supported by the evidence.

If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's basic or compensatory award? By what proportion?

69. The sending of the emails only came about because of Mrs Aquilina's actions and such conduct was 'blameworthy and culpable' for the purposes of a reduction for contributory conduct. The compensatory award will be reduced to 0 on the basis of my finding above but if it had not, I would nevertheless have applied a 100% reduction to reflect this contribution.

70. I consider that a 50% reduction to the basic award is appropriate. I do not consider that 100% would be appropriate because Mrs Aquilina's conduct was ultimately a mistake and a mis-application of data protection laws and practice stemming from what appeared to be a lack of confidence. Any harm to a pupil or parent appeared to be potential rather than actual and there was no attempt at personal gain but an attempt to do what was seen as best for the school and its pupils. Mrs Aquilina has succeeded in her claim of unfair dismissal and a 50% reduction to her relatively modest basic award is in my view just and equitable.

WRONGFUL DISMISSAL

71. I consider that Mrs Aquilina did commit a repudiatory breach of contract that justified KCSP not paying her notice and the reasons to apply only a 50% reduction to the basic award do not change this fact.

72. My reasoning is explained in the findings made above but in summary, Mrs Aquilina sent the emails, they contained sensitive and confidential data and the recipient did not have a relationship with the school that justified such sharing, whether under the GDPR, the DPA 1998 or any school policy. The purpose I have found was to seek a second opinion on how to write emails and address issues and I do not consider this comes within 'pastoral support' in the context of the recipient's role. As Mr Powis stated in the appeal hearing, "we are talking of a Head Teacher here" [580] and I consider that position of responsibility as important context for the standards expected.

REMEDY AND DIRECTIONS

73. The parties agreed with the Tribunal a potential remedy date of 24 October. Unfortunately, by this time this judgment has been written, approved and promulgated the date is now very close.

74. However, based on this judgment I would hope and expect that this date would not be necessary. To assist the parties, my initial view on remedy based on the schedule of loss is that the appropriate remedy would be:

- a. A basic award reduced to £2017.50.
 - i. I have not heard argument on whether the un-reduced basic award calculation is agreed and will consider any such argument if raised.
- b. An 'ACAS uplift' of 15% to reflect the failure to carry out necessary investigations, contrary to paragraphs 4 and 5 of the Statutory Code on Disciplinary and Grievance Procedures. 15% reflects that the flaws here relate to relatively basic and important steps of the initial evidence collation stage. The basic award therefore increases by 15%.
 - i. I have not heard argument on this point at all and will re-consider the point if any such argument is raised on this small sum. I note no such claim is made in the schedule of loss but do not consider that this would prevent the Claimant from making such a claim for this statutory right at a remedy hearing.
- c. There will be no compensatory award in light of my findings above regarding the chances of a fair dismissal.
 - i. I consider this applies to the claim for loss of statutory rights as well as financial loss but will consider a contrary argument if raised.

4. The parties are encouraged to agree the remedy calculation and directed:
 - a. To confirm to the Tribunal with a joint statement by 4pm on 20 October whether they still require the remedy hearing on 24 October.
 - b. If the remedy hearing is required, the parties are required at the same time to provide an agreed set of directions for the remedy hearing.

- c. If the parties are not able to provide such a statement or they will not be ready to deal with remedy then they should state this, provide proposed directions and dates to avoid for the next six months.

Employment Judge England
Date: 21 September 2022