Neutral Citation Number: [2022] EWHC 408 (Admin)

Case No: CO/2930/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 25 February 2022

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court

Between :

YA **(by his litigation friend MSA)**	**Claimant**
- and –	
THE INDEPENDENT APPEAL PANEL OF SWANSEA COUNCIL	**Defendant**
- and –	**Interested Parties**
(1) SWANSEA COUNCIL **(2) THE GOVERNING BODY OF OLCHFA SCHOOL**	

Mr Rhodri Williams QC and Ms Ablfa O'Callaghan (instructed by **Watkins and Gunn Solicitors**) for the **claimant**
Mr Peter Oldham QC (instructed by **Legal Services, Swansea Council**) for the **defendant**
The **interested parties** did not appear and were not represented

Hearing dates: 31 January 2022

Approved Judgment

HH JUDGE JARMAN QC :

Introduction

1. The claimant challenges a decision made by the Independent Appeal Panel for Swansea Council (the Panel) dated 13th July 2021 upholding his permanent

exclusion from Olchfa School (The School) by its headmaster. Permission to bring the claim was granted by His Honour Judge Lambert sitting as a judge of the High Court. There are 11 grounds of challenge but there is a good deal of overlap, and Mr Williams QC, on the claimant's behalf, presented the challenge on the basis that the Panel made four fundamental errors. I found that approach to be a helpful one and shall structure this judgment accordingly.

2. First, the Panel failed to ask itself the relevant question of whether there was a serious breach of the School's behaviour policy and there was no or no adequate assessment of proportionality in relation to the serious harm to the wellbeing of staff and pupils. Second, it did not consider any alternatives prior to or after the exclusion or the headteacher's misinterpretation of the Welsh Government Guidance "Exclusion from schools and pupil referral units" in November 2019 (the Guidance). Third, it failed to consider the headteacher's wrongful imposition of a fixed exclusion as a holding exclusion. The disciplinary impact of the fixed term exclusion was therefore not given any weight prior to issuing a permanent exclusion. Finally, it failed to apply the test of exceptionality when considering the headmaster's change from a fixed term exclusion into a permanent exclusion or the fact that this was a one-off offence, it failed to take into account a separate earlier incident unrelated to the claimant, and wrongly took account of irrelevant considerations such as the impact of social media and the sending of a strong message.

3. The claimant now attends another school in Swansea and does not want to be reinstated at Olchfa. Nevertheless, he does not want the stigma of permanent exclusion to affect his future and wants the Panel's decision quashed.

4. Mr Oldham QC, for the Panel, in opposing this challenge, relied on general points that the statutory function of exclusion provided by section 52 of the Education Act 2002 (the 2002 Act) is placed upon the headteacher as the person running the school, and that the role of the Panel is not to consider the matter afresh but to consider whether the sanction was appropriate and to give heavy weight to the headmaster's decision in that regard. The Guidance is just that, and was dealt with in sufficient detail by the Panel. It is not appropriate for the Panel to overturn that decision on the basis of procedural irregularities unless important matters were not considered. The headmaster excluded the claimant for an initial period of five days whilst he gave anxious consideration to the appropriate sanction.

The facts

5. There is now no challenge to the facts relating to the claimant's exclusion. At the time he was a 14 year old bright pupil, who was coming the end of his first year of GCSE courses. There were no previous material concerns about his behaviour. On the 14 May 2021 during a break, the claimant whilst in the School yard called out the word "slut" to a female teacher. The teacher spoke to a colleague, who approached the claimant. He admitted what he had said and that it was about the teacher, and apologised in front of her.

6. The colleague took him to the School's exclusion unit and asked him to write down what had happened. What he wrote was that the saw the female teacher and that he

"…said slut without intention of the actual meaning and I did not realise how bad it was and then I admitted it to her and apologised."

7. The female teacher also wrote down her account that day which confirmed what the claimant had "shouted" at her. The account continued:

> "I approached him about his and he admitted it. I am extremely upset and shocked by this derogatory comment as this is the second occasion this week. I hope that this matter will be dealt with immediately and there will be an appropriate sanction in place given the nature of the comment."

