EMPLOYMENT TRIBUNALS

Claimant: **Mr D Bagnall**

Respondent: **Bury College**

Heard at: **Manchester** (remotely, by video)

On: **6, 7, 8 May 2025**

Before: **Employment Judge Kenward (sitting alone)**

Representation
Claimant: **James Bagnall (brother)**
Respondent: **Mr R Allen (Counsel)**

RESERVED JUDGMENT

(1) The complaint of unfair dismissal contrary to Employment Rights Act 1996 sections 98 and 111 is well-founded.
(2) Any financial remedy for unfair dismissal will be reduced on the basis that:
(a) the conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce any basic award for unfair dismissal by 90%;
(b) any compensatory award should be reduced by 90% to reflect the likelihood that the Claimant would still have been dismissed had a reasonable investigation and procedure been followed;
(c) any compensatory award should be subject to an increase of 10% by reason of the Respondent having unreasonably failed to comply with the ACAS Code of Practice on disciplinary procedures;
(d) it would not be just and equitable to make a further and separate reduction to any compensatory award to take account of the extent to which the Claimant's conduct contributed to his dismissal.

REASONS

Introduction

1. This case involves allegations regarding the use of a derogatory term in the course of a maths lesson. The subsequent disciplinary proceedings resulted in the dismissal of the Claimant who has brought these Employment Tribunal proceedings complaining of unfair dismissal. In making findings of fact, in so far as relevant, as to what happened, it will be necessary to make reference to the derogatory term in issue

Background and proceedings

2. In order to be able to commence proceedings, on 15 January 2024, the Claimant complied with the requirement to notify ACAS of his prospective Claim for the purposes of early conciliation and an early conciliation certificate was issued on 5 February 2024. The ET1 Form of Claim was received by the Tribunal on 2 March 2024.

3. At section 8.1 of the ET1 Form of Claim, the Claimant ticked the applicable boxes in respect of bringing complaints as to unfair dismissal, disability discrimination and sex discrimination.

4. At section 8.2 of the ET1 Form of Claim, the Claimant referred to the details of his Claim as being set out in attached Grounds of Claim. This document provided a lengthy narrative. This document contains the Claimant's version of events regarding an incident on 8 September 2023 which had resulted in the disciplinary proceedings leading to his dismissal. He had been taking a class in which a student (student A), who he had also taught the previous year, had been misbehaving. The Claimant's case is that he asked him "*what would your friends say?*". Student A replied, "*you're a retard*" (meaning, in the context of the conversation, that this is what his friends would have said to him), which the Claimant then queried by saying "*you're a retard?*". In other words, his case was that he had not called the student a "*retard*", but had queried what had been said by student A.

5. After the Respondent had filed detailed Grounds of Resistance, a preliminary hearing took place for case management purposes before Employment Judge Shergill on 16 September 2024. A further preliminary hearing took place before Employment Judge Malik on 29 January 2025 which resulted in a Judgment dismissing the complaint of disability discrimination on withdrawal by the Claimant and striking out the complaint of sex discrimination as having no reasonable respect of success.

6. As ordered by Employment Judge Malik, the parties subsequently provided and agreed list of issues in respect of the complaint of unfair dismissal. The list of issues identifies the standard questions which fall to be considered by an Employment Tribunal in an unfair dismissal case with an additional paragraph added in the terms set out below.

"*If the Tribunal decide that the reason or principal reason for dismissal did not meet the charge put to the Claimant, then the dismissal was for something that had not been charged i.e. for using the word in a way that was not 'calling a student with a known learning disability a retard'*".

Evidence

7. In terms of documentary evidence, the Tribunal was provided with a Bundle of 957 pages.

8. In terms of witness evidence, the Tribunal had Statements of Evidence from the Claimant, Sarah Walton (Assistant Principal) who conducted the investigation, Becky Tootell (Deputy Principal) who conducted the disciplinary hearing, and Charlie Deane (College Principal) who conducted the appeal hearing. The Tribunal also heard oral evidence from these witnesses.

Findings of fact

9. The Claimant commenced employment with the Respondent as a lecturer on 1 February 2015. He previously worked for the Respondent as an agency lecturer. He remained employed by the Respondent until his dismissal on the grounds of gross misconduct with effect from 17 October 2023. At the time of his dismissal, he was employed as a lecturer in GCSE maths.

10. On 8 September 2023, at the beginning of the new academic year, the Respondent was teaching a new maths class for the first time. The lesson was being treated as an induction lesson.

11. One of the students who attended the lesson, student B, subsequently expressed dissatisfaction as to the lesson. She was brought to see Linda Lyons, another GCSE maths lecturer, on the helpdesk at 11.03 am. 15 minutes later, Linda Lyons sent an e-mail to Shehla Ijaz, the Assistant Curriculum Manager Maths, describing student B as having been "*very irate and upset*". It was stated that student B "*was not happy with her tutor as he had made slurs to the whole class calling them retards*". It was stated that student B "*questioned his ability to teach as he was so old*" with it being added that these was "*her words not mine*". The e-mail further stated that "*I advised her to write down how she felt and to see you*".

12. When later interviewed about this exchange, Linda Lyons stated that "*I then wrote everything down*", which appears to be referring to having made a written record of the conversation immediately after the conversation, although it is not clear whether she was referring to the e-mail that she sent subsequently or was referring to having made a separate note before sending the e-mail. Certainly, no other note seems to have been produced. Clearly her e-mail was being sent within a few minutes of the conversation taking place.

13. Student B duly went to see Shehla Ijaz on the same day. There does not appear to be a contemporaneous record of that meeting, and Shehla Ijaz does not seem to have made a note or sent an e-mail about the meeting afterwards. She was not interviewed as part of the investigation. Much later, shortly prior to the

disciplinary hearing, she provided a statement at the request of the Claimant. This recorded that student B was saying that she did not want to have lessons with the Claimant. Student B had taken issue with the Claimant's approach to the induction lesson and the Claimant had suggested that she was being rude in doing so. She told Shehla Ijaz that "*she is never going back to that class because the tutor called her a retard in front of the whole class, she has a disabled sister and was offended by this term*". Obviously, this is a different version of events provided by student B from that recorded in the e-mail from Linda Lyons.

14. Shehla Ijaz said that she would ask for an explanation from the Claimant. When she did so, his account was that one of the students (student A), who he had taught the previous year, was messing about in the class and the Claimant had asked "*the learner to behave and said what would you call yourself if you are behaving like that*". In response to the Claimant's question, student A had said "*I would be a retard*". Then the Claimant said, "*are you calling yourself retard?*" Shehla Ijaz also said that the Claimant had added that he was "*very sorry if* (student B) *felt offended by this but I had no intent to hurt her feeling*" and "*I was simply repeating the word and I shouldn't have done that*".

15. This is quite a detailed version of events, apparently provided about a month later. Obviously, Shehla Ijaz was not interviewed, either as part of the original investigation or as part of the disciplinary process, so it was not established whether this was based on memory or assisted by any kind of note or communication. The extent of any communication by or on behalf of the Claimant in seeking this statement from Shehla Ijaz was not in evidence either.

16. Having qualified any comments that might be made regarding the potential significance of this evidence, the point can be made that it appears to be a version of events given by the Claimant very soon after the incident at a point in time when he possibly had not had the opportunity to, or had been alerted to, the need to construct a narrative which suited his best interest. It is consistent with his own case that he simply repeated the language used by student A and / or did so by way of a rhetorical question or querying what had been said by student A. It is also significant, since the extent and sincerity of any apology or self-reflection or accountability appeared to become an issue in the latter disciplinary process, that the Claimant seems to have immediately made it clear that he was sorry and recognised that, even on his version of events, what had been said was not acceptable.

