Case No: 1600791/2021

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Coughlin

**Respondent:** (1) The Governing Body of Cathays High School

(2) Cardiff Council

**Heard at:** Cardiff – Hybrid Hearing **On:** 10,11,12 and 13 October 2022

**Before:** Tribunal Judge MM Thomas

Ms L Bishop

Ms P Humphreys

**Representation**

Claimant: Unrepresented – Litigant in Person

Respondent: Ms H Roddick, Counsel

**JUDGMENT** and the reasons for it were given orally by the Tribunal on 13 October 2022 and the Judgment sent to the parties on 18 October 2022. Written reasons have been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, and as such, the following reasons as were set out orally on 13 October 2022 are provided:

## Reasons

### Issues

1. The issues for the Tribunal to determine where whether the Claimant was

(i) unfairly dismissed;
(ii) directly discriminated against because of his age;
(iii) automatically unfairly dismissed due to his role as a trade union representative; and/or
(iv) automatically unfairly dismissed for having made a protected disclosure, that is a whistleblowing claim.

### Judgment

2. The unanimous decision of the Tribunal was that all four claims be dismissed. In short, the Tribunal held that the Claimant was not unfairly dismissed; was not directly discriminated against because of his age; was not automatically unfairly dismissed due

to his role as a trade union representative; and was not automatically unfairly dismissed for having made a protected disclosure.

**<u>Proceedings to date of Final Hearing</u>**

3. The claim was presented 1 June 2021. There were then three preliminary hearings on 27 January 2022, 23 March 2022 and 27 September 2022.

4. On 23 March 2022 following an application by the Respondent for strikeout, the claims based on trade union membership and age discrimination in regards events in 2014 and 2018 were determined to be out of time and dismissed. As such the remaining issues for determination were those as set out in paragraph 2 above.

**<u>Documents and Witnesses</u>**

5. The Claimant represented himself. The Respondents were represented by Counsel, Ms Roddick.

6. All parties were introduced to the members of the Tribunal. I took time to explain to, in particular, the Claimant the format that would be adopted for the hearing and assured him that he would be guided through the process as we went along. I explained to the Claimant about the independence of the Tribunal and its role. I also explained to the Claimant that the burden of proof in regard the discrimination claim, and the whistleblowing claim was upon him. As such, he would be the first to present his case. The Claimant confirmed that he understood this and that what I had told him was what he had been told by the judge who conducted the preliminary hearing on 27 September 2022.

7. A bundle of documents had been provided which ran to 1079 pages ('the Bundle'). Additional documents were submitted in the course of the hearing, which included the '*Cardiff Schools Resolution Policy ('Replacing the School Grievance Policy & Harassment Policy and Procedure)'* document ('School Resolution Policy document'), the *'RS1 form'* completed by the Claimant on the 25 September 2019 ('RS1 form 25.09.2019'), and *'Cathays High School Prospectus 2018'* and '*Staff Handbook 2019-2020'* ('School prospectus and handbook'). At hearing the Tribunal had sight of a hard copy of the book, *'Whiteboard Jungles'* ('the book'). The hard copy of the book was produced by the Claimant.

8. The Tribunal heard oral evidence from the Claimant and four witnesses on behalf of the Respondent, namely, Mr Peter Wong, Chair of the Board of Governors ( 'Mr Wong'), Ms KA Slade, Deputy Chair of the Board of Governors and Chair of the disciplinary panel ('Ms Slade'), Mr C Weaver, a school governor and the Chair of the appeal panel ('Mr Weaver'), and Mr Stuart Davies, current Headteacher of Cathays High School ('Mr Davies'). All relied upon what was set out in their witness statements. All witnesses gave evidence by affirmation.

9. In addition, there was provided a '*list of people involved in key events'* which set out the names and the title/role of those persons in the claims brought by the Claimant.

10. In regard to the Bundle, and the documents in particular that the parties requested the Tribunal to read as part of its pre-reading. The Claimant referred to specific paragraphs

and pages within his witness statement and the documents referenced therein, for pre-reading and cross reference. The Respondent provided a document titled, *'suggested Tribunal pre-reading'*. In summary, prior to rising for pre-reading, the Tribunal confirmed with the parties that they would read the documents that they have been referred to, and all the witness statements. Thereafter, they would read any other documents or further documents which they were referred to in the course of the hearing.

**Background**

11. The Claimant was employed by the Second Respondent, Cardiff Council ('the Council') as a teaching assistant at Cathays High School ('the School').

12. The First Respondent, the Governing Body of Cathays High School ('Governing Body') was and is responsible for the recruitment and dismissal of employees engaged to work at the School (paragraph 20 Claimant's Contract of Employment (page 218)) and the document titled *'Rules, Policies and Procedures applied by the Council'* (paragraph 47 - 49 page 231). This was not in issue.

13. The Claimant commenced his employment with the school 1 September 2006 as a teaching assistant. He was subsequently promoted to the position of a senior teaching assistant. His role was that of an attendance officer, in addition to being part of the inclusion and wellbeing team.

14. The Claimant had been subject to disciplinary proceedings on two occasions prior to the proceedings before this Tribunal. Those disciplinary proceedings took place in 2014 and 2018. On both occasions the complaints made against the Claimant were not upheld.

15. In July 2018 the Claimant raised a complaint against the then Headteacher, Ms Tracey Stephens ('Ms Stephens'), Mr Peter Wong, Ms Slade, Alyyson Bikram and Mr Tom Cox of Human Resources for the Council ('HR'), Mr Stacey, the independent investigation officer in regard the complaint in 2013/2014, and Mr Rod Philips, the previous Headteacher of the school prior to Ms Stephens (page 913-915). The complaint was submitted using the school's formal resolution dispute form, the RS1 form ('RS1 form July 2018'), as outlined in the School Resolution Policy document.

16. The complaint was forwarded on Mr Wong's request to the Council to investigate. As to the detail of what then happened, I refer to paragraph 81(c)(iii) to (ix) below. However, the ultimate finding of the Council was that the compliant had already been addressed within the disciplinary proceedings and processes in 2014 and 2018.

17. In the Claimant's letter dated 16 May 2019 written to the then Director of Education and Life Long Learning, Mr Nick Batchelar of the Council, the Claimant sought to initiate its whistleblowing policy (page 937).

18. As to then what occurred in relation to the whistleblowing claim is set out in paragraphs 46-56 below. In short, the Council held that the Claimant's complaint did not amount to a whistleblowing claim.

19. On 24 September 2019 the Claimant submitted a further RS1 form ('RS1 24.09.2019'). In it he identified his complaint to be against Mr Wong and Ms Slade (page 957).

20. On 25 September 2019 the Claimant submitted RS1 form 25.09.2019. In it he identified his complaint to be against solely Mr Wong. Other than the deletion of the name of Ms Slade, the substance of what was set out in the RS1 form was the same as that set out in RS1 form 24.09.2019.

21. At the beginning of September 2019, the Claimant along with his colleague, Mr C Alexander attended at the home of two brothers ('the boys') who were in different school years in the School. Following their visit, a written complaint was sent to the School by the parents of the boys in regard to the visit (page 242). The then Headteacher, Ms Stephens, met with both the Claimant and Mr Alexander separately to discuss what had happened in the course of the visit. No criticism was made of either the Claimant or Mr Alexander. The outcome of the meeting was that Ms Stephens stated that she would respond to the complaint.

22. On 16 October 2019 the Claimant wrote to the parents who made the complaint ('letter 26.10.2019'- page 238).

23. By an email from Ms Stephens sent at 7.55am on 24 October 2019 to the Claimant, Ms Stephens stated that she was aware that the Claimant had contacted the parents of the boys against her instruction not to do so. In her e-mail she stated that no further contact should be made by the Claimant with the parents and that she would be carrying out an independent investigation as to the next steps (page 246-247).

24. On 24 October 2019 the Claimant wrote a further letter to the parents (page 248-249).

25. On 25 October 2019 the Claimant sent an e-mail to all school staff, through the group email address *'Email Group Staff'* titled *'Re: Hiring and firing processes'* ('all school email 25.10.2019') the content of the email was in regard to the dismissal of another employee of the school, and critical of the senior management of the school. The e-mail was part of a chain of emails which included an e-mail to Mr Davies, (who was at that time the deputy Headteacher) dated 21 October 2019, which gave the name of the employee who had been dismissed (pages 257-258).

26. On 7 November 2019, at a meeting with Ms Stephens and Mr Wong, the Claimant was suspended. A copy of the letter of suspension was handed to the Claimant at the meeting (page 468). The letter set out eight allegations of misconduct against the Claimant.

27. By a letter to the Claimant from Mr Wong dated 6 January 2020, the Claimant was advised that following the independent investigation of Ms Sarah Maunder (of Maunder Ward) a decision had been made that the Claimant's conduct amounted to gross misconduct and as such, required full consideration at a disciplinary hearing by the Staff Disciplinary and Dismissal Committee (page 472).