8. It is not in dispute that the female teacher afterwards took time off work, was on medication, and was contemplating whether she could continue in the teaching profession.

9. The headmaster met with the claimant the same day and again he apologised. Later that day the headmaster wrote to him and his parents in separate letters, informing them of a decision to exclude him from school for a period of 5 days from Monday 17 May 2021. Both letters included the following passage, referring to the claimant as "you" or by name as appropriate:

> "You have been excluded for this fixed term because you have made a highly inappropriate insulting comment of a sexual nature to a female member of staff. This fixed term exclusion is being issued pending my full investigation of this incident. It is possible that further sanctions will follow, up to and including permanent exclusion, depending on the severity of my findings."

10. Each letter ended with a reference to the period of exclusion expiring on 21 May 2021, and that it was expected to see the claimant back in school on Monday 24 May 2021.

11. On the 18 May 2021, the headmaster met with the claimant and his parents, although no notes were kept of that meeting. The claimant repeated his apology and the family offered to speak with the teacher concerned. The headteacher replied that the teacher was not in a fit state to meet the family at that point. The parents requested the headteacher to consider keeping the claimant in school until the end of term. There were no alternatives to exclusion discussed.

12. By letters dated 24 May 2021, the headteacher notified the claimant and his parents of the decision to exclude the claimant from the School on a permanent basis. The letters (again with the claimant named in the letter to the parents) included the following.

> "You have been excluded permanently because you made a highly sexually offensive comment to a female member of staff. It is clear that the comment was heard by others as well as the member of staff herself. It is also clear there was no provocation or indeed interaction between yourself and the

> teacher immediately before the comment. The comment was specifically targeted at a woman, demeaned her and caused her significant emotional distress which has in turn, necessitated her absence from school."

13. By a letter from the claimant's GP dated 26 May 2021, it was stated that the claimant was suffering anxiety and stress as a result of the exclusion. By letter dated 4 June 2021 to the Governing Body of the School, the parents set out how sorry they were for the incident, and for the hardship and anxiety which it had caused to the teacher concerned. They set out their own apology and the disciplinary action which they had taken in respect of their son. However, they pointed out that this was out of character and that permanent exclusion would affect him and his education in a way which was disproportionate to this one incident. They referred to the effect on his mental health, and that they would support any action which the School deemed appropriate for his rehabilitation.

14. In a handwritten letter dated 7 June 2021 addressed to the teacher concerned, the headmaster and the Governing Body, the claimant repeated his apology in a fulsome way, although he referred to his use of the term as in a conversation with a friend. He set out in his own words the effect of permanent exclusion upon him. He too indicated that he wanted to rehabilitate and learn from the incident and hoped that the School would support him in that process.

15. Because the chosen sanction was permanent exclusion, a meeting of the Governing Body's Pupil Discipline and Exclusions Committee was as a matter of course convened to reconsider the decision and took place on 15 June 2021. The meeting, which took place online, was chaired by the Chair of the Governors with two parent governors. The headteacher presented the School's case and the claimant's parents with a support worker presented that of the claimant.

16. The Committee then discussed the submissions between themselves and decided to uphold the decision of the headmaster for the reasons set out in written minutes of the meeting, dated the same day, as follows:

> "By his own admission, [the claimant] had used the word 'slut' either directly to, or about, a particular female member of staff. Olchfa's Core Values, embedded in its Behaviour Management Policy, are 'Respectful, Ready, Safe'. [The claimant]'s use of such an offensive term was extremely disrespectful and caused the member of staff concerned significant emotional distress which, in turn, necessitated her absence from school. Governors have a duty of care to all pupils and staff in the school. Everyone should be able to go about their day in a safe and respectful environment as instilled through the Behaviour Management Policy."

The challenged decision

17. The claimant then appealed to the Panel, which appeal also took place online on 6 July 2021. The Panel, which was independent of the School, consisted of a lay chair, an education practitioner, and a representative of governing bodies. A bundle

of documents was before the Panel. The claimant was represented by counsel, who appears as junior counsel in the present proceedings. The attendees from the School were the headteacher, the senior pastoral worker and the pupil welfare officer. The Chair of the Governors and local authority representative also attended.