17. In her statement, Shehla Ijaz said that she then changed student B's Maths group and arranged another meeting with her. Her statement says that , in this meeting "*I discussed the matter and also shared Doug's response to her*" and "*told her that Doug is very sorry that you were offended by what happened in the class*". Again, in the absence of Sheila Ijaz being interviewed, or any further investigation, it is not clear whether this further meeting was recorded in any way or the extent to which the matter was discussed and whether this involved any further relevant description of events during the course of the incident. However, Shehla Ijaz states that student B was content that the matter had been resolved and also subsequently referred to her "*mum being thankful to me as well*".

18. The statement of Shehla Ijaz ended by stating that, at "*this stage I thought, the matter was closed*".

19. The Claimant has sought to rely upon this evidence as being to the effect that, insofar as a complaint had been made, it had been resolved to the satisfaction of the complainant, and in so far as there was any issue regarding his conduct, it had been dealt with informally, with the matter closed, so that it should not have been open to the Respondent to decide to deal with the matter further.

20. However, whilst it is clear that Shehla Ijaz had dealt with the matter informally, insofar as she considered it necessary to do so at the time and would appear to have decided that no further action was necessary, she had not formally closed the matter or recorded this to be the case.

21. Although the Claimant seems to have reported to Shehla Ijaz on a day-to-day basis, his line manager was Victoria Fell, the Faculty Director and Strategic Lead for English and Maths, to whom Shehla Ijaz also reported. In any event, the Respondent's position was that responsibility for dealing with any safeguarding issues ultimately rested with the College's Designated Safeguarding Lead who was Sarah Walton, the Respondent's Assistant Principal for Personal Development.

22. However, the matter had not been resolved to the satisfaction of student B's mother who wrote to the Respondent at 1.21 pm on Monday, 11 September 2023 by way of an e-mail sent to Stuart Marsden, who had been assigned as student B's personal tutor at the College. The e-mail sent on 11 September 2023 began by thanking Stuart Marsden for "*seeing me the other day, regarding maths and* (student B's) *experience*". There does not appear to be any other written record of this meeting. At any rate, no evidence appears to have been gathered regarding this meeting, albeit any discussion of the incident was second-hand and presumably confirmed in the e-mail of 11 September 2023.

23. The purpose of the e-mail seems to have been to get student A assigned to a different Maths tutor so the e-mail set out various causes of supposed dissatisfaction with the Claimant, with the specific incident described on the basis that student B "*was upset with her experience, as her tutor was discriminative towards a child in class, saying his breathing was too noisy, calling him retarded, which upset* (student B) *and myself upon hearing this unprofessional and disrespectful behaviour*", with it being explained that student B's "*younger sister is disabled and we find these words such as retarded, disrespectful to all, regardless if they have a disability or not*". It was stated that the Claimant "*continued to make unprofessional comments to the child in the class*". It was further stated that the Claimant was disrespectful towards student B as well with "*comments such as sloppy sod*", and "*saying she was miserable because* (she) *asked if she could do some learning, as he was telling her about his life story and friends in the fire service*". It was also stated that the Claimant informed student B that "*he had short term memory loss too, which* (student B) *is concerned how he can remember and teach GCSE maths*".

24. The e-mail concluded by stating that "*I would appreciate if College could look into providing her with a different maths tutor, one who is respectful and doesn't use words such as retarded please*".

25. The point can obviously be made that the version of events provided in the e-mail, albeit second-hand but apparently from student B, amounted to a third version of events from student B with all three versions of events being different in material respects regarding the key issue as to the alleged use of the word "*retard*". The first version, given to Linda Lyons, had been that the whole class had been called this. The second version, given to Shehla Ijaz, had been that it was student B who was specifically called this. The third version, given to Stuart Marsden, via student B's mother, was that it had been a male student who had been called this (which might obviously be student A, although the actual identity of this other student had not been confirmed at this point in time).

26. Student B does not seem to have provided a written version of events, despite having been asked to do so by Linda Lyons, and there is no evidence that either of the first two versions of events had been recorded by the member of staff to whom they were given (albeit Linda Lyons described the first version of events in an e-mail sent 15 minutes later), so clearly there would have been scope for misunderstanding the allegation which was being made. The differences between these various versions of events were never properly explored with student B.

27. Later, on 11 September 2023, Stuart Marsden forwarded the parental complaint to Ian Allonby, the College's Pastoral Manager. The following morning, Ian Allonby forwarded the complaint to Becky Tootell, the Deputy Principal, Curriculum and Quality. She forwarded the complaint to Sarah Walton and Danny Rushton, Director of HR. The following day, 13 September 2023, Danny Rushton advised that "*we need to start starting by talking to*" student B before talking to the Claimant.

28. On 14 September 2023, a meeting was held between student B and Marc McMahon, the Prevent and Safeguarding Manager with Alex Jardine from HR taking notes. The interview lasted 16 minutes. The note of the interview does not record any issue as to the need for confidentiality having been raised with student B. The interview began with Marc McMahon asking student B "*really quickly can you tell us what happened*" in "*your own words*" and "*I'll take on board what you said on the stairs*". It is unclear from the note, or any evidence as to the subsequent investigation, what had been said by student B, on the stairs, prior to the meeting, or the reason for this needing to be taken on board. In the interview, student B described various aspects of the lesson which she found to be unsatisfactory. This included the Claimant referring to having a "*short-term memory*", to which she commented "*I can't have a teacher if he has a short-term memory*" and further explained that "*there are people complaining about him, it's like … he was forgetting what he said he was saying and repeating again and again*". This was an induction session, and the Claimant spent time getting each student to introduce themselves by saying "*what they wanted to be*" and student B was concerned that this was delaying the start of the lesson, and when she raised this the Claimant said, "*you're a right miserable sod you aren't you*". In the course of the discussion, another student, student

C, said they were in the "*Biscuit Class*", so that "*I had a laugh with her*", and the Claimant "*said again that I was a miserable sod or sloppy sod*". The record of the interview goes on to state that student B said that the Claimant "*was talking to someone behind me he called someone a retard, and another student said you can't use that*". This appears to have been a different student from student A, with a further student apparently having heard any alleged derogatory term sufficiently clearly to take issue with it. The identity of these two students does not seem to have been established or any attempt made to interview them.

29. The note of student B's account then says that there "*was a boy at the front of the class, who … might have additional needs and he said, 'you're a retard to* (sic)' *I then text my mum*". In so far as any text message sent by student B to her mother during the class may have represented a contemporaneous communication or comment about the incident, that evidence does not seem to have been sought.

30. Student B then summed up her dissatisfaction by saying that he "*has short term memory, he has used slur words and then also called two students retards*". She explained her reasons for being offended at the word that had been used.

31. Arguably, this amounted to a fourth different version of events provided by student B. None of the different versions of events were ever explored with student B to establish which was the correct version of events. In the course of this interview, no questions were asked of student B about the incident itself other than the initial question as to what had happened and a question which was asked as to the identity of student C who had been described as "*complaining to me that she didn't like the word he had used*".

32. Student C was also interviewed by Marc McMahon on the following day, Friday 15 September 2023. Again, she was asked to describe what had happened during the lesson. She described the introductory process to the point where the Claimant got to student A and "*called him a retard*". No description was given as to any circumstances or discussion which immediately preceded this alleged derogatory remark. However, the record of the interview noted that the use of this word prompted student B, who was next to student C, to say that "*you're not allowed to say that*" to which the Claimant replied, "*I am a teacher and I can say what I want*". Student C then added that the Claimant "*also said to the boy behind us, called him retarded*". No further questions about the incident were asked, save seeking confirmation as to the name of student A. Student C suggested that the "*boy that he called a retard … wasn't really offended*", although student B had been offended.

33. It can be seen that the version of events given by student C was similar to the version of events given by student B when interviewed by Marc McMahon, although the Claimant makes the obvious point that there had been the opportunity for the two students to discuss the matter between the two interviews

34. Linda Lyons was also interviewed by Marc McMahon on 18 September 2023. She confirmed the complaint made to her by student B on 8 September 2023, but the note of her interview does not involve her giving any details of the

incident reported by student B (other than the word used and that the use of the word had upset student B).