28. By a letter dated 25 February 2020, the Claimant was advised of the date, time and venue of the disciplinary hearing, the identity of the governor panel members conducting the disciplinary hearing, the allegations against him, the Respondent's witnesses, and provided with copies of the documentation to be used as evidence for the purposes of the disciplinary hearing (page 479). Within the same correspondence the Claimant's rights were outlined which included his right to provide written

submissions, invite witnesses to the hearing to give evidence in support of his case, and be accompanied.

The eight allegations were:

(i) Allegation 1 - inappropriate communication with parents, namely the letter sent to the parents on 16 October 2019.

(ii) Allegation 2 - Inappropriate communication with the education welfare service.

(iii) Allegation 3 - Inappropriate communication via a whole staff email on 25 October 2019.

(iv) Allegation 4 - Disclosure of confidential personal information in breach of the general data protection regulations in an email on 25 October 2019.

(v) Allegation 5 - Inappropriate posting of information on Facebook which could bring the school into disrepute, namely Facebook post on 30 April 2019.

(vi) Allegation 6 - Bringing the school, its staff, former staff and Cardiff Council into disrepute.

(vii) Allegation 7 - Breach of trust and confidence between the employee and the school.

(viii) Allegation 8 - Specified conduct which is incompatible with the ethos and the precepts of the school as set out in the school's prospectus, staff handbook and school's policy and procedures.

29. Thereafter, the disciplinary hearing, originally scheduled to be on Wednesday 11 March 2020 was postponed as a result of the impact of the Covid 19 pandemic. It was then eventually re-scheduled for 27 November 2020. In total the disciplinary hearing lasted three days, the first day 27 November 2020, the second day 21 January 2021 and the third and final day 16 April 2021.

30. The disciplinary panel thereafter convened on the 22 April 2022 (page 565). In section 4 of the minutes of the meeting having considered each allegation individually, the panel determined the appropriate sanction in regard to each allegation. The overall outcome was dismissal on grounds of gross misconduct. The sanctions were:

(i) Allegation 1- proven - final written warning

(ii) Allegation 2- not proven - no sanction

(iii) Allegation 3 - proven - gross misconduct

(iv) Allegation 4 - proven- final written warning

(v) Allegation 5 - proven - gross misconduct

(vi) Allegations 6-8 - proven - gross misconduct

31. On 22 April 2021 the Claimant was advised by letter of the outcome of the disciplinary hearing and the decision of the disciplinary panel ('DH dismissal letter'). The decision was to dismiss summarily (page 571).

32. The Claimant appealed (page 577).

33. On 24 and 25 May 2021 the appeal hearing took place. The appeal hearing took the form of a rehearing. The appeal panel considered only the seven proven allegations, that was, all the Allegations other than Allegation 2. By a letter dated 9 June 2021 the Claimant was advised of the outcome of the appeal hearing and the decision of the appeal panel ('AH dismissal letter'). The overall finding of the appeal panel was that summary dismissal was the appropriate sanction (page 625). In relation to each individual Allegation the following findings were made:

    (i) Allegation 1- proven - lesser misconduct

    (ii) Allegation 3 - proven - gross misconduct

    (iii) Allegation 4 - proven – gross misconduct

    (iv) Allegation 5 - proven - lesser misconduct

    (v) Allegations 6-8 - proven - gross misconduct

**Dealing with each Claim made in turn:**

34. At this juncture I return to what is set out at paragraph 14 above. The Claimant had been subject to disciplinary proceedings in 2014 and 2018. Albeit the complaints were not subsequently upheld, in short, dismissed, what became apparent throughout the course of the hearing was that the Claimant remained very aggrieved as to the reasons for those disciplinary proceedings and the procedures followed at the relevant times times. He considered there had been a failure by those involved at the time, be that the school management and/or the Respondents, to address his grievances/ complaints in regard to those proceedings. Albeit the Tribunal understood that the Claimant found it difficult to move on from this, these were nevertheless not the issues for determination before the Tribunal. At the outset of the hearing, as on a number of occasions throughout the course of the hearing, the Claimant was reminded as to the issues before the Tribunal as identified at the case management hearing on 23 March 2022 and on 27 September 2022.

**The age discrimination claim**

**The law**

35. The Claimant argued direct discrimination on account of his age. Direct age discrimination, that is, the prohibited conduct, is when the person is treated less favourably than another because of his/her age (section 13 Equality Act 2010 – 'EqA 2010'). Direct age discrimination is permissible provided that the employer can show that there is a good reason for the discrimination. Section 39(2) EqA 2010 states that employers must not discriminate on account of age in terms of employment; in the provision of opportunities for promotion, training, or other benefits; by dismissing the employee; or by subjecting the employee to any other detriment.

36. Section 136 EqA 2010 provides that where the complainant can establish facts from which the Tribunal could determine that there has been a contravention of the EqA 2010, the Tribunal must make a finding of unlawful discrimination unless the employer shows it did not contravene it. As put in **Madarassy v Nomura International Plc**

**[2007] EWCA Civ 33**, *'could'* means at stage one, facts from which an inference of discrimination is possible. In short, the burden of proving discrimination starts with the Claimant. In **Igen Ltd and Others v Wong [2005] IRLR 258** guidance was given as to the steps to be taken by a Tribunal in determining whether there has been discrimination. In short, there are two stages, stage one which requires the Claimant to prove, on the balance of probabilities facts from which a (reasonable) Tribunal could conclude in the absence of an adequate explanation, that the Respondent has discriminated against the Claimant, that is committed the unlawful act. The burden of proof is therefore was on the Claimant (**Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913 Royal Mail Group Ltd v Efobi [2021] UKSC 22**). As such, the Claimant has to produce some evidence of discrimination before the burden would then pass to the Respondent. If the Claimant does so, the Tribunal then moves onto stage two, in which the Respondent would have to prove that it did not commit or was not to be treated as having committed, the unlawful act.

37. Age discrimination requires the person to be treated less favourably because of age. In short, the treatment of the Claimant must be compared with that of an actual or hypothetical comparator, that is, a person who did not share the same protected characteristic, that is, a person not of the same age, but otherwise his/her circumstances should not be materially different to that of the Claimant (section 23 EqA 2010).

38. When considering the direct discrimination claim and that set out in section 39(2) EqA 2010, the question for the Tribunal to determine was whether the Claimant was treated as he was because of his age or for another reason or reasons.

39. The Claimant's age discrimination claim was premised on the basis that he was 72 years of age at the time that the disciplinary action was taken by the Respondents against him. In evidence he asserted that because of his age it was assumed by the Respondents, making particular reference to Mr Wong, that he would retire following the suspension on the basis of the eight allegations and that he would not defend them. In short, the age discrimination claim was premised on the basis that he was not prepared to do so, and his *'motivation'* to proceed with the disciplinary and then appeal proceedings.

40. As set out above, the starting point was, considering all the evidence in the round, whether there were facts from which the Tribunal could determine, in the absence of any other explanation, that discrimination took place (**Madarassy v Nomura International Plc [2007] EWCA Civ 33**).

41. Although the Claimant has not specifically identified the unlawful act or acts, the Claimant's discrimination claim was premised on the act of dismissal (see case management orders 23 March 2022 paragraph 59). The Claimant referred the Tribunal to the paragraphs in his witness statement where the age discrimination claim was specifically addressed (paragraphs 3, 22, 147 onwards and 230 onwards).

42. The Tribunal made the following findings:

    (i) The Claimant's evidence was that at no time during his employment, or during the entirety of the disciplinary process, be that at the date of suspension, during

the suspension, the investigation, disciplinary or at the appeal hearing had or was there any reference ever made to his age.

(ii) The only reference to the Claimant's age, either during his employment, or during the disciplinary process had been a reference made by the himself.

(iii) The Tribunal found Ms Slade a credible witness and had no reason to doubt her evidence that the first time she became aware of the Claimant's age was following the government's guidance in relation to the need for those over 70 years of age to isolate at the beginning of the pandemic. As such, the requirement then because of the Claimant's age to postpone the disciplinary hearing.

(iv) The all school email 25.10.2019 sent by the Claimant was sent with the intention of *'provoking'* disciplinary action. In short, the Claimant knew that when he sent it, it would result in disciplinary action. As such, the disciplinary action taken against him in regard to that email, he knew would have been taken against any other employee irrespective of their age if he/she had sent such an email.

(v) The letter 16.10.2019 written by the Claimant to the parents of the boys was written by him when he had been told by the Headteacher, Ms Stephens, that she would deal with the matter. In short, he went against her direct instruction. The Claimant provided no examples or evidence of any other circumstances, or of comparators where disciplinary action would not been taken in similar circumstances.

(vi) The Claimant posted on an open Facebook account derogatory statements (the latter was not denied - see paragraph 84(e) below) in regard to the school. It was not in issue that on the Facebook account that the school was easily identified as the relevant school. No evidence had been adduced of any other circumstances, or of comparators, where disciplinary action would not have been taken in similar circumstances.