18. The three persons who attended for the School were questioned in turn by counsel for the claimant. It was put to the headmaster by counsel for the claimant that the term was used by the claimant in a conversation with a friend. The headmaster replied that this is not what the claimant had told him and that he, the headmaster, believed that the term had been called out for the teacher to hear. Members of the Panel also asked questions. The claimant's father asked questions and both parents then orally supplemented written representations which they had made. There were some further questions from the Panel and then final submissions. Finally, the claimant spoke to the Panel saying that he was truly sorry and that he did not intend to cause the teacher concerned distress or anxiety. He added that he had been talking to a friend and that the teacher had overheard the conversation.

19. The Panel members then considered the appeal amongst themselves. By letter (the decision letter) dated 13 July 2021, its clerk sent to the claimant and his parents a record of the appeal hearing and notification of its decision to uphold the decision to exclude permanently.

20. In that part of the decision letter headed "Deliberations" it was recorded that the Panel was satisfied that the claimant had called out the term to the teacher loud enough for her to hear it.

21. The other main conclusions of the Panel were set out as follows.

> "The Panel were satisfied that if the school's behaviour policy referred to examples of serious behaviour which could result in permanent exclusion, it was a matter for the school to judge what behaviours were serious enough to justify permanent exclusion. The Panel did not consider that there was any evidence that the Head did not follow the school's behaviour Policy.
>
> The panel were satisfied the incident did on the balance of probabilities take place as described by the school and it was an incident that placed it in the realms of permanent exclusion rather than some lesser sanction because it could seriously harm the welfare of others in the school…
>
> The panel were satisfied from the evidence…that the incident had caused the teacher concerned great distress and had had a significant impact on her…
>
> The panel were of the view that the decisions were taken carefully, in accordance with guidance…The panel gave full consideration as to whether there was discrimination and were satisfied that there was no evidence that there had been any discrimination by the Head…

> The panel noted the examples for a one-off offence where in the headteacher's judgement it is appropriate permanently to exclude and that the Welsh Government Guidance provides that these instances "are not exhaustive". The panel are of the view this incident was sufficiently serious in all the circumstances of the case to warrant permanent exclusion…
>
> In deciding to uphold the decision to exclude, the Panel balanced [the claimant's] interests against the interests of all the other pupils and staff at the school…The panel believed that permanent exclusion was a proportionate response. The panel noted and balanced the remorse shown by [the claimant] and the impact on his mental health in not being able to return to school against the interests of the female teacher who had been impacted by the incident and the interests of others in the school…
>
> The Panel were mindful of the current issue of sexual abuse and harassment in schools and the "Everyone's Invited" campaign referred too. The panel felt the balancing exercise fell in favour of not overturning the exclusion and directing reinstatement and it was important that there was a clear message that it is not ok for such comments to be made without serious sanction because of the impact this can have on the health and well-being of female teachers and pupils."

The statutory framework

22. Section 52(1) of the 2002 Act deals with the power of a headteacher in Wales to exclude a pupil. It provides:

> "The head teacher of a maintained school in Wales may exclude a pupil from the school for a fixed period or permanently."

23. Section 52(3) requires regulations to be made providing for the procedures to be followed when the power is exercised. Section 52(4) makes provision for regulations requiring a headteacher of a maintained school to have regard to any guidance given from time to time by the National Assembly of Wales. The function to give guidance is now vested in the Welsh Ministers. Section 52(10) sets out that "in this section "exclude", in relation to the exclusion of a child from a school or a pupil referral unit, means exclude on disciplinary grounds (and "exclusion" shall be construed accordingly)."

24. The regulations made under those provisions are the Education (Pupil Exclusions and Appeals) (Maintained Schools) (Wales) Regulations 2003 (the 2003 Regulations).

25. Regulation 7 deals with appeals from a decision to exclude permanently a pupil. Regulation 7(1) provides:

> "A local education authority must make arrangements for enabling the relevant person to appeal against any decision of the governing body under regulation 5 not to reinstate a pupil who has been permanently excluded from a school maintained by the authority."