35. In the interview, Linda Lyons also confirmed that student C had come to see her, although this was "*for a different reason*". However, Linda Lyons had taken the opportunity to ask her "*if anything happened in the class*" with the record of the interview recording that Linda Lyons said that student C "*confirmed that there was a bit of commotion as a lad had been calling out a Student B, as Student B was upset due to the word retard had been used in the class*", which is not a description of events which is easy to follow. However, the note of the interview then recorded Linda Lyons saying that "*2 people have told me that the word retard has been used*", which was presumably a reference to student B and student C.

36. A short while after the interview with Linda Lyons, Danny Rushton e-mailed Sarah Walton some attachments apparently relating to a comment made by the Claimant during a sexual harassment training session which had allegedly upset members of the GCSE English team although he noted that "*I'm not sure about the actual comments he made*" as well as noting that the Claimant "*apologised and it went no further*". Danny Rushton was suggesting that it was "*worth talking to him about this*" as "*it does suggest there is some previous*".

37. From the three attachments attached to this e-mail, it can be seen that Victoria Fell had just forwarded three e-mail trails to Danny Rushton which dated from November 2022. The day after the sexual harassment training, Vanessa Nelson, a GCSE English lecturer, had e-mailed Victoria Fell saying that she was uncomfortable and concerned "*about a lot of comments that were made in that meeting*". The e-mail did not describe the comments or who had made them. The next e-mail showed that Victoria Fell had arranged a catch-up meeting later that day with the Claimant for the purposes of a "*quick chat about the meeting last night*". Following the meeting, the Claimant had e-mailed Victoria Fell to say that he would endeavour to speak to the English team on the Monday morning. There was then an e-mail sent to Victoria Fell by Amy Halliday, Team Leader - Functional Skills (English), from which it is clear that a conversation had taken place that morning in which the Claimant had "*explained his point of view re the training last week*" with Vanessa Nelson and Amy Halliday, with the latter e-mailing that "*I told him we were shocked but it must have taken guts to come in and face the music and he explained and said sorry*". None of these attachments actually detailed the comments apparently made which had caused Vanessa Nelson to feel uncomfortable and had caused the Claimant to apologise. There is no suggestion that his apology was inadequate or insufficient.

38. On 19 September 2023, an investigation meeting was conducted with the Claimant by Sarah Walton as the College's Designated Safeguarding Lead. Alex Jardine from HR was in attendance to take a note. It is not clear to what extent anything about the complaint had already been communicated to the Claimant as part of the investigatory process, but when told that there had been a couple of complaints from students and having been given the name of student B, the Claimant was clearly able to work out that it was the same incident which he had discussed with Shehla Ijaz.

39. The Claimant was asked for his recollection and gave the version of events set out below.

    "… *one of the learners who was (student A) who I had last year, he is always talkative, talks rubbish, last year, his colleagues/ friends used to refer to him as retard, that's what they called him, I would ask him what would your friends say? He would say "shut up retard" … it was how his friends referred to him, I would ask him if he was being talkative, I would ask what would your friends say? In this class there is only one person who was in the class last year, I can't remember who said it first, but I definitely said retard. He was messing about, and I can't remember if I said it or I repeated what he said*".

40. The Claimant was later asked about the complaint of student B and "*what did Shehla talk to you about / or say about?*". His reply was as below.

    "*I can't remember. I can't remember if Student B said that I called her a retard, which I never did, but I have been made aware that she has a disabled sibling. I have told Shehla I will apologise to her, I have not had the chance to speak to her to explain the historical use of the word with (student A). I had forgotten we were in a new class*".

41. The Claimant was then asked about any previous use of the word and said that "*it's not something that I would normally* use", and when asked if he had used the word with student A the previous year said "*no, I never called him, his friends were saying "shut up you retard" … it sounds bad … it wasn't nasty, they were joking*"

42. At this point, Sarah Walton suggested that due to the derogatory nature of the word, "*under the equality, diversity and inclusion policy it would be deemed as gross misconduct … allowing that language to go on in the classroom*". The reply of the Claimant recorded in the notes appears to be ambiguous in that he is recorded as having said, "*I didn't allow it, I did allow it as I didn't tell them to stop and then I inferred to it*". The Claimant disputed the accuracy of this part of the note when he was provided with a copy of the notes. The amendment that he was making was not entirely clear. His amended version possibly read as "*I didn't allow it, I told them to stop and then I inferred it*", but this was not entirely clear as there was also a line through the word "*told*". There remained uncertainty as to the correct or agreed version of the notes. It was not entirely clear what the Claimant meant by "*I inferred it*", but the most likely interpretation would be that he was accepting that word in issue could be inferred from the Claimant having said "*what would your friends say?*"

43. The Claimant had become concerned about the direction of travel which the meeting was taking as shortly afterwards he said, "*I think what we are going to do is stop now, so I can have union representation*" and "*I am stopping it here*". Shortly before this, the Claimant had been asked as to whether student A had a learning disability and had replied that "*I don't know, I do know he needs blue paper*".

44. In closing the meeting, Sarah Walton said that it had been "*an initial fact finding investigation meeting*" and that she was going to consider the information obtained so far and possibly send it to the Local Authority Designated Officer (LADO) for advice, following which there might be a "*fuller investigation*".

45. Following the meeting, the Claimant was formally suspended, by Tracy Pullein, the Vice Principal – Finance & Corporate Resources. The notes of the suspension meeting record that the Claimant was told "*we are going to place you on suspension without prejudice to pay as you called a student with a recognised learning disability a retard, which has caused offence*". The Claimant was told that he would be invited to "*a further investigation meeting*".

46. The LADO referral was made on the same day, 19 September 2023. Sarah Walton provided the information obtained from the interviews which had taken place. In completing the referral form she also provided the information that "*I called Student A who has left the College and is now working I asked him about whether teacher had called him a retard he said yes but it was joke and he would not say anything more I have tried to contact both parents but no response on the telephone numbers*". This had been recorded in an e-mail sent to Alex Jardine on 19 September 2023 which stated, "*I asked if he had called him a retard he said he did it was a joke he was not offended and he liked Doug*" and "*I asked him about last year and he said he didn't want to say any more*".

47. A question on the referral form as to "*historic allegations or concerns in relations* (sic) *to the member of staff*" was answered in the affirmative with reference being made to "*a report that during training for staff on the Colleges Zero Tolerance approach to sexual harassment and sexual violence, the teacher made comments that offended several members of staff*". This was referring to the matter which had been dealt with by Victoria Fell, but no detail as to the comments was given.

48. The advice given by the LADO was as set out below.

    "*So it is right that you have referred the matter to me but given the potential victim child is not raising the issue at this time and no actual harm has been caused to a child, I feel this is a matter (if no police involved) that you can deal with to an outcome as you see fit and let me know that outcome. This is especially so given there is some previous issues around DB's conduct towards members of staff. If College decides to dismiss the staff member for these conduct breaches it "may" be then that I would review the staff members suitability to work with children but this would depend on what it says in their dismissal letter*".

49. The LADO advised the Respondent to check "*in with parents/children to see if they want to have matter referred to police*", and otherwise the Respondent should deal with it, which would include obtaining "*any accounts that you can for the moment to assist you in your internal matter*".

50. On 27 September 2023, Sarah Walton e-mailed Alex Jardine to say that she had managed to get hold of student A's father who was in Tenerife and who "*said he was not concerned about this as he felt the context was banter*".

51. Alex Jardine then e-mailed back as to "*next steps*" other than speaking again to the Claimant and doubting "*if there is anyone else left to speak to in relation to the remark being made*". The e-mail did suggest talking to Shehla Ijaz "*to find out what she did when the allegation was raised with her, but that would be a separate conversation – as it would be more to do with Management training*".

52. The Claimant was invited to a further meeting on 27 September and replied asking for the notes from the previous meeting and stating, "*I've been thinking about some of the comments made by Sarah and, upon reflection, find that I agree with her*".