(vii) The Claimant had written a book which although was not in the public domain for purchase, nevertheless, copies of the book have been published, albeit limited in number, those copies were in the public domain. The book, in short, referred to within it persons who are although anonymised, could be identified. The book was critical of those persons and derogatory of the school (see paragraph 84(f) below).

43. In summary, the Claimant in oral evidence confirmed that when he sent the all school email 25.10.2019 he did so knowing that, that action alone would be sufficient to initiate disciplinary action. Equally, in oral evidence, albeit the Claimant still felt aggrieved about what had happened to him in the disciplinary proceedings brought 2014/2018, and his complaints and requests thereafter being *'ignored'* (see paragraph 84(a)(v)), which as a result of which he felt justified in his writing to the parents of the boys directly nevertheless, he was fully aware, that he had no authorisation to do. The Tribunal do not address each of the allegations brought however in relation to all eight, the Claimant did not submit that they would not have been brought against any other employee in such circumstances irrespective of age.

44. In summary, the fact that the Claimant was 72 years of age and believed that the Respondents and/ or, the senior management team within the School thought he would not defend the allegations brought against him, did not amount to an age discrimination claim. The burden was on the Claimant in the first instance to evidence less favourable treatment because of his age, and to show that the less people treatment, that was the dismissal, was on account of his age.

45. The Tribunal found having considered all the evidence in the round that the Claimant did not get over stage one that was, produce evidence to show that because of his age he was treated less favourably. In short, the Claimant failed to adduce any evidence in support of the same. As such his discrimination claim fails and is dismissed.

**Whistleblowing claim**

**The law**

46. The Public Interest Disclosure Act 1998 ('PIDA') gives special rights and protections for workers who disclose wrongdoing by their employers to a third party in specific circumstances.

47. In order to assess whether, as in the Claimant's case, the dismissal and /or detriment falls within the PIDA, the qualifying disclosure must be one falls under section 43B of the Employment Rights Act 1996 ('ERA 1996').

48. **Kilrainne v London Borough of Wandsworth [2018] ICR 1850** set out the test for determining whether the information threshold had been met so as to potentially amount to a qualifying disclosure. In short, the disclosure has to have *'sufficient factual content and specificity such as is capable of tending to show'* one of the five wrongdoings or a deliberate concealment of the same. It is a matter '*for the evaluative judgment of the Tribunal in the light of all facts of the case'* (paragraphs 35-36). Equally, there must be a reasonable belief on the part of the worker that the disclosure was in the public interest.

49. In short, there are two components first, a subjective belief at the time on the part of the worker that the disclosure was in the public interest and secondly, that the belief was a reasonable one. To satisfy the first component the worker must believe that they were acting in the public interest. To satisfy the second, applying the guidance in **Chesterton Global Limited v Nurmohamed [2018] ICR 731**, it is not necessary that the disclosure need to be of interest to the entirety of the public. On the contrary, the Tribunal needs to consider all the circumstances of the case although in **Chesterton** it identified four factors as relevant in that determination namely, the numbers in the group whose interests the disclosure served; the nature and extent of the interests affected; the nature of the wrongdoing; and the identity of the alleged wrongdoer.

50. Very importantly, it must be determined as to whether the disclosure was the reason or principal reason for the dismissal. Section 43B ERA 1996 states a *'protected disclosure'* means a qualifying disclosure which is made by a worker in accordance with any of sections 43C to 43H of the ERA 1996.

51. The Claimant referred to in his witness statement where the whistleblowing claim was specifically addressed (paragraphs 79-82 and 90-144). The Tribunal referred to the case management orders of 23 March 2022. The protected disclosure was identified

as that of what was set out in the letter dated 16 May 2019. On that date, the Claimant wrote to Mr Nick Batchelar, the Director of Education and Lifelong Learning at the Council requesting the initiation of the whistleblowing procedure, he stated it that he sought *'to expose the fact that staff in schools, and perhaps beyond have, for some years, had their employment rights enshrined in Employment Law systematically ignored. We are currently exposed to having our employment terminated based on spurious allegations supported by lies and contrived evidence as part of a conspiracy involving members of the so-called great and the good. It's a method of ensuring that members of staff who do not show the accepted level of deference can be removed based on trumped up allegations. This can be facilitated by senior members of a governing body and Human Resources'.* The Claimant then went on in the letter to set out what had happened to him in regard to the complaints made against him and the disciplinary proceedings brought against him in 2014 and 2018.

52. Following sending that letter and the Claimant then chasing a response, a response was sent from Mr Batchelar dated 2 July 2019 advising that he had referred the matter to the Council's monitoring office to establish whether what had been set out within the Claimant's letter fell within the ambit of its whistleblowing policy. The correspondence was self-explanatory (page 943). Thereafter further information was then sought by the Council in their letter dated 25 July 2019 (page 947). To summarise, in the latter letter Mr Batchelar stated that what had been set out within the Claimant's earlier correspondence had related to issues in regard to '*previous disciplinary and grievance/resolution procedures'* handled under the *'Schools Disciplinary and Resolution Policies and Procedures'*, which, were not usually covered by whistleblowing policy. In short, the Claimant was requested to provide information as to why he maintained his complaint fell under the umbrella of the whistleblowing policy.

53. The Claimant responded on 30 July 2019. By way of a response dated 11 September 2019 Mr Batchelar advised that his letter of 30 July 2019 identified complaints pertaining to HR officers. There then followed one further letter from the Claimant to Mr Batchelar but, in short, a whistleblowing claim was not identified either at that time by the Council, nor when the Claimant further pursued the matter following his suspension with Mr Batchelar's successor, Mr M Tate (pages 954, 967 and 976).

54. The issue before the Tribunal was whether the Claimant had been automatically unfairly dismissed as a result of his complaint of whistleblowing.

55. As previously stated, to meet the definition of what is a public interest disclosure, specific criteria must be met. First, it must be a qualifying disclosure. From what had been set out in the original letter to Mr Batchelar dated 16 May 2019, and considering the criteria set out in section 43B ERA 1996, in the absence of any clear direction from the Claimant in regard to this, the Tribunal inferred that the criteria relied upon were that the disclosure was one that showed

*'(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject';* and /or
*'(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed'.*

56. Applying to the facts. It was never accepted by the Council that what was set out within the letter dated 16 May 2019 amounted to a protected disclosure either when the complaint was first raised and investigated by Mr Batchelar, or thereafter by Mr M Tate.

57. As acknowledged by Respondent's Counsel, the Tribunal are not bound by that decision. As such, the question for the Tribunal was at the time under consideration had there been a disclosure of information which in the reasonable belief of the the Claimant tended to show one or more of the failures set out at section 43B, and whether the Claimant reasonably believed that the disclosure was made in the public interest.

58. The starting point for the Tribunal was the determination of whether it was a qualifying disclosure, as such, whether it fell within the criteria set out above. In short, had there been a failure to comply with a legal obligation or an attempt to deliberately conceal such a failure. The only evidence provided by the Claimant in regard to the asserted failure by the School and/or the Respondents was in relation to what happened in regard to his disciplinary proceedings in 2014 and 2018. Nevertheless, what the Claimant failed to identify was albeit he had been subject to complaints at that time, it was as a result of the procedures in place that those complaints were not upheld and dismissed. As the Claimant has repeatedly stated throughout the course of these proceedings there was found to be *'no case to answer'*.

59. In summary, the premise of the protected disclosure claim was purely on the basis of the Claimant's own experience having gone through disciplinary proceedings. It did not identify as to how or why it was of any public interest. In the first instance, it did not identify the legal obligation that was asserted to be breached or concealed. If anything, it can only be determined that because the procedures were adhered to on the part of the Respondents, in that the two complaints were not upheld, the appropriate legal procedures were followed. Although the Claimant referred to what had been set out within his letter of the 16 May 2019 to *'expose the fact that staff in schools'*, had had their employment rights *'ignored'*, he did not reference one other instance or person to whom this had happened. The Tribunal found, that despite the repeated contention of the *'stripping'* of other workers/employees of their employment rights, the assertion was, no more than a mere assertion as it lacked sufficient factual content and/or specificity to show a breach of the legal obligation or a deliberate concealment of one.

60. Further, it is a twofold test, there must be a reasonable belief on the part of the Claimant that the disclosure was in the public interest. The Tribunal do not repeat what it has previously set out above but again, the Tribunal could not identify as to why the issues pertaining to how the Claimant's disciplinary proceedings were handled at the time were or are, of public interest. The Claimant other than making a generic reference to the breach of fellow employees' employment law rights provided no evidence in respect of the same. In short, the public interest argument was premised on pure assertion and nothing more.

61. As such, in the first instance, the Tribunal found that what was asserted to have been a public interest disclosure was not one. In short, the Claimant's claim on the issue fell at the first hurdle. Nevertheless, even if the Tribunal had found that it was a protected disclosure, albeit it did not, there still must be shown to have been a link between the

dismissal and the employee having made the protected disclosure (section 103A ERA 1996). In short, the onus was on the Claimant to show the link between his dismissal and the letter of 16 May 2019 and the investigation that followed.