26. Regulation 7(3)(b) provides:

> "An appeal panel is not to determine that a pupil is to be reinstated merely because of a failure to comply with any procedural requirement imposed by or under these Regulations in relation to —…(b) the exclusion or decision by the head teacher to which that decision related."

27. The powers of an appeal panel are dealt with in 7(5) as follows:

> "On such an appeal the appeal panel may —
>
> (a) uphold the exclusion;
>
> (b) direct that the pupil is to be reinstated (either immediately or by a date specified in the direction), or
>
> (c) decide that because of exceptional circumstances or for other reasons it is not practical to give a direction requiring his or her reinstatement, but that it would otherwise have been appropriate to give such a direction."

28. Regulation 8 requires the head teacher of a maintained school or the governing body of such a school or an appeal panel constituted in accordance with the Schedule to the Regulations to have regard to any guidance given from time to time by the National Assembly of Wales as follows:

> "Exclusion of pupils: guidance
>
> 8.—(1) This regulation applies to any functions of —
>
> (a) the head teacher or the governing body of a maintained school,
>
> (b) a local education authority, or
>
> (c) an appeal panel constituted in accordance with paragraph 2 of the Schedule,
>
> under section 52(1) of the 2002 Act or these Regulations.
>
> (2) In discharging any such function, such a person or body must have regard to any guidance given from time to time by the National Assembly for Wales."

Welsh Government Guidance

29. The Guidance was issued by the Welsh Government. The introduction includes this passage:

> "Under section 52(4) of the Education Act 2002, headteachers, teachers in charge of a PRU, governing bodies, LAs and independent appeal panels must by law have regard to this guidance when making decisions on exclusion and administering the exclusion procedures and appeals. There is a strong expectation that the guidance will be followed unless there is good reason to depart from it. The guidance is not exhaustive and judgements will need to take account of the circumstances of individual cases."

30. Section 1 deals with the use of exclusion, and the material paragraphs to the decision to exclude are as follows:

> "1.1 The decision to exclude
>
> 1.1.1 A decision to exclude a learner should be taken only:
>
> - in response to serious breaches of the school's behaviour policy; and
> - if allowing the learner to remain in school would seriously harm the education or welfare of the learner or others in the school.
>
> 1.1.3 A decision to exclude a learner permanently is a serious one. It will usually be the final step in a process for dealing with disciplinary offences following a wide range of other strategies, which have been tried without success. It is an acknowledgment by the school that it has exhausted all available strategies for dealing with the learner and should normally be used as a last resort.
>
> 1.1.4 There will, however, be exceptional circumstances where in the head teacher's judgment it is appropriate to permanently exclude a child for a first or "one off" offence. These might include:
>
> - Serious actual or threatened violence against another learner or a member of staff
> - Sexual abuse or assault
> - Supplying an illegal drug
> - Use or threatened use of an offensive weapon
>
> 1.1.5 In most cases it would be appropriate for schools to inform the police if they believe such a criminal offence has

taken place. There may be cases where this approach is appropriate for learners excluded for a fixed-term. Schools should consider whether or not to inform other agencies, e.g. Youth Offending Team, social workers, etc.

1.1.6 These instances are not exhaustive, but indicate the severity of such offences and the fact that such behaviour can affect the discipline and wellbeing of the school community.

1.3 Factors to consider before making a decision to exclude

1.3.1 Exclusion should not be imposed in the heat of the moment, unless there is an immediate threat to the safety of others in the school or the learner concerned. Before deciding whether to exclude a learner, either permanently or for a fixed-term, the headteacher should:

• ensure that an appropriate investigation has been carried out

• consider all the evidence available to support the allegations.

The more serious the allegation and thus the possible sanction,

the more convincing the evidence substantiating the allegation

needs to be

• take account of the school's behaviour and equal opportunities

policies, and, where applicable, the Equality Act 2010

• allow the learner to give his or her version of events

• check whether the incident may have been provoked,

e.g. by bullying or by racial or sexual harassment

• if necessary consult others, but not anyone who may later have a role in reviewing the headteacher's decision, e.g. a member of the discipline committee

• keep a written record of the incident and actions taken."