53. On 27 September 2023, the further investigation meeting with the Claimant was conducted by Sarah Walton. At the beginning of the meeting, the Claimant read a prepared statement in which he "*sincerely apologised for the offence that I have caused*" and said that he had "*no intention to cause offence*". He stated that "*I understand now using the "R" word can have a negative impact even to those to whom it was not directed*". He continued that using "*the "R" word, or any other derogatory word, in a classroom environment is not something I am in the habit of doing*" and to ensure that "*this never happens again*", he had "*removed the "R" word from my vocabulary*".

54. After the statement had been read, Sarah Walton originally said that "*I'm not sure if I have anything else to ask*". After some further discussion she asked, "*just for my records, when this incident happened, you used the R word this year*" to which the Claimant replied ,"*I said to Student A this year, what would your friends say?*" The Claimant stated that student A "*said it and I repeated it, and I didn't realise at the time, I didn't realise the impact on the word*". It can be seen that the Claimant's recollection had seemingly improved from the first investigation meeting at which he was unable to remember "*who said it first" or "if I said it or I repeated what he said*", to the position where he was saying that student A used the word and the Claimant had simply repeated it.

55. Sarah Walton asked further "*to be clear, in relation to last year, when they said it …* (did) *you ever* (use) *the word last year?*" The Claimant replied "*no, I would put a stop to it, but when Student A was being disruptive I would say "what would your friends say?"*"

56. Sarah Walton also asked the Claimant about whether there had "*been any other occasions where you have said something that has caused offence?*" When the Claimant answered in the negative, she referred to the zero-tolerance sexual harassment training which had taken place, but the subsequent discussion in the investigation meeting did not really establish what had been said or that the Claimant accepted that he had said anything which had given rise to any need to apologise.

57. The meeting ended with Sarah Walton stating that "*I will write a report* (and) *sent it to HR with my recommendations*".

58. The resultant report gave the summary of findings as being that "*Doug confirmed on 19th September, that he has called a student … with a known learning disability, "a retard"*" which "*has caused offence to … another student, and their parent*". This seemed to suggest that there was certainty as to the extent of any admission made by the Claimant, which was not the case. The version of events put forward by the Claimant at the second investigation meeting was that he had simply repeated the word used by student A, with the Claimant's case being that this did not amount to calling the student a "*retard*". The report further stated that "*whilst Doug has intervened when other students in the class (have) referred to* (student A) *as a retard he has then repeatedly asked (student A) "what would your friends say?"*". It was also stated that the Claimant had apologised for the use of the word with reference being made to the statement provided by the Claimant.

59. The report contained no evidence as the "*known learning disability*" of student A, or the basis upon which it was alleged to have been known to the Claimant, beyond the notes of the discussion of the issue in the second investigation meeting.

60. The section of the report setting out the conclusions and recommendation was in the terms set out below.

    "*Based on the information available at the time of concluding the investigation I am recommending a disciplinary hearing to consider disciplinary action up to and including dismissal. At the hearing, the chair should consider the apology and written statement from Doug. The chair should also consider previous concerns around offensive comments made to colleagues in November 2022*".

61. By letter dated 4 October 2023, the Claimant was invited to a disciplinary hearing to "*consider disciplinary action against you on the grounds of potential misconduct*" with the disciplinary case to be answered being set out in the terms set out below.

    "*The issues to be explored are linked to you calling a student with a known learning disability a retard and the inappropriate comment made during zero tolerance sexual harassment training with colleagues which has led to:*

    1. Breach of the Code of Conduct

    Treat everyone with dignity, building relationships rooted in mutual respect, and at all times observing proper boundaries appropriate to a professional position." "Staff are required to maintain the highest standards of personal and professional conduct and integrity at all times and to be courteous and considerate with any student and colleagues – they must always be treated with dignity and respect"

    2. Breach of the Prevention of Harassment and Bullying Policy /"Harassment and bullying can take many forms which can include offensive remarks or jokes, offensive remarks about a person's disability"

3. Bringing into question your professional judgement.

The hearing may result in:

• *Written Warning*

• *Final Written Warning*

• *Dismissal*".

62. The letter enclosed (as attachments to the covering e-mail) the Code of Conduct, Disciplinary Policy, Prevention of Harassment and Bullying policy and "*Investigation & Suspension meeting notes*" (in other words, the notes of the three meetings attended by the Claimant).

63. The Claimant replied to the letter requesting, in relation to the allegation of the comments made to student A, copies of the documents set out below.

"1. Copies of the student complaint(s)
2. Copies of any investigation/meeting notes with the complainant
3. Copies of interviews with any witness
4. Copies of statements made by any witness
5. Copies of any other investigation notes relating to the complaint
6. Copies of any communications, from the College, informing me that the student in question has a known learning disability".

64. The Claimant also requested sight of any evidence as to the November 2022 incident. Although this incident had now made its way onto the disciplinary charge sheet, no evidence had been disclosed as to the allegation.

65. In a subsequent e-mail, the Claimant requested provision of "*the advice given to the College by LADO, and the confirmation from LADO that an appropriate investigation was carried out in this instance*".

66. Alex Jardine subsequently provided notes of the interviews with students B and C and the e-mail from the mother of student B. In relation to the November 2022 incident, the only evidence provided was the exchange of e-mails from the incident which did not really provide any detail or description as to the incident. In dealing with the request for the LADO referral, Alex Jardine stated that "*we are not prepared to share this information at this stage, I can confirm that LADO have advised us to follow our own internal procedures*". It is to be noted that the LADO referral contained evidence which the Claimant did not have as to the incident with student A, in particular the comments obtained from student A.

67. The Claimant had provided proposed amendments to the non-verbatim notes of the investigation meeting on 19 September 2023. Only some of the proposed amendments were agreed and a revised set of the notes was produced as part of the evidence pack for the disciplinary hearing. However, the consequence was that the note of this investigation meeting effectively remained a disputed note so that the extent of any admissions made by the Claimant was in dispute.

68. On 12 October 2023, a disciplinary hearing with the Claimant was conducted by Becky Tootell, with Alex Jardine present as an HR representative and note taker. The Claimant attended with a union representative, Adnaan Abdulla.

69. At the beginning of the disciplinary hearing the Claimant made it clear that he wanted to read out a prepared statement. He stated that, "*I've taken some advice and I know it might not be well*". He also stated that, "*I'm not going to be taking any questions during or afterwards*" although he qualified this on the basis that he was not going to answer questions about the statement but would answer other questions, depending on the questions.

70. The Claimant duly read out the statement. He was not so much setting out his version of events as setting out various arguments in relation to the disciplinary case. His case was that "*I used the word while repeating it as spoken by someone else*", and as such this should be considered an acceptable use of the word. The Claimant suggested that the matters raised by student B or her mother should have been dealt with under the Respondent's complaints policy rather than the Respondent's disciplinary policy. The Claimant took issue with the limited extent to which the College had sought to interview students who had been present and questioned the reliability of those who had been interviewed. One point he made was that it would amount to sex discrimination to discipline him for having used the word "*retard*" when it had been used on a number of occasions by female members of staff over the course of the subsequent investigation and disciplinary process. This was to ignore the very different circumstances in which the word needed to be used as part of an investigation into its alleged unacceptable use. Another point that he made was that student B had referred to the Claimant having memory issues with it being suggested that memory loss amounted to a disability under the Equality Act 2010 which the Respondent had breached by failing to take this into account. This was similarly a misconceived point given that the Claimant was to acknowledge that he was not seeking to suggest that he actually had such a disability. It arose out of the other comments made by student B about the class which he had been taking. In addition to raising these issues of alleged discrimination, the Claimant also made a number of legal points in relation to unfair dismissal and effectively threatened legal proceedings in the Employment Tribunal.

71. In the course of the disciplinary hearing, the Claimant was asked about the apology which he had appeared to give during the second investigation meeting by reference to the statement which had provided on that occasion. He insisted that this apology had been sincere.