62. Again, and not to repeat what has previously been set out the Tribunal found that the Claimant failed to establish any link between his dismissal and what he asserted to have been a protected disclosure. As already set out in paragraph 42 above, the Claimant was fully aware that when he sent the all school email 25.10.2019 that that e-mail would trigger disciplinary action. His evidence was when he sent it, he wanted to send something *'that would bite'* and as his time was coming to an end at the school, he wanted to send something *'they would jump at'*. His evidence was that when he sent it, he wanted the opportunity to put his case before a panel of governors before he left the school as he had been *'repeatedly ignored'* for 18 months. In short, the Claimant knew that what he did at that time would trigger disciplinary action further, as previously stated, the Claimant knew when he sent the letter 16.10.2019 that he had no authorisation to do so.

63. In summary, the Tribunal found that albeit on the basis of the Claimant's evidence he clearly felt aggrieved by what had happened in the past nevertheless, what he purported to be a protected disclosure, first, was not one and secondly, even if it had been, there was no link between it and the reasons for his dismissal. In short, the reasons for his dismissal were clearly identified as being for the reasons as set out at paragraph 42 above.

**Automatic unfair dismissal as a result of the Claimant's role as a trade union representative.**

**The law**

64. In brief, a dismissal is automatically unfair if the reason for the dismissal is as a result of an employee's role in a trade union (section 152 Trade Union & Labour Relations (Consolidation) Act 1992).

65. In regard the same the Claimant referred to the chain of three emails, dated 21 October to the all school email 25.10.2019 (pages 257-258). His assertion was that the all school email 25.10.2019 was sent in his capacity as a trade union representative and as such, his dismissal as a result of sending that email was automatically unfair. In support of this claim the Claimant did not direct the Tribunal to any specific paragraph(s) within his witness statement nevertheless, when considering this claim the Tribunal in particular considered what the Claimant had set out in paragraphs 147 onwards.

66. It was not in issue that the first email dated 21 October 2019 was considered appropriate and reasonable for the Claimant to send in his capacity as the trade union representative. In short, in the first email, with the subject line '*Hiring and firing processes',* the Claimant requested in his capacity as the unison steward, information in regard the '*hiring and firing processes'* in the school. In Mr Davies' email of response of the same date, he indicated that the *'Local Authority's Human Resources policies, processes and procedures'* were those followed.

67. The Claimant asserted that all school email 25.10.2019 was also sent in that same capacity. The Respondents maintained it was not. In short, the Respondent' contended that although it made reference to the Claimant being the unison steward, it was condemnatory email in substance, and critical of the School's senior management. Further, it referenced another employee who was not a unison member and had not been instructed by the Claimant to act on her behalf. I refer to what has been previously set out in regard the evidence in relation to this as detailed at paragraphs 25 and 42 above.

68. In oral evidence the Tribunal asked the Claimant as to how many of the staff in the school were members of the union. The Claimant's reply was 16 to 20 persons, but he did not know if any of the potentially affected staff had been unison members to whom the email was sent. In short, the all school email 25.10.2019 sent included a significant number of staff/employees who were not in the union, one of whom included the employee who was identified within it.

69. The Tribunal found that albeit the Claimant sought to rely on his trade union representative role as a reason for his dismissal as in the email he referenced that he was the unison representative, that it was not sent in that capacity. I refer to what has already been set out in regard the all school email 25.10.2019 above. In oral evidence the Claimant stated that he considered the e-mail from Mr Davies of 21.10.2019 to be dismissive. As a result, he wished to write something '*that would bite'*. He stated that he *'wanted something'* for them to *'jump at*'. His evidence at the disciplinary, appeal and this hearing was that he sought to provoke a reaction, and his view was that the only way to get *'in front of the governors was to create a case against me'* because his time at the school was coming to an end and he felt he had been repeatedly ignored. In short, albeit the Claimant now asserted that the all school email 25.10.2019 was sent in his capacity as the school's union representative, his own oral evidence confirmed the contrary, it was motivated purely on grounds of self-interest, and for no other reason.

70. In summary, although one of the allegations against the Claimant related to the sending of the all school email 25.10.2019, the Tribunal found that there was no link between the Claimant's dismissal and his role as a trade union representative. As such, the Tribunal dismissed the Claimant's claim of automatic unfair dismissal on this basis.

**Unfair dismissal claim**

**The law**

71. A dismissal can be substantively and/or procedurally unfair.

72. The Tribunal referred to section 98 ERA 1996 which sets out the two stage test for the determination of whether a dismissal is fair or unfair. First, the employer must show it had a potentially fair reason for the dismissal (section 94(2) ERA 1996) and secondly, if the Respondent shows that it had a potentially fair reason, the Tribunal must consider whether the Respondent acted fairly or unfairly in dismissing for that reason.

73. Section 98 ERA 1996 deals with fairness and what the Tribunal must consider when determining whether a dismissal is fair or unfair. As set out at Section 98(4) ERA 1996 the Tribunal must have regard to whether

*a) ……..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.*

74. The burden of proof is neutral, in that, there is no burden on either party to establish the reasonableness or unreasonableness of a dismissal under section 98(4) ERA 1996.

75. In assessing the reasonableness of the employer's decision, the Tribunal does not substitute its own views, instead it must ask, '*Is the dismissal within the band of reasonable respon*ses?' that is, *'…is it possible that a reasonable employer, faced with these facts, would have dismissed?'.* As such the function of the Tribunal is to determine whether in the particular circumstances of a case the decision to dismiss the employee fell within the band of reasonable responses that a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair, and vice versa (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**).

76. When considering conduct, conduct can be any unacceptable behaviour which goes to the root of the contract. There is also conduct which may merit a lesser sanction short of dismissal. The Respondent referred to its School Staff Disciplinary Procedure and the examples set out there in respect of the same ('SS Disciplinary Procedure' - page154).

77. In a misconduct dismissal when determining fairness within section 98(4) ERA 1996, the Tribunal referred to the guidance in **British Home Stores Ltd v Burchell 1980 ICR 303**, which I have referred to as the Burchell test. In short, **the** Burchell test has three elements

    The employer needs to show: -

    (a) It had an honest belief that the employee was guilty of the offence;

    (b) It had reasonable grounds for holding that belief; and

    (c) That its belief came from a reasonable investigation into the incident.

78. In summary, when considering the substance of the dismissal, the ultimate test is whether the respondent's decision fell within the range of reasonable responses of a reasonable employer in all the circumstances of the case. Very importantly, the Tribunal's role is to review the fairness of the Respondent's decision, in this instance, the decision to dismiss the Claimant, and not substitute its own view on the facts.

79. There is then the matter of the disciplinary and appeal procedure followed. As to whether a fair procedure was carried out will be measured against the SS Disciplinary Procedure and that against the ACAS Code of Practice. In summary, even if the dismissal was not substantively unfair, it can be procedurally so.

**<u>The Disciplinary/Appeal Procedure followed</u>**

80. The Respondents asserted that a fair procedure was followed and one that was in accordance with the SS Disciplinary Procedure and the '*Code of Professional Conduct and Practice for registrants with the Education Workforce Council'* ('*EWC Code*' -page 209), the '*Local Government Wales Code of Conduct'* (page 220) and that as set out within the Claimant's contract of employment ( page 215) and the updated contract of employment ( page 223).

81. On contrary, the Claimant identified a number of flaws within the disciplinary procedure which I will deal with in turn.

**(a) <u>Suspension</u>**

(i) The Claimant questioned the procedural validity of the suspension. The Claimant as previously stated was suspended on the basis of eight allegations of misconduct. The Tribunal referred to the letter of suspension dated 7 November 2019 ('suspension letter' - page 468).

(ii) The Tribunal referred to paragraph 86 onwards of the SS Disciplinary Procedure (page 172) and paragraph 2 of the document '*Cardiff Council School - Suspension Policy and Procedure'* (page 1037), the latter document being a document relied upon by Claimant.

(iii) Both paragraphs referenced related to the circumstances when a suspension would be permissible and justified. In short, suspension pending disciplinary proceedings would normally only be considered if the allegations related to gross misconduct. Further, the decision to suspend could only be taken by the Headteacher or Chair of Governors.

(iv) It was Ms Stephens who completed the relevant form for the suspension, '*Preliminary Assessment/ Review To Consider Appropriateness Of Suspension From Duty Form' ('*Suspension from Duty Form'*).* The assessment was dated to have commenced on 25 October 2019 and to have concluded 4 November 2019. Within it at *'Section A'*, Ms Stephens briefly set out the issues and events that had led to the making of the decision to suspend. At *'Section B'* she identified the potential risks if the Claimant was not suspended and remained in the workplace. She identified the Claimant's conduct to have amounted to gross misconduct (page 462). In addition, she stated that moving the Claimant to a different role within the workplace would not be viable nor, his working from home.

(v) On 7 November 2019 the Claimant was suspended. Minutes were taken of the meeting (page 466). At the meeting the Claimant was accompanied by his sister, Ms M Barry.