31. Paragraph 1.5 deals with alternatives to exclusion as follows:

".. 1.5 Alternatives to exclusion

1.5.1 Exclusion should not be used if alternative solutions are available. Examples include the following. –

- Pastoral Support Programmes (PSPs)…

- Restorative justice...
- Internal exclusion...
- Managed move:…"

32. Paragraph 1.7 deals with the length of fixed term exclusions. Paragraph 1.7.1 provides;

> "The regulations allow headteachers to exclude a learner for one or more fixed-terms not exceeding 45 school days in any one school year. However individual exclusions should be for the shortest time necessary, bearing in mind that exclusions of more than a day or two make it more difficult for the learner to reintegrate into the school. Inspection evidence suggests that one to three days is often long enough to secure the benefits of exclusion without adverse educational consequences."

33. Paragraph 2.1.12 provides:

> "In exceptional cases, usually where further evidence has come to light, a fixed-term exclusion may be extended or converted to a permanent exclusion."

34. Section 4 deals with appeals from the decision to exclude to an independent appeal panel, the relevant provisions of which are as follows:

> "4.9.1 In considering an appeal, the panel should consider, on a balance of probabilities, whether the learner did what they are alleged to have done…
>
> 4.9.2 The panel should consider the basis of the headteacher's decision and the procedures followed having regard to:
>
> - whether the headteacher and discipline committee complied with the law and had regard to the Welsh Government guidance on exclusion in deciding, respectively, to exclude the learner and not to direct that they should be reinstated….
>
> 4.9.3 Having satisfied themselves as to the issues, the panel should consider whether to overturn the exclusion. If they do so, they should then decide whether this is an exceptional case where reinstatement is not a practical way forward.
>
> 4.12. The decision letter should give the panel's reasons for its decision in sufficient detail for the parties to understand why the decision was made."

School policy

35. The relevant provisions of the School's Behaviour Management Policy (the Policy) are as follows:

> "X2 – Recorded on SIMS – the most serious level of inappropriate behaviour; these actions will again involve an internal exclusion (BSU), the length of which will be determined by the nature/context of the incident and how well the pupil responds in relation to behaviour modification and accepting their responsibility for their actions. The school can extend the period of an exclusion if it is necessary to achieve appropriate behaviour modification.
>
> We will require parents to attend an Exit Meeting at the end of the fixed term internal exclusion so that an agreement can be made regarding expected future behaviour. Behaviours warranting this type of exclusion include:
>
> - Fighting and/or encouraging others to fight
> - Off-site truancy
> - Bullying/victimisation of others
> - Swearing at a member of staff
> - Any aggressively discriminatory comment or action relating to race, gender, faith, orientation or disability
> - Selling cigarettes/vapes
> - Assault on another pupil
> - Deliberately setting off the fire alarm
> - Possession of cannabis, alcohol or any controlled substance (police involvement likely to be sought)
>
> There are some behaviours that may result in a permanent exclusion, these include:
>
> - Ongoing bullying, despite repeated interventions
> - Assault on any staff member
> - A particularly vicious assault on another pupil
> - The bringing of any dangerous weapon to school or the use of an item as a weapon in a way which is threatening and dangerous to others

- The supply of cannabis or other controlled substances

> Please note the lists above cannot cover everything. Where an action occurs which is not formally listed below, staff will use their judgment to sanction that behaviour at the most appropriate level, balancing the needs of the individual with those of the school community as a whole. Please remember that the Headteacher can sanction any behaviour at any level, at any time.
>
> All actions will be considered in the context in which they took place. Aggravating factors which worse the impact of an action will be considered, and may lead to the school extending its action beyond the typical stage listed above."
>
> Where actions are repeated, especially within a short space of time, students can expect the school to intervene at a higher than typical stage."