72. The notes of the disciplinary hearing referred to the Claimant being asked about his use of the word in issue with the Claimant insisting that, on the occasion in issue, he had been "*only repeating the word in this class*". He was then asked about whether he had used word in class over the last year and the answer recorded was "*yes that and others, I would say things like "what would your friend say" when he was messing about*". The Claimant was asked as to the "*thinking behind that*" and explained that "*it always made him behave, made him think*", although he was recorded as having accepted that "*I know it sounds bad*". There was then an exchange which is recorded in the notes as set out below.

"*BT what impact do you think it might have.*
DB he would always behave afterwards.
BT that is at odds of your statement, as the use of the word has an impact – a negative impact.
DB the first time I did it, I said to him afterwards I said I didn't want to cause offence. I apologised to him. He said he wasn't bothered, and that is why I kept going.
BT so you used it in multiple occasions in multiple lessons?
DB yes
BT the first time you used it you knew it was wrong; you apologised and you continued to use it afterwards?
DB yes. There was never any malicious intent".

73. There was a further exchange in the terms set out below.

"*DB I know it can be hard to see that, there was never any intent to offend or upset and he accepted it and said that he wasn't offended or upset by it. I felt comfortable to use because he wasn't going to be upset by it. I said it to keep him under control….*
BT so why was this ok
DB not something that it is ok, it's not something I do all the time, it was one learner, it was a phrase that worked so I could continue teaching, it was something that I could use to continue teaching. I can see now Sarah's view that by using the word could have been me reinforcing the word, it was not the intention at the time. There was no intent to embarrass. It was used to stop the disruption in the class so we could carry on, I have not done it with anyone else. We got on so well Student A and I. He would say things to me.
BT can you understand that people witness to that word would be offended …. I'm also offended by it, it's an offensive word….
DB I appreciate the severity of it. It's not something I called him, I never ever used the word, I never called him that word
BT you never called him that word?
DB I repeated the word. I'd asked what would your friends say and he would say "you're a retard" and I would repeat "you're a retard".
BT so you called… him the R word?
DB no I repeated it".

74. The Claimant expressed regret in that he stated that if "*I could turn back time I wouldn't go down that route*".

75. The part of the disciplinary case regarding any comments made by the Claimant during zero tolerance sexual harassment training the previous year was not discussed during the disciplinary hearing. Becky Tootell had taken the decision to focus on the core issue of calling a student a "*retard*". Thus, in her Statement of Evidence, she states that she had made the decision to disregard the second issue although she does also state that it was "*to be dealt with on a separate occasion by different senior manager if necessary*". Her Statement seeks to

suggests that it was not "*an influencing factor into the ultimate decision regarding his continuing employment*".

76. On 17 October 2023, Becky Tootell wrote to the Claimant with an outcome letter which also attached the notes of the disciplinary meeting.

77. The letter began by stating that "*I write to confirm the outcome of the disciplinary hearing held on Thursday 12th October 2023 regarding the allegation of your calling a student a 'Retard'*". This was a simplified version of the allegation which had appeared in the letter convening the disciplinary hearing which had referred to the alleged conduct as being "*calling a student with a known learning disability a retard*". The issue of any learning disability was not a matter in respect of which any meaningful information or evidence had been produced; nor had there been any significant discussion regarding this aspect of the matter at the disciplinary hearing.

78. The letter responded to some of the points made by the Claimant in his statement, as set out below.

"*I have considered the points you raised in the statement and would make the following comments*

• At the point of suspension, you had admitted to using the word 'Retard' towards a student. This was inappropriate language and behaviour.

• All further use of the word from colleagues at Bury College were using it in context to the workplace investigation.

• A student initially raised concerns, which was followed by a parent complaint. The concern and complaint contained allegations amounting to gross misconduct. It was therefore appropriate to follow the College disciplinary process and initiate a workplace investigation.

• By your own admission, you had not disclosed a medical concern or formal diagnosis of memory loss. Hence, this was not considered in your workplace investigation. This does not mitigate your treatment of this student".

79. The letter then set out various findings and conclusions in the terms set out below.

"*In the disciplinary hearing I did acknowledge that during the investigation you made a statement of apology. However, the subsequent statement which you read out during the hearing has led me to question your understanding of the impact of your words towards this student, and the impact on other students who were present*".

It is clear that throughout the last academic year 22/23, you failed to stop other students calling the student a 'retard' and hence, failed to challenge bullying and harassment. Indeed, your continuation of this treatment of the student into a new academic year, in particular your continued use of this word towards him

as part of a 'behaviour management strategy' ('it's how I managed him', 'I said it to keep him under control') was inappropriate and a continuation of the bullying and harassment to which he has been subjected.

Furthermore, during the disciplinary hearing, you informed me that when you first used the word in the classroom, you spoke to the student after the lesson, to apologise if you had caused any offence. You explained "he said he wasn't bothered, and that is why I kept going". You admitted that you used the word multiple times afterwards. This is unacceptable behaviour.

Having reviewed all the information available to me, including your own admission, I have reasonable belief that you used the word 'retard' towards a student. Also, by your own admission, during the last academic year you did not stop other students calling the student a 'retard', and again by your own admission you referred to it as a form of a behaviour management strategy".

80. On the basis of the above findings and conclusions, the letter went on to state that it had been decided to dismiss the Claimant, without notice, on the basis that he was in breach of the requirements set out below.

"*1. Breach of the Code of Conduct*

"Treat everyone with dignity, building relationships rooted in mutual respect, and at all times observing proper boundaries appropriate to a professional position".

"Staff are required to maintain the highest standards of personal and professional conduct and integrity at all times and to be courteous and considerate with any student and colleagues – they must always be treated with dignity and respect."

2. Breach of the Code of Conduct

"Professionalism involves using judgement over appropriate standards of personal behaviour. This means that staff should not: Make or encourage others to make unprofessional personal comments which scapegoat, demean, humiliate or which might be interpreted as such swear at or in front of Students".

3. Breach of the Prevention of Harassment and Bullying Policy

As a teacher you failed to address the harassment and bullying of a student. Furthermore, by your actions you created an environment in which discriminatory language was effectively encouraged".

81. Whilst the letter inviting the Claimant to a disciplinary hearing had also referred to breaches of the Code of Conduct and the Prevention of Harassment and Bullying Policy, the disciplinary charge sheet which had effectively been set out in that letter had not referred to the specific passages now cited as numbered paragraphs 2 and 3 in the dismissal letter.

82. The disciplinary charge sheet had described the "*issues to be explored*" as "*linked to you calling a student with a known learning disability a retard*", which, in the context of the investigation possibly appeared to refer to the incident in September 2023, rather than any other incidents, particularly as it was the incident in September 2023 which had been investigated and was the subject of the investigation report. However, the dismissal letter seemed to extend the disciplinary case against the Claimant so that he was now being disciplined for having "*failed to address the harassment and bullying of a student*" which appeared also to refer to failing to take appropriate actions in relation to the behaviour of other students towards student B, in the class which he had taken the previous year. Certainly, although this had been explored in some length with him during the disciplinary hearing, it was difficult to suggest that he was on notice that this was part of the disciplinary case against him or that this was a matter in respect of which there had been any meaningful investigation. It appeared simply to arise out of the context or background, from the previous academic year, which the Claimant had given in order to try to explain the exchange which he had had with student A in September 2023.

83. The decision letter acknowledged that the Claimant had made a statement of apology during the investigation, but it seemed to discount this on the basis that the statement read out by the Claimant during the disciplinary hearing suggested that the Claimant did not have an understanding as to the "*impact of your words*". Otherwise, in imposing a sanction of dismissal, the decision letter gave no real indication that any consideration had been given to any mitigation, such as length of service which the Claimant described as his "*9 year unblemished work record*" (bearing in mind that the letter was silent as to the issue of any comments made during training the previous year) and gave no real indication that consideration had been given to any alternative to dismissal.