(vi) In regard to the suspension, the Claimant stated that there had been a failure by the Respondents to comply with what are set out within paragraph 89 of the SS Disciplinary Procedure. In short, prior to the implementation of the suspension, a failure by the Respondents to consult with the chief education officer of the maintaining LA ('chief education officer'). The Tribunal also referred to what had

been stated by the Claimant in regard his suspension at paragraphs 85 of his witness statement.

(vii) The Tribunal accepted that although there was no indication that the Claimant's suspension was discussed with the chief education officer nevertheless, in the minutes of the suspension meeting, Mr Tom Cox of HR, in short, the chief education officer of the maintaining LA's representative was in attendance.

(viii) One point the Tribunal did note was that although the Suspension from Duty Form identified the conduct as gross misconduct, that was not stated in the suspension letter. Nevertheless, the Tribunal did not consider this to be a fundamental flaw. The minutes of the meeting and what was set out within the suspension letter clearly identified the reasons as to why the Claimant had been suspended, that it was a suspension pending an investigation, and that the criteria to suspend were satisfied (paragraph 89). Further, the Tribunal were satisfied that the suspension was appropriately reviewed in accordance with the SS Disciplinary Procedure, and any delay in the suspension process and ultimately, the disciplinary hearing was as a result of the impact of the pandemic.

(ix) As such, the Tribunal were satisfied that the correct process had been followed in regard to the suspension, and the appropriate considerations made, and measures taken for the purposes of it.

**(b) <u>The Presenting Officer's Reports (PO's Reports)</u>**

(i) There were two PO's reports produced, first the report of Mr Wong (page 484) and secondly, that of Mr Davies (page 511).

(ii) The issue raised by the Claimant in regard to the PO's reports was the similarity between them.

(iii) In oral evidence Mr Davies confirmed that other than a few amendments to his PO's report by referencing and attaching as an appendix copy of the book he had no reason to otherwise amend the substance of the previous PO's report prepared by Mr Wong.

(iv) The role of the presenting officer was set out in the SS Disciplinary Procedure. In short, it identified the presenting officer as not a witness, but the person who would present the Respondents' case, and set out the allegations and the evidence that the Respondents relied upon in support of their case. Further that as part of the presenting officer's role, he/she must also outline how the disciplinary procedure that had been followed (paragraphs 11 onwards page 182).

(v) As such, the Tribunal found that there was nothing irregular about the fact that Mr Davies used the contents of the previous PO's report prepared by Mr Wong as the basis for the substance of his report.

(vi) In addition, an issue had been raised pertaining to what had been set out at paragraph 5.5 of Mr Wong's report, and paragraph 5.4 of Mr Davies' report. In

short, the Claimant contended that what was set out were not *'findings',* but *'recommendations'.*

(vii) The Tribunal having carefully considered the contents of both paragraphs found that what was set out was no more than factual findings. In the preceding paragraph 5.4, it stated that *'the following is a summary of the factual findings',* prior to which, it referred to the investigation report of Ms Maunder. Further, the Tribunal found that as stated at paragraph 1.6 of Mr Davies' report it was a report written *'in accordance with Welsh government guidance, this report will not contain any recommendations or conclusions as to what action should be taken next'*.

(viii) In summary, the Tribunal found that both the PO's reports, that was Mr Wong's report and Mr Davies' report, were neutral, in that neither report contained either recommendations or conclusions.

**(c) Investigation Report**

(i) An independent investigation report was commissioned from Ms Sarah Maunder of Maunder Ward HR Specialists ('Ms Maunder's report').

(ii) First, the Claimant raised an issue pertaining to the independence of the investigator. The Tribunal considered what had been set out by the Claimant in his statement in respect of the same (in particular paragraphs 50, 107, 117, and 205 onwards) and also what he stated in oral evidence. In short, in evidence he stated that albeit the report was '*independent, it was not impartial'*. The Claimant gave little further information in relation to this. The second issue pertaining to Ms Maunder's report related to the Claimant's concerns regarding the appropriateness of the meeting that the governors had with Ms Maunder following the completion of her investigation and report. In short, the meeting following its completion with Mr Wong, another parent governor Ms Mary Anderson, and also present was Mr Tom Cox.

(iii) Ms Maunder's report in total ran to 20 pages with 23 appendices (page 131). The report at the outset identified Ms Maunder's capacity to act as an independent workplace investigator. She confirmed that when undertaking her investigation, she had done so in accordance with the SS Disciplinary Procedure and the EWC Code. The report set out her instructions, the allegations to investigate, the methodology applied by her and in section 5, titled *'Findings'*, her findings in regard to each allegation.

(iv) The Tribunal carefully read the report and having done so, found, that the report was as it was labelled, that is, a report of a disciplinary investigation of misconduct in relation to an employee, namely the Claimant. In short, the report set out no more than her factual findings following her investigation, which involved the interviewing of witnesses, and consideration of the documentation in relation to the allegations of misconduct against the Claimant.

(v) That a Headteacher or the Chair of Governors can commission an external body to undertake an independent investigation report is clearly identified within the SS Disciplinary Procedure (paragraph 17 page 159).

(vi) In regard the second issue, the meeting, the Claimant asserted that this was in breach of the disciplinary policy. The Tribunal were referred to paragraph 52 of the SS Disciplinary Procedure (page 166) where it stated, *'the report once completed will be given to the headteacher and the chair of governors (or chair of governors and another governor in respect of investigations into the conduct of the head teacher) who will consider the findings and decide….'.* In short, it did not state that there could be a meeting.

(vii) The SS Disciplinary Procedure is a policy document, it has no statutory basis. As it identifies at the outset it is a document *'designed to ensure consistent and fair treatment for all members of staff within the school'.* As such, it is a document that promotes best practice, nevertheless, the fact that the contents of it are not followed to the letter, does not necessarily flaw the disciplinary process. In short, the fact that it was determined that there should be a meeting arranged with Ms Maunder's to discuss the contents of her investigation report, the Tribunal found nothing unusual about this. It was a report that undoubtedly required very careful scrutiny and as a result, further questions put and addressed by its writer. Further, the fact that in the minutes of the meeting that there was not recorded every allegation or what was discussed, again, the Tribunal did not find irregular as minutes are not meant to record verbatim everything that is said in a meeting. In short, what the minutes recorded were the key issues that are discussed at that meeting, the decisions reached and the action to be taken (page 470).

(viii) In summary, the Tribunal having considered all the evidence in the round in regard to this issue, had no reason to doubt the independency of the investigator Ms Maunder, and as such found the investigation report adduced to be an independent and impartial as set out in paragraph (iv) above. Further, the Tribunal found no procedural irregularity in the fact that a meeting was held with Ms Maunder to discuss the contents of her report.

**(d) <u>The Disciplinary Panel and the originally appointed Presenting Officer ('PO')</u>**

(i) When the Claimant was sent notice of the Disciplinary Hearing and details as the identity of the three panels members, namely Ms Slade, Councillor Norma Mackie and Miss Rebecca Newsome and the presenting officer, Mr Wong, he raised an objection to the involvement of both Mr Wong as the PO, and Ms Slade as a panel member.

(ii) In regard the former, Mr Wong ultimately stood down. The Tribunal had no reason to doubt the credibility of Mr Wong's evidence that in the first instance, he had not wanted to take the role when offered. He agreed to do so as his understanding was that it was a neutral role, and that it was limited to the presentation of the case for the Respondents. In short, he would take no part in the decision making process. Nevertheless, when the objection was raised by the Claimant on both reflection and having spoken to HR, he stepped down. Mr Wong stated that he decided to do this because he believed that it was more important for him to concentrate on solely his role as Chair of Governors. As a result, the PO role was then passed to Mr Davies. The Tribunal found nothing untoward in relation to this being done by Mr Wong. Further, the Tribunal had no reason to doubt the

credibility of Mr Wong's evidence that following his stepping down as PO he had no further involvement in the disciplinary process.

(iii) The second issue was in relation to Ms Slade being a member of the disciplinary panel and remaining a member of the panel despite the Claimant's objection to her involvement. The Claimant at hearing maintained that position. In his closing submission he asserted that her impartiality resulted in the disciplinary hearing being effectively a *'kangaroo court'*.

(iv) That the Claimant had a right to object to a member of the panel when that member's ability to act impartially was in question is set out at paragraph 74 of the SS Disciplinary Procedure. In short, Ms Slade's impartiality was in issue on the basis of her having previously been part of the disciplinary panel in 2014 which heard the then complaint against the Claimant. The disciplinary panel in 2014 upheld the complaint with a final warning having been given however on appeal, the complaint was dismissed. In short, as a result of Ms Slade being part of that panel in 2014 and the initial finding made, the Claimant's submission was she was not impartial.

(v) On the contrary Ms Slade in oral evidence confirmed she had had no concerns in regards her impartiality, and her ability as such to be a member of the disciplinary panel. Nevertheless, when the objection was raised by the Claimant, she stated that she had taken legal advice from HR. HR advised that because she would be one of three members, in short, she had one vote out of the three, her decision would not be determinative. To summarise, HR had no issue with her being a member of the disciplinary panel.