84. On 26 October 2023, the Claimant sent a letter of appeal to Danny Rushton. The covering e-mail also indicated that he had issues with the content of the disciplinary hearing note which had been provided.

85. The letter of appeal made a number of points. In relation to the allegation of having called a student a "*retard*", he stated that while "*I admitted to using the word once in this academic year, the admission was that the word was used in in conversation <u>with</u> a student*" which was not the same as the disciplinary allegation of having "*called*" a student a "*retard*". Only two students out of the entire class had been interviewed. The two students interviewed were friends who were effectively backing up the other's version of events. Student B had changed her story. The Claimant was being disciplined in respect of allegations which had not properly been investigated and which had not been brought to his attention as part of the disciplinary proceedings. There had been a failure to disclose evidence. There was no real evidence of any impact on student A.

86. By the time of the appeal hearing, the Claimant had provided a considerably expanded version of the grounds of appeal which had been fairly lengthy in the first place. This effectively formed the basis for his submissions at the appeal hearing. This included an argument that the concerns which had been raised had effectively been dealt with by Shehla Ijaz so that the matter should have been considered as "*closed*".

87. On 8 November 2023, there was an appeal hearing conducted by the College Principal, Charlie Deane. Becky Tootell attended in the capacity of the disciplinary manager so as to provide a summary of the dismissal. Alex Jardine attended as a note taker. The Claimant is recorded as having been accompanied by both Adnaan Abdulla and Paul Houston.

88. In summarising the disciplinary case which provided the basis for the decision to dismiss, Becky Tootell suggested that she had regarded the Claimant as having given an "*insincere apology*" based on his answers to questions during the hearing.

89. The Claimant then summarised his case, with the focus on the context and interpretation of the words used. He sought to suggest that the students had not been offended. The word had not been used in a derogatory way. It had been used to get student a to behave in class. He reiterated that his apology still stood. He was extensively questioned by Charlie Deane. The Claimant effectively took Charlie Deane through the numbered points in his appeal submissions.

90. The Claimant's concluding words were that "*I am proud of the relationships I have with my students, and in all my 9 years have had greet rapport with them they have enjoyed coming to Maths and I get good results, this is a one off incident that I would hope you would take into consideration*".

91. By letter dated 15 November 2023, the Claimant was informed that his appeal had been dismissed.

92. The reasoning for the appeal decision proceeded on the basis that "*the use of a derogatory and discriminatory word aimed at a student by a teacher in a position of trust and authority cannot be justified*". Further reliance was placed on the Claimant having admitted to referring to the word in his dealings with Student A in the last academic year as a way of maintaining behaviour within the class in that "*you had overheard his friends calling him the "R" word and you ask, "what would your friends say?""*"

93. The letter then set out a response to twelve numbered appeal points taken from the Claimant's grounds of appeal. In terms of the adequacy of any investigation it was stated that, as "*you repeatedly admitted to using the word, we did not require further investigation, three students, Student B, Student C and Student A confirmed the use of the word*". On this basis, a finding was effectively made that the Claimant had "*used / referred* (to) *a derogatory term towards a student to control their behaviour*". So far as the Claimant suggested that the "*impact*" on students as a result of the use of the word had not been investigated, the letter suggested that the Claimant had himself, over the course of the proceedings, accepted the negative impact of the word. However, it was stated that, in any event, the "*use of a derogatory and discriminatory word aimed at a student by a teacher in a position of trust and authority cannot be justified*".

94. The concluding paragraphs of the letter noted that, after an adjournment in the appeal hearing, the Claimant had apologised and stated that he was willing to receive further training, guidance or mentoring. However, it was also noted that he had attended equality and diversity training as recently as February 2023 and

such training should have made "*it clear to any reasonable person that your comments were not acceptable*". Moreover, it was noted that the Claimant had declined an invitation to withdraw his appeal statement, and Charlie Deane commented that "*I am also highly concerned that your continued claims that the word and your comments towards the student have been taken out of context and that no offence has been taken, show a failure on your part to be fully accountable for your actions and to fully appreciate and understand the impact of what you have said*".

95. The conclusion of the letter was the effect that "*I find that the Disciplinary Chair had a genuine belief that your actions constituted gross misconduct*" and such "*behaviours from a teacher towards a student, in a classroom full of students clearly constitute gross misconduct*".

96. The issue of mitigation was not specifically addressed, but the comments made in relation to gross misconduct, a lack of confidence in further training and a continuing lack of accountability, clearly suggested that Charlie Deane did not consider options short dismissal to be viable.

Legal principles

97. Section 98 of the Employment Rights Act 1996 ("ERA 1996") sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within ERA 1996 section 98(2). Conduct is a potentially fair reason for dismissal. In *Abernethy v Mott, Hay & Anderson [1974]* it was said that "*a reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee*".

98. Once the employer has shown a potentially fair reason for dismissal, the Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the Claimant for that reason. ERA 1996 section 98(4) states that this (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 sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case.

99. In *British Home Stores Limited v Burchell [1978] IRLR 379*, the Employment Appeal Tribunal held that, in misconduct cases, Tribunals should consider whether: (1) the employer genuinely believed that the employee was guilty of misconduct; (2) the employer had in mind reasonable grounds on which to sustain that belief; and (3) at the stage at which the employer formed the belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

100. In *Iceland Frozen Foods Limited v Jones [1982] IRLR 43*, it was made clear that, in applying the test in *British Home Stores Limited v Burchell [1978]*, the Tribunal must not substitute its decision as to what was the right course for the Respondent to adopt. It must ask itself whether the decision to dismiss the

Claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

101. In terms of the extent of the investigation required, in *Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23*, the Court of Appeal held (at paragraph 30) that the band of reasonable responses test applies as much to the question of whether the investigation into the suspected misconduct was reasonable in the circumstances, as it does to the reasonableness of the decision to dismiss.

102. In *A v B [2003] IRLR 405, EAT*, the EAT stated that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation.

103. In *Whitbread plc v. Hall [2001] EWCA Civ 268*, it was confirmed that the Tribunal must consider the issue of both substantive and procedural fairness, as set out below.

"*Section 98(4) of the 1996 Act requires the Tribunal to determine whether the employer 'acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee' and further to determine this in accordance with the 'equity and the substantial merits of the case'. This suggests that there are both substantive and procedural elements to the decision to both of which the 'band of reasonable responses' test should be applied*".

104. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (*Taylor v OCS Group Limited [2006] IRLR, 613*).

105. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the ACAS Code on Disciplinary and Grievance Procedures Code is admissible in evidence and, if any provision of the Code appears to the Tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

106. Paragraph 9 of the Code of Conduct is in the terms set out below.

"*If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification*".

107. If the dismissal was unfair, the issue arises, in accordance with the principles established in the case of *Polkey v A E Dayton Services Limited [1988] AC 344*, as to whether any adjustment should be made to any compensatory award to reflect the extent of any possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed.

108. The ACAS Code is also relevant to compensation. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, if the Claim concerns a matter to which the Code applies and there is an unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

109. Under ERA 1996 section 122(2), the Tribunal shall reduce the basic award where it considers that any conduct of the Claimant before dismissal was such that it would be just and equitable to do so.

110. Under ERA 1996 section 123(6), where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

111. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under ERA 1996 section 123(6), *Rao v Civil Aviation Authority [1994[ICR 495, CA***,** made it clear that the Tribunal should bear in mind that there has already been a *Polkey* deduction. In *Granchester Construction (Eastern) Ltd v Attrill [2013] EAT 0327/12*, it was noted that it may be "*appropriate to moderate what would otherwise be the degree of contributory fault that would reduce an award because there have been matters of conduct taken into account in assessing the chances of a fair dismissal*". Were this not so, "*it might be in effect double counting to impose upon the claimant a further reduction by way of contributory conduct*".

112. However, the effect of the same cases is that the reason for reducing the percentage contributory fault reduction of the compensatory award would not apply to the basic award.

Conclusions

What was the reason or principal reason for dismissal?

113. The Respondent says that the reason was conduct. I was satisfied that this was the reason for the dismissal. It was the reason given in the dismissal letter. It was not seriously suggested by the Claimant that Becky Tootell, in arriving at this decision, had another reason for dismissing the Claimant. The evidence of Becky Tootell was clear that she had dismissed the Claimant on the grounds of her findings of misconduct, and I accepted this evidence.

Did the Respondent genuinely believe that the Claimant had committed misconduct?

114. I was satisfied that the Respondent genuinely believed that the Claimant had committed misconduct. Again, the wording of the dismissal letter was consistent with the existence of such a belief. This was the evidence of Becky Tootell and, in this respect, it was not seriously challenged.

At the time that the belief was formed, had the Respondent had carried out a reasonable investigation?

115. There were many aspects to the investigation which were flawed. It was not established whether Linda Lyons made a contemporaneous record of her conversation with student B, besides the e-mail which she subsequently sent to Shehla Ijaz. Her interview did not involve her giving any details of the incident reported other than the use of the word and the fact that it had upset student B. It was not established whether there was a contemporaneous record of the description of events provided by student B to Shehla Ijaz, or the subsequent meeting which took place between the two of them, or of the explanation which Shehla Ijaz subsequently sought from the Claimant. Shehla Ijaz was not interviewed. Similarly, it does not seem to have been established whether there was any written record of the meeting between Stuart Marsden and student B's mother, other than the e-mail which student B's mother subsequently sent to Stuart Marsden. Student B herself was never asked to provide a written version of events. Since she was effectively the main witness regarding the alleged conduct of the Claimant and since she had given a number of different versions, this meant that there was considerable scope for misunderstanding the allegation which was being made. The differences between these various versions of events were never explored with her. When student B was interviewed, it does not seem that the need for confidentiality regarding the subject matter of the interview was explained. Indeed, student B was not really asked about the incident beyond the initial question as to what had happened. The record of the interview itself referred to a separate conversation with student B but gave no indication of its content. In the interview, student B indicated that at least two other individuals might have heard the use of the word on the same occasion or separately but the identity of these two students does not seem to have been established, still less any attempt made to interview them. Student B seems to have texted her mother immediately following the conversation in which the word was used, but this contemporaneous evidence does not seem to have been sought. Similarly, in relation to the interview of student C, no questions were asked about the incident other than asking the student to describe what had happened, so that the circumstances of the discussion which immediately preceded the use of the word in issue were not explored. Insofar as the extent of any previous use of the word in issue (or condoning of the use of the word) by the Claimant in the class he had taken with student A the previous year was either relevant and / or became a part of the disciplinary case against him, no attempts were made to investigate these matters beyond the discussion of them with the Claimant. Given that significant reliance was being placed upon admissions made by the Claimant, it was fundamentally unsatisfactory that the disciplinary case against the Claimant proceeded on the basis of a disputed record of the investigatory interview, with no meaningful attempt made to establish the correct version, or to seek clarification of parts of the interview which were in dispute, unclear, ambiguous or vague, such as by further interviewing the Claimant. Although reliance was being placed upon admissions made by the Claimant, the areas of dispute over what he had said were not explored with him in any meaningful way in the disciplinary hearing.

116. The standard expected of a disciplinary investigation is simply that it needs to be within the band of reasonable responses. It is not a standard which requires an employer to leave no stone unturned. There may be potentially good reasons for not wanting to interview everyone in a class or carry out extensive interviews with students. In the present case, those effectively investigating and deciding upon the allegations effectively considered that there was sufficient evidence based on the admissions which the Claimant was considered to have made. However, this was in circumstances where there were areas of dispute as to what had been admitted and considerable inconsistency in relation to the various versions of events produced by key witnesses.

117. Applying the band of reasonable responses test, having regard to the extent of the flaws in the investigation set out above, the Tribunal was not satisfied that the Respondent had carried out a reasonable investigation.

Did the Respondent otherwise act in a procedurally fair manner?

118. In terms of fairness, it is a fundamental procedural requirement that an employee is given a fair opportunity to meet the case against them. Ironically, the disciplinary case which was disclosed to the Claimant involved an allegation which was never pursued, but which he was given to understand was part of the disciplinary case against him, namely any alleged comments made during the course of sexual harassment training, albeit no particulars of evidence were provided as to what he was actually supposed to have said. By contrast, it was not made clear that the Claimant's actions in being present, in a class, the previous year, when the word in issue may have been used or referenced, formed part of the disciplinary case which was considered against him. It was not specifically referred to in the letter convening the disciplinary hearing which set out the disciplinary allegations but featured significantly in the dismissal letter. In so far as part of the disciplinary case relied upon the word in issue having been used towards a student with a learning disability, the case proceeded without any information as to this aspect of the case against the Claimant. The evidence before the disciplinary hearing did not prove this element of the allegation. No findings were made as to this element of the allegation. To this extent, the case which was found proven against the Claimant was a different case from that set out on the disciplinary charge sheet. The evidence regarding the response of student A to the allegation, and in relation to any impact upon him, which had actually been obtained from student A, was not shared with the Claimant until after the appeal hearing. Given that significant reliance was being placed upon admissions made by the Claimant, it was fundamentally unsatisfactory that the disciplinary case against the Claimant proceeded on the basis of a disputed record of the investigatory interview.

119. The dismissal letter effectively made findings of misconduct against the Claimant in relation to his conduct during the previous academic year in relation to any previous use of the word by the Claimant, failing to stop other students using the word and failing to challenge bullying and harassment. Reference was made to these findings and conclusions in respect of the Claimant's previous conduct justifying dismissing him. Again, on my analysis, these matters were either not part of the disciplinary charge sheet or, if they were, the disciplinary charge sheet was insufficiently clear as to the case alleged against the Claimant.

120. The decision was further justified by references to the Code of Conduct and the Prevention of Harassment and Bullying Policy. The disciplinary charge sheet particularised the alleged misconduct on the basis of the Claimant being in breach of specific provisions of these policies. The dismissal letter subsequently referred to separate and different breaches of the Code of Conduct and the Prevention of Harassment and Bullying Policy in the numbered paragraphs 2 and 3 of that letter. Again, this effectively introduced an expanded or revised disciplinary case at the very point of arriving at a decision.

121. Given the extent of the procedural unfairness set out above, the Tribunal was not satisfied It cannot be said that any procedural unfairness was rectified by the appeal process. The appeal hearing simply involved hearing from Becky Tootell and the Claimant, with no further investigation undertaken. It largely consisted of a review of the points raised by the Claimant in his grounds of appeal. In so far as it might be argued that he now had notice that the disciplinary case against him consisted of the matters relied upon in the dismissal letter, the point at which these matters had been introduced into the disciplinary case against him meant that he only had one shot at defending himself in relation to this part of the disciplinary case.

122. In the circumstances, on the analysis set out above, I did not consider that the procedure followed by the Respondent in dismissing the Claimant was within the band of reasonable responses.

123. On the basis set out above, I was not satisfied that the Respondent acted reasonably in all the circumstances in treating the Claimant's conduct as a sufficient reason to dismiss the Claimant. For these reasons, the dismissal was unfair.

Would the Claimant still have been dismissed had a fair and reasonable procedure been followed?

124. It is for the Respondent to adduce any relevant evidence on which it wishes to rely in relation to this issue. I have considered evidence from various of the decision makers at both the disciplinary and appeal stages. I am also required to have regard to all of the material and all of the reliable evidence when making that assessment, including any evidence from the Claimant. Indeed, it is inevitable that a degree of uncertainty is a feature of the exercise. In answering the predictive questions, I must be careful to assess the chances of what this particular Respondent would have done on the assumption that it acted fairly. It is not an exercise of assessing on balance what the Tribunal or a hypothetical reasonable employer would have done.