(vi) The Tribunal heard evidence from both Mr Wong and Ms Slade about the difficulties that there were in trying to arrange a panel of three governors to be available on what would be a normal working day. The Tribunal were reminded, that this is a voluntary position and therefore requires the relevant governor to take a day off work. In short, although best practice would be that there would always be three people who were entirely unconnected with the person going through the disciplinary process, that was not always practical or possible.

(vii) In summary Ms Slade's oral evidence was that she had identified no issue with her being able to exercise independence of mind despite her involvement in the 2014 disciplinary proceedings. As such, she could identify no reason to recluse herself, nor was it considered that the Claimant had adduced any evidence to support his contention in relation to her lack of impartiality, other than as assertion that because she had been on the previous panel, she lacked independence.

(vi) The Tribunal carefully considered all the documentation in relation to the disciplinary hearing. The disciplinary hearing in total lasted three days. Prior to the hearing the Claimant had been notified in writing of the eight allegations against him and advised that if proven of the risk of dismissal (page 508).

(viii) On each of the given dates of the disciplinary hearings minutes of the hearing were recorded (pages 522,535,557).

(ix) The meeting of the disciplinary panel and its deliberations on the 22 April 2021 were set out in the minutes of that meeting, which again, were comprehensive minutes (page 565).

(x) In the letter of dismissal to the Claimant dated of 23 April 2021, a letter which ran to 6 pages, there was set out a summary of the disciplinary panel's considerations and findings.

(xii) In summary, the Tribunal having carefully scrutinised the letter to the Claimant of notice of the disciplinary hearing, the minutes of the disciplinary hearing on the three separate dates, the minutes of the deliberations of the disciplinary panel, and the DH dismissal letter, found that there was first, no evidence of procedural irregularity and secondly, no evidence of bias, impartially or lack of independence of the panel or of any singular member. It was a unanimous decision. It was clearly evidenced in the aforementioned documents that the procedure as outlined within both the SS Disciplinary Procedure and the EWC code had been adhered to by all those involved in it. Further, throughout the process of it there was noted to be present a HR representative. In short, the Tribunal dismissed the Claimant's submission that as a result of Ms Slade's involvement it was a *'kangaroo court'*.

82. Finally, even if there had been identified to be a flaw within the disciplinary process and proceedings, albeit the Tribunal did not identify any, that flaw would have in any event been remedied on appeal (**Clark v Civil Aviation Authority [1991] IRLR 412**). The Claimant raised no issue pertaining to the appeal other than initially, when advised of who would be the members of the panel, he questioned their training to sit on it. The Tribunal were entirely satisfied having heard the evidence, that any governor who formed part of such a panel had received the requisite training. Of note, the appeal hearing was a full rehearing for the purposes of which the panel had no access to any of the documentation relating to the disciplinary hearing. Although the Tribunal accepted that the sanctions of the disciplinary panel and the appeal panel in relation to Allegations 4 and 5 were different nevertheless, both hearings resulted in the same final outcome, in that the Claimant be dismissed summarily.

83. If anything, the only criticism that the Tribunal would have was in relation to what was set out in the DH dismissal letter which although identifying that the Allegations, that is, all the Allegations bar Allegation 2 had been proven, it did not identify as to what the outcome was, in regard to each. In short, although the recommendations in the minutes of the deliberations indicated that Allegation 1, would carry a final warning, a lesser sanction, that was not clear from the DH dismissal letter. The Tribunal accepted that this had no overall effect on the outcome as the DH dismissal letter made it clear that the Claimant had been dismissed nevertheless, from the Claimant's perspective it potentially would have be assumed that all the gross misconduct allegations had been proven, when that was clearly not the case.

**<u>The Substantive grounds for the dismissal</u>**

84. The test is as previously out at paragraphs 71-78 above. Dealing with each allegation of misconduct in turn

**(a) Allegation 1 – inappropriate communication with parents, namely the letter sent to parents on 16 October 2019**

(i) The decision of the panels at both the disciplinary and appeal hearings were that the sending of the letter 16.10.2019 to the parents was inappropriate. I do not intend to recite what was set out within either the DH dismissal letter or the AH dismissal letter, but merely summarise.

(ii) In short, following the complaint by the parents of the boys, the then one to one meeting that the Claimant had with Ms Stephens in regard to the visit, and then Ms Stephens telling the Claimant that she would deal with the issue the Claimant, nevertheless, decided to write directly to the parents.

(iii) In the Claimant's witness statement, he set out in detail his reasons and his justification for doing so. In particular, the Tribunal referred to what was set out at paragraph 83 onwards in relation to the same, and then at paragraph 100 onwards where he addressed this specific allegation. In addition, the Tribunal heard oral evidence from the Claimant in relation to it.

(iv) The Claimant's evidence was fully noted and considered by the Tribunal in relation to his justification for his actions.

(v) It was not in issue that the Claimant sent the letter16.10.2019, or that he knew that he had no authority to send it. In short, the Claimant felt he had was entitled to send it first, because of Ms Stephen's failure to provide him with a copy of the letter of response she had sent to the parents; secondly, because of what had been set out in the letter in regards the *'grandmother'* and the distress caused to her by their visit and then thirdly, as a result of the parents' behaviour/attitude generally to staff within the school. In short, the Claimant did not consider his sending of it to be inappropriate. Similarly, he did not consider the letter in content or tone inappropriate.

(vi) The Tribunal read very carefully what was set out in the letter 16.10.2019. In addition, the Tribunal took into account that all those involved with these parents, which included the Claimant, were aware of the tenuous relationship that existed between the school and them.

(vii) In oral evidence the Claimant confirmed that he was told by the Headteacher when he met with her that she would deal with the matter. He accepted that that had been the instruction from the Headteacher. Nevertheless, he then sent the letter and albeit not on school notepaper it was signed off by him in his capacity as *'Inclusion and Wellbeing – Cathays High*'.

(viii) In oral evidence the Claimant questioned the reason as to why Mr Alexander was not interviewed as part of the independent investigation. In short, the Respondent's position was that there was no need to interview him because the allegation of misconduct was solely in regard to the Claimant's sending of the letter 16.10.2019, not in regard the visit.

(ix) The Tribunal noted the Claimant's justification for his actions was fully taken into account by both the disciplinary hearing panel and then the appeal panel as evidenced in the minutes of the hearings, the minutes of their deliberations, and

as set out in both the DH dismissal letter and AH dismissal letter. Further that both panels found that irrespective of the Claimant's reasons for having written directly to the parents, that the sending of the letter was inappropriate. Further that the content and tone of the letter was inappropriate.

(x) In regard the Claimant's point in relation to as to why Mr Alexander had not been interviewed, the Tribunal accepted the Respondent's evidence that there was no necessity for him to be interviewed. The disciplinary action pursued was identified from the outset as being in regard to the sending of the letter. In the email from Ms Stephens dated 24 October 2019 it was made clear that it was the sending of the letter 16.10.2019 that was to then trigger the investigation. The Tribunal noted that albeit the Claimant stated at the disciplinary hearing and appeal hearing that he did not know that he had no authority to send the letter, he nevertheless confirmed in oral evidence that when he had the one to one meeting with Ms Stephens, she told him that she would deal with the matter from thereinafter. Further that prior to that letter he had never before written to the parents of any child in the school.

(xi) In addition, reference was made when considering this Allegation to the email received by the Claimant from Ms Stephens dated 24 October 2019. In it, as set out at paragraph 23 above she instructed the Claimant to make no further contact with the parents. Nevertheless, and despite this instruction the Claimant then sent a further letter to the parents on 24 October 2019 without authorisation to do so. Although the sending of the latter letter did not form part of original allegations of misconduct, the Tribunal concurred with the findings of the disciplinary and the appeal panel, that the Claimant in doing so acted in complete disregard to his Headteacher's implicit instructions. Further the Tribunal accepted the Respondent's evidence that that letter was also inappropriate in tone and content.

(xii) In summary, the Tribunal found that a fair investigation was followed by the Respondents in regard this Allegation and that the Claimant was given a full opportunity to explain his reasons for sending the letter 16.10.2021. In short, the mitigating and aggravating circumstances were fully considered and taken into account by the disciplinary and then the appeal panel which was reflected in the sanction. As such, both panels found the appropriate sanction in the circumstances was a final warning, and not gross misconduct.

(iv) In conclusion, the Tribunal found that a fair investigation was carried out, and that the response of the Respondent in regard to this Allegation was one that was open to the Respondent as outlined in the AH decision letter and reflected in the SS Disciplinary Procedure.

**Allegation 2 – inappropriate communication with the Education Welfare Service**

(i) The Allegation concerned the exchange of emails between Eleanor Jones of the Education Welfare Service ('Ms Jones') and the Claimant. No previous complaints had been made by Ms Jones in relation to the Claimant, until she contacted the school having received from the Claimant copies of the letters he

had sent to the parents (letter 16.10.2019 and the letter dated 24.10.2019) in regards Allegation 1. As this Allegation was dismissed by the disciplinary panel it did not proceed for determination by the appeal panel.