125. Ultimately, I consider that there was a 90% chance that, had the allegations, including those in respect of the Claimant's conduct during the previous year's class, been reasonably investigated and had a fair procedure been followed, dismissal would have been within the band of reasonable responses and this Respondent would have dismissed the Claimant. He had made significant admissions regarding his conduct, both in relation to 8 September 2023, and in relation to the previous academic year, although there was some residual uncertainty as to the precise context in which the Claimant had used the word,

partly because the Claimant had a tendency to give answers which initially appeared to be clear but which were then muddied by further amplification. However, the Claimant's own explanation for the use of the word on 8 September 2023 involved having to accept that, over a period of time, he challenged the behaviour of student A in a way which referenced, by inference or otherwise, even without the word being used, the apparent fact of student A having been called a "*retard*", with the Claimant bringing this up in a way which suggested that student A would have brought such abuse on himself through his conduct, and thus appeared to validate or normalise the use of the term in the first place. However, had the Respondent conduct a fair process I think that there is a very small chance that the Claimant would have been less defensive and inclined to double down on his attempt at justifying or minimising his conduct, might have been more reflective of the need to acknowledge and accept responsibility for the seriousness of his conduct, and this might just have provided the Respondent with the basis for not dismissing an employee of the Claimant's length of service and service record. While I very much doubt that this would have been the outcome, I cannot entirely discount such an outcome: hence I have fixed the percentage chance of the Claimant not being dismissed as being as low as 10%.

Non-compliance with the ACAS Code of Practice

126. The Grounds of Claim identified various respects in which it was alleged that the Respondent had failed to follow ACAS guidance, with these being in respect of not keeping the period of suspension under review, having disciplinary rules which did not give examples of acts of gross misconduct, not dealing with the appeal impartially and failing to provide the Claimant with a copy of the comments obtained from student A. It was further alleged that the Respondent failed to comply with ACAS guidance through making an assumption of the Claimant was not disabled and through the College itself supposedly diagnosing the Claimant as not disabled. I have already indicated that I consider the Claimant's arguments in relation to disability issues to be misconceived.

127. In this case, he Respondent's disciplinary policy did contain a guidance note giving examples of types of gross misconduct. It is arguable that the Claimant's conduct came within the scope of the examples given but, regardless of this, as an educational professional he should have been completely aware that his use of the word in issue was unacceptable and would bring into question his continued employment. He should not have needed a list of potential acts of gross misconduct to be aware of this. I have not found that any failure to review the suspension impacted upon the fairness of the dismissal. It would be unusual for this to be the case given that suspension is normally a neutral act. Similarly, whilst the appeal decision letter of Charlie Deane was certainly judgemental, the Tribunal has not made a finding of lack of impartiality.

128. However, the failure to provide the Claimant with the evidence for the comments obtained from student A was a significant failing given that the comments were directly relevant to the issues at the heart of the disciplinary case, namely what had been said, as well as also being relevant to the issue of impact. The effect of paragraph 9 of the Code of Practice was that this evidence should have been provided. On the basis of the findings and conclusions already

set out above, the Tribunal was also not satisfied that the Respondent had complied with the requirement that the notification of a disciplinary case to answer should "*contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting*".

129. On the basis set out above, I was satisfied that there had been an unreasonable failure by the Respondent to comply with the Code and that it was just and equitable to apply an uplift of 10% to the Claimant's compensation. In setting the uplift at this level, I took account of the fact that the Respondent had otherwise essentially sought to follow the normal requirements of a disciplinary procedure and I did not think that this was a case of deliberate non-compliance.

Did the Claimant contribute to his dismissal by blameworthy or culpable conduct

130. On the balance of probability, I was satisfied that the Claimant had committed misconduct, not least on the basis of the Claimant's admissions to the effect that he had used word "*retard*", and notwithstanding the context in which he claimed that the word had been used. The use of word had been confirmed by three of the students in the class. The Claimant's own case, in terms of explaining the circumstances in which he had used the word involved having to explain interactions which had previously taken place involving student A, other students in a previous class and himself. On the Claimant's own description of the circumstances, the word had been used by others towards student A, directly calling him a retard, so that, even on his own case, the Claimant was repeating, in conversation with student A, a derogatory term which had been used about student A. Notwithstanding his protestations, there is no room for doubt that the Claimant had used language which was unacceptable and discriminatory. The context arose from the Claimant having asked a question of student A which effectively referred to student A having previously been subjected to abuse through the use of the word and had the effect of suggesting that such abuse was again warranted as a result of student A's own conduct. This condoned and validated the abuse to which student had been subjected when the Claimant's responsibility should have been to make it clear that such abuse was unacceptable. The relevant setting in which the word was used by the Claimant was that of an educational setting. It was used by an educator and adult, in a position of trust, and was used in conversation with a student and young person. It is a word to which considerable stigma attaches, so that using the word about someone, or in the context of that person, has the effect of stigmatising them in relation to their intellectual ability. The Claimant's attempts at justifying the use of the word, or minimising the seriousness of its use, were misguided and clearly caused his employer to lose trust and confidence in the Claimant's suitability for continued employment by the Respondent. In all of the circumstances, clearly the Claimant's conduct was almost entirely causative of his dismissal.

131. The House of Lords in *Devis v Atkins [1977] AC 931*, confirmed that it is permissible for a contributory fault assessment to be 100%. However, I should not simply assume that because there is no other reason for the dismissal a finding of 100% contributory fault must be appropriate. The percentage may still require adjustment in the light of what is just and equitable. Indeed, in the

Claimant's case, I have already identified that the particularly negative light in which his conduct was seen, and the perceived absence of mitigation, may partly have been a product of the shortcomings which had been identified in the fairness of the process. In the circumstances, having regard to my findings above as to the Claimant's conduct, I would have found that the degree of contributory fault is 90%.

132. However, in deciding the amount by which it would be just and equitable to reduce the award for that reason under ERA 1996 section 123(6), I am conscious that to make two separate reductions of 90% would not be just and equitable because inevitably I have taken account of the conduct of the Claimant in deciding that there was a 90% chance that he would have been dismissed in any event. Indeed, the Claimant's conduct is the reason that it is 90% likely that he would have been dismissed in any event. Whilst I did consider whether to make a lower percentage reduction for conduct, ultimately I concluded that it would amount, in effect, to double counting to impose upon the Claimant any further reduction to any compensatory award by way of conduct. So, having regard to the case law authorities referred to above, I have decided that it would not be just and equitable to make a separate deduction in respect of contributory fault in order to avoid the injustice of an excessive and disproportionate reduction.

Reduction of basic award

133. However, as previously stated, the effect of the same case law authorities is that the reason for discounting the percentage contributory fault reduction of the compensatory award would not apply to the basic award. The separate issue arises as to whether it would be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, as set out in ERA 1996 section 122(2), and if so to what extent? On the basis of the findings and analysis already set out in relation to the Claimant's conduct, I have concluded that it would be just and equitable to reduce the basic award by 95% to reflect the Claimant's contributory fault.

Outcome

134. It follows that the decision of the Tribunal is that the complaint of unfair dismissal is well-founded and that any award to the Claimant will be assessed at a remedy hearing on the basis that (1) the conduct of the Claimant before the dismissal was such that it would be just and equitable to reduce any basic award for unfair dismissal by 90%; (2) any compensatory award should be reduced by 90% to reflect the likelihood that the Claimant would still have been dismissed had a reasonable investigation and procedure been followed; (3) any compensatory award should be subject to an increase of 10% by reason of the Respondent having unreasonably failed to comply with the ACAS Code of Practice on disciplinary procedures; and (4) it would not be just and equitable to make a further and separate reduction to any compensatory award to take account of the extent to which the Claimant's conduct contributed to his dismissal.

135. The case will be listed for a further hearing to determine remedy.

Approved by

Employment Judge Kenward
10 August 2025

Judgment & Reasons sent to the parties on

11 August 2025

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For the Tribunal office