(ii) The Tribunal was satisfied that on the basis of what was set out in Ms Maunder's report, and on reading the communications which passed between Ms Jones and Claimant that the Respondents had a reasonable belief that the Claimant was not completing the paperwork appropriately, and that potentially there was a misconduct issue. Further, that on the basis of the reasons identified and the finding of Ms Maunder's that it was appropriate for this Allegation to proceed to be addressed at the Disciplinary Hearing.

(iii) The Claimant had addressed this Allegation in his witness statement at paragraph 127 onwards.

(iv) In summary, the Tribunal found that a fair investigation was followed by the Respondents in regard this Allegation as evidenced in the minutes of the disciplinary hearing, the panels' deliberations and in the DH decision letter. As such, held that there was no misconduct. A finding open to the Respondents as reflected in the SS Disciplinary Procedure.

**(c) <u>Allegation 3 – inappropriate communication via a whole staff email on 25 October 2019</u>**

(i) I refer to what has previously been stated and the findings made in regard to the all school email 25.10.2019 as set out in paragraphs 42, 62 and 69 above.

(ii) Applying the Burchell principles, it was not in issue that the email was sent. Further, it was not in issue that the Claimant intended to send it to all staff members in the school. Equally, it was not in issue that the Claimant sent the email to *'provoke'* a reaction. In oral evidence he stated that he wanted to write something ***'****that would bite****'*** He stated that it was something he wanted for them to *'jump at'*, '*to create a case against me'*, and as his time ***'****at the school was coming to an end he wanted to put his case before the panel of governors before he left the school because he had been repeatedly ignored****'*.**

(iii) The Tribunal referred to what the Claimant had set out within his witness statement in relation to this Allegation in particular from paragraph 147 onwards. In oral evidence, the Claimant stated that the reasons why he sent the all school email 25.10.2019 was because his complaints had been consistently '*ignored'* by the School management and/or the Respondents. The Tribunal considered that it was very important to review and take into account the history between the parties when making its determination in regard this Allegation. Further, to consider as to whether there could be any culpability on the part of the School and/ or the Respondents when considering the reasons and effectively, the motivation behind the Claimant sending the all school email 25.10.2019.

(iv) In summary, the Claimant in July 2018 invoked the resolution process ('RS1 form 22 July 2018'). The complaint was raised against Ms Stephens, Mr Wong, Ms Slade, Alison Bikram and Mr Tom Cox of HR, Mr Stacey, the independent

investigation officer in 2013/2014 and Rod Phillips, the previous Headteacher (page 913-915).

(v) In oral evidence Mr Wong stated that when he had received the 'RS1 form 22 July 2018' he passed to it to HR. He felt it was inappropriate for him to deal with as he had been named as one of the persons in the complaint. He accepted that he did not notify the Claimant of his actions either at the time or when the Claimant chased what was happening in regard his complaint. The Tribunal considered that this was somewhat short-sighted on his part and discourteous.

(vi) Nevertheless, irrespective of this, the RS1 form 22 July 2018 was passed to the Council and on the 14 January 2019, Miss Z Spencer-Biggs, the '*Service Delivery Manage – Lead HRPS'* responded requesting further information (page 920). In the Claimant's response to Ms Spencer-Biggs dated 23 January 2019, the Claimant set out his grievances and complaints (page 922) to which Ms Spencer-Biggs responded on 27 February 2019 with her findings in regard to them. Her response was self-explanatory. In short, she stated that the complaints/ grievances raised had already been addressed and dealt with through the disciplinary proceedings brought in 2014 and then 2018. She advised the Claimant of his right of appeal of her findings. Although the Claimant responded to her letter, by a letter dated 3 March 2019, he did not seek to appeal but stated that he would pursue the matter *'further up the chain'*.

(vii) The Claimant then lodged his whistleblowing claim. I do not intend to repeat what has already been set out in regard that claim but refer to what is set out at paragraphs 51 to 63 above. As previously stated, it was not considered by the Council to be a whistleblowing claim, but a complaint in regards the disciplinary proceedings in 2014 and 2018 and against HR.

(viii) There were then two further RB1 forms submitted 24 September 2019 and 25 September 2019, neither of which the Tribunal's understanding were acted upon.

(ix) As previously stated, the Tribunal sets out the history because the Claimant sought to rely upon it as justification for his reasons for sending the all school email 25.10.2019. However, having gone through the history and albeit, understanding the Claimant's clear frustration and upset that he had been subject to disciplinary proceedings in 2014 and then again in 2018 it was nevertheless difficult to understand what more, or what further answers the Claimant was searching for. The resolution process that had been commenced in July 2018 has been undertaken and completed by Ms Spencer-Biggs. If the Claimant had been unhappy with that outcome, he had a right of appeal. The Claimant did not exercise that right. He then went on to pursue the whistleblowing claim however, there again, as set out in paragraph 56 above, by September 2019 he had been advised by Mr Batchelor that it was not recognised as such.

(x) Turning to the all school email 25.10.2019, the Tribunal considered the contents of it, and the emails prior to it which were attached. In addition, the minutes of the disciplinary and appeal hearing, the minutes of both deliberation meetings of the panels, and the DH dismissal letter and AH dismissal letter. The documentation confirmed that the panels took fully into account the background history and the

reasons why in particular, the Claimant referred to the other employee within the all school email 25.10.2019.

(xi) The findings of both the disciplinary and appeal panels was that the all school email 25.10.2019 was critical of senior management in the school, all of whom would have received it. In particular, the Respondent referred to the wording within it '*below management's shallow saccharine veneer exists a callous, selective approach to who's in and who's out'.* In short, it was the Respondent's submission that it was inflammatory and condemnatory in nature.

(xii) Further the Respondent asserted that the all school email 25.10.2019 contained confidential personal information about another employee, a *'low paid vulnerable single mother'* who was easily identifiable from it and had been identified by name in the chain of emails (email dated 21 October 2019). In short, the Claimant had referred to this employee within his email without authorisation to do so and albeit, subsequent to his having sent the email he may have been in contact with her, and she did not raise an issue with this, nevertheless, at the time, he had no authority to do so.

(xiii) As previously stated, having considered all the evidence in relation to this Allegation, the Tribunal were satisfied that a fair investigation had been followed and that the mitigating factors advanced by the Claimant for the sending of the all school email 25.10.2019 were taken into account by both the disciplinary panel and ultimately, by the appeal panel. It was both panels' findings that the Claimant's conduct was gross misconduct.

(v) The Tribunal found that this finding was one that fell within the band of reasonable responses. In short, when the Claimant sent the all school email 25.10.2019 he did so, as identified to provoke disciplinary action. He knew that what he was doing was wrong, and that there would be repercussions nevertheless, he sent it. The Tribunal found that a reasonable employer faced with these same set of circumstances, taking into account what the Claimant stated was his motivation for sending the all school email 25.10.2019, would have considered the Claimant's actions to have amounted to gross misconduct and the appropriate sanction to have been summary dismissal. The Tribunal found that the finding in regard to the Claimant's conduct in relation to this Allegation in isolation, in accordance with the SS Disciplinary Procedure, was sufficient to summarily dismiss.

**(d) Allegation 4 – Disclosure of confidential personal information in breach of the General Data Protection Regulations in an email on 25 October 2019**

(i) I do not repeat what has already been stated in relation to Allegation 3. That the all school email 25.10.2019 was sent was not in dispute.

(ii) In addition to the Claimant's oral evidence in regard to this Allegation, the Tribunal referred to what the Claimant had set out within his witness statement in particular from paragraph 159 onwards.

(iii) The Tribunal noted the finding of both the disciplinary panel and appeal panel in relation to the Allegation. The finding of the disciplinary panel had been that the

Claimant's conduct met a lesser sanction, a final written warning. The appeal panel found the misconduct was gross misconduct. The Tribunal referred to the minutes of the deliberations of the panels and what was set out within the both the DH dismissal letter and the AH dismissal letter in respect of the same. In short, both panels recognised that although there was no evidence to support the fact that the Claimant had received any training on data protection nevertheless, both identified that in his role in the school and also as the trade union representative, that he would have handled personal information. The appeal panel referred to the documentation that the Claimant had access to in relation to the protection of data. It referred to the *'Confidentiality of Personal Information - Regulations'* and the '*Local Government Wales Code of Conduct'.*

(iv) In oral evidence the Claimant confirmed it was an oversight by him not to redact the name of the employee in the email dated 21 October 2019.

(v) In summary, the Tribunal having considered all the evidence in the round found that a fair investigation had been carried out by the Respondent. In short, the Claimant knew that when he sent the all school email 25.10.2019 and referred to the employee in question that he had no authorisation to do so. Further that he knew that the employee referenced in the all school email 25.10.2019 was easily identified from the information set out. Equally, although the Tribunal noted that there had been no formal data protection training, nevertheless, on the basis of the information available to the Claimant in regard to data protection and taking into account his roles and the access he would have had to personal data, the Tribunal concurred with the Respondent's finding that he would have known that what he did was a breach. As such, the Tribunal found that a reasonable employer in such circumstances would have found misconduct on the part of the Claimant.

(vi) As such the Tribunal found the appeal panel's finding of gross misconduct in light of the breach in regard to this Allegation, and the Claimant's lack of justification in respect of the same, to be a sanction that fell within the band of reasonable responses and in accordance with the SS Disciplinary Procedure.

**(e) Allegation 5 – inappropriate posting of information on FB which could bring the school into disrepute, namely a Facebook post on 30 April 2019**

(i) It was not in issue that the Claimant had posted what was set out in the Facebook post dated 30 April 2019 ('FB post'), or that his account had an *'open'* status.

(ii) The Tribunal were also satisfied that what was set out in the FB post amounted to sufficient grounds to investigate potential misconduct.

(iii) The Tribunal heard evidence, which was not refuted by the Claimant, that a google search would have identified Cathays High as the school which the Claimant identified himself as an employee within it.

(iv) The Tribunal referred to what the Claimant had set out within his witness statement in relation to this Allegation in particular from paragraph 164 onwards. In oral evidence the Claimant referred to the FB post as '*a moment'*. Significantly,

he did not deny that what he stated was either derogatory in relation to the School or disparaging of those within it, be that staff or pupils. In short, the post was a platform to generate interest for his book and in the section titled *'blurb'* he effectively set out his reasons for writing the book and its aim. Nevertheless, in part of that *'blurb'* he referred to

*'those maindy high pupils whose education has been blighted by the educational establishment's decisions of prioritising the school's image and personal ambition over there welfare……*
*All those poor, damaged, neglected and abandoned pupils from domestic Tories who have come through the gates of radii, and who, despite the dedication animal dual input of many dedicated staff, have been failed'* (page 262).

(v) In oral evidence, the Claimant stated that the FB post created *'little reaction'*.

(vi) The Tribunal noted that the panels' sanction in regard to the Allegation were different, the disciplinary panel finding that the conduct was gross misconduct, whereas the appeal panel, lesser misconduct.

(vii) In summary, the Tribunal having considered all the evidence in the round found that a fair investigation was carried out by the Respondent in regard to this Allegation. In short, despite the Claimant's contention that it was *'a moment'* and the FB post had *'little reaction'*, and albeit, as accepted by the appeal panel, that employees are entitled to their personal views nevertheless, the Claimant's criticism of the School on a public forum, as an employee of it, the Tribunal accepted the Respondent's contention that it brought the school into dispute. As such the Tribunal found that a reasonable employer in the same circumstances would have found misconduct on the part of the Claimant.

(viii) As such, the Tribunal found the appeal panel's finding of a lesser sanction on the basis of the Claimant's evidence, that is, his mitigation and their having been no identifiable personal information disclosed, or specific allegations detailed, to be a sanction open to the Respondent. As such a sanction in alignment with the SS Disciplinary Procedure.

**(f) Allegation 6 – Bringing, the school, its staff, former staff and Cardiff Council into disrepute**

(i) The subject matter of this Allegation was the book. The Claimant's evidence was that he started writing the book when he commenced his employment in 2006. To date only seven copies of the book had been published. Two of those copies he had given to two ex-school employees, and two to current employees. The Claimant stated it was from one of the current employees, that the copy of the book that the School and/or Respondents now had, had been obtained.

(ii) The Tribunal referred to what the Claimant had set out within his witness statement in relation to this Allegation, in particular, from paragraph 192 onwards. The Claimant's oral evidence was that it was never his intention to publish the book and asserted that what was contended to be a book, was not one.

(iii) The Respondents referred to the minutes of the disciplinary and appeal hearing, the minutes of both deliberation meetings, and the DH dismissal letter and the AH dismissal letter. In short, the Respondents' position was that at the disciplinary hearing the Claimant stated that he did intend to publish the book, and that the disciplinary process was to be the final chapter. Further at the appeal hearing he also stated that it was his intention to publish it.

(iv) A copy book of the book was produced at the hearing with a blank cover nevertheless, this was identified to not be the current version. The Tribunal were referred to the copies of the book in the Bundle which included the title page (page 646). The copies of the version therein clearly identified the title of the book and its author.

(v) In oral evidence the Claimant did not deny that the book was derogatory of the school, nor of staff or pupils within it. He did not deny that albeit he had anonymised individuals within it, that those individuals were identifiable from the context of the book. Further, he did not deny that albeit the number of books that had been distributed were limited, that the book was in the public domain. The Tribunal attached little weight to the Claimant's assertion that the book had been obtained *'forcefully'* from the member of staff who had it. No evidence was adduced in support of the same.

(vi) The Tribunal considered all the evidence in the round and in particular the Claimant's evidence in regard the book, the excerpts from the book as set out in the Appendix to Ms Maunder's report, the copies of the pages of the book provided electronically, the PO's report and the identified extracts therein, the minutes of the disciplinary and appeal hearing, the minutes of both deliberation meetings and the letters of dismissal for both hearings.

(vii) In summary, the Tribunal having considered all the evidence in the round found that a fair investigation had been undertaken by the Respondent and that a reasonable employer faced with the same set of circumstances would have found misconduct on the part of the Claimant. Albeit the Claimant stated in oral evidence that he had no intention to publish the book nevertheless, on the date of both hearings, he indicated, it was his intention to do so. The Tribunal had no reason to doubt the truth of the account as set out in the minutes of the meetings, deliberations, and dismissal letters. The Claimant did not deny that the book was derogatory and critical of the school and as such, if published it would bring the school into disrepute and those within it.

(viii) As such, the Tribunal found that the finding of gross misconduct in regard the Allegation was a sanction that fell within the band of reasonable responses and one that was in alignment with the SS Disciplinary Procedure.

**(g) Allegation 7 - breach of trust and confidence between the employee and the school and Allegation 8 – specified conduct which is incompatible with the ethos and the precepts of the school as set out in the schools perspective, staff handbook and school policies and procedures.**

(i) It was not in issue that Allegations 7 and 8 flowed from the previous Allegations. The Respondent referred to the minutes of the disciplinary and appeal hearing, the minutes of both deliberation meetings and the letters of dismissal for both hearings in regard to same. In short, reference was made to the Claimant's contract of employment and the updated contract of employment, the *'Local Government Wales Code of Conduct'* and the Council's document '*Undertaking to Maintain Confidentiality'*. The Respondent's assertion was that the Claimant had breached his duty of confidentiality. Similarly, that the Claimant's conduct was contrary to '*the ethos and the precepts of the school'* as identified within the School's prospectus and handbook. The decision of the appeal panel referred to specifically Allegations 1,3,4,5 and 6.

(ii) It was both the disciplinary and the appeal panels' findings that the Claimant's conduct amounted to gross misconduct in regard both these Allegations.

(iii) The Tribunal referred to what the Claimant had set out within his witness statement in relation to these Allegations in particular from paragraph 192 onwards (which considered also Allegation 6) to paragraph 210. In oral evidence the Claimant stated that the breach of trust and confidence was on the part of the Respondent, not himself. Further, as previously stated when considering Allegation 6, the Claimant did not deny that was set out in his book was derogatory, or that his sending of either of the emails, the subject of Allegations 1 and 3 was wrong or inappropriate.

(iv) The ethos and precepts of the school were clearly set out in the opening paragraphs of both the School's prospectus and handbook. The Tribunal do not repeat all that was set out therein however, in its definition of the School's ethos it was defined as *'one of inclusion, diversity and opportunity for all, were mutual respect, collaboration, openness, trust and empathy prevail'*.

(vi) In summary, the Tribunal having considered all the evidence in the round and taken into account the Claimant's evidence and his mitigation as to his reasons for his actions/conduct where relevant, nevertheless found, without repeating the evidence and the findings made, that a fair investigation in regard these two Allegations was carried out by the Respondents. Further that the Respondents' findings that the Claimant's conduct was contrary to the School's ethos and precepts, and that there was a breach of trust and confidence as a result of the same, were findings that were open to the Respondent. Equally that the Claimant's conduct as such was gross misconduct was a finding that fell within the band of reasonable responses and in accordance with the SS Disciplinary Procedure.

85. As such, in regard to the eight allegations of misconduct the Tribunal found that the findings of gross misconduct of the appeal panel were findings that fell within the band of reasonable responses, and findings that a reasonable employer faced with those set of facts could have made. Further, the Tribunal found that in regard each finding of gross misconduct, that that finding in isolation would have been sufficient to summarily dismiss.

**Conclusion**

86. For the reasons set out, the Claimant’s claim is dismissed in its entirety.

Tribunal Judge MM Thomas

Date 18 November 2022

JUDGMENT SENT TO THE PARTIES ON 21 November 2022

FOR THE TRIBUNAL OFFICE Mr N Roche