36. Before I turn to deal with the claimant's challenges and the Panel's response to them, I should emphasise that it is not the function of this court to decide whether or not the claimant should have been permanently excluded. That function has been entrusted by the UK Parliament and the Senedd to the headteacher, subject to an appeal to the Panel. The function of this court is to determine whether the decision making process of the Panel was one which was conducted in accordance with the statutory scheme and the Guidance.

The first main issue: assessment of seriousness

37. Mr Williams, in dealing with what he describes as the first key issue, submits that it was not sufficient for the Panel to determine that it was a matter for the school to judge which behaviours were serious enough to justify permanent exclusions or simply to accept that the headteacher stated that he had complied with the law and Guidance. The Panel should have grappled with the substance of these issues so that it complied with its own duties to have regard to the Guidance. In accordance with paragraph 1.1.1., it should have determined whether there was a serious breach of the School's Policy and whether allowing the claimant to remain in School would seriously harm the education or welfare of the pupil or others in the school.

38. He further submits that the Panel undertook neither of these exercises. It was particularly important it did so, because the headmaster in his evidence to the Panel said that the incident in question did not fit neatly into any of the examples set out in the Guidance or the Policy. Moreover, the headmaster's approach to the claimant's apology was to give an extreme example of an apology given by a murderer. He was questioned about this before the Panel by counsel for the claimant, and the decision letter records the exchange as follows:

> "He said that he would expect an apology as it would be the right thing to do both ethically and strategically…He… gave an extreme illustration that killing someone would not prevent them from murdering again. [Counsel] asked whether he was

> comparing the situation to murder and [the claimant's father] told the Panel that this was the third time that the Head had compared his son to a murderer – he had repeated this to the Governors and said that this showed the Head's attitude. [The headteacher] explained that he had used an extreme illustration but was not suggesting that [the claimant] is a murderer. [Counsel] asked whether this was proportionate or relevant to use as a comparison. [The headmaster] responded that a comparison to enable someone to see the point you are making is also relevant and that he had already made clear that he does not have a negative view of [the claimant] he simply made a comment that an apology does not guarantee better behaviour."

39. In my judgment, this reference was neither appropriate nor relevant. It is perhaps unsurprising that the claimant's parents should see this as a comparison with their son's behaviour. Even if the headmaster's explanation of making a point is acceptable objectively, the fact remains that this exchange demonstrates his approach to the claimant's apology. That apology was given immediately, after an immediate admission, and was maintained in a fulsome way. The claimant's later failed attempt to downplay this somewhat by suggesting that the term was used in an overheard conversation must weigh in the balance, but the admission that the term was used towards the teacher and in her hearing was maintained throughout, as was the apology.

40. In my judgment, these factors were clearly relevant to the decision making process. The Policy, when referring to internal exclusion for the most serious level of inappropriate behaviour, states that the length of such exclusion will depend on context and how well a learner accepts responsibility for their actions. After setting out the sort of actions which may justify permanent exclusion, it is provided that all actions will be judged in context. None of those examples, save arguably the second one, apply here, although of course the list is not exhaustive. However, in my judgment the context in which the claimant's behaviour must be judged includes his immediate admission and apology.

41. I accept Mr Oldham's submission that the Panel was entitled to give due weight, even heavy weight as he terms it, to the headmaster's decision. This is clear from the reference to the basis of the headmaster's decision set out in paragraph 4.9.2 of the Guidance. What it could not do was fail to carry out its own duty under Regulation 8(2) to have regard to the Guidance. That in turn required it to have regard to the two limbs in paragraph 1.1.1, and whether before a decision to exclude could be justified, namely, so far as material, whether there was a serious breach of the Policy, and whether allowing the claimant to remain in the School would seriously harm others in the School. It also required an assessment of whether it was serious enough to come within paragraph 1.1.4.

42. Mr Oldham submits that this is precisely what the Panel went on to do in the remainder of its deliberations as set out in the decision letter. I would accept that the letter must be read fairly as whole, that it is not a legal document and that the Guidance only requires sufficient reasons for the parties to understand why the decision was made.

43. In my judgment the decision letter clearly records that the Panel took the view that it was a matter for School to judge whether the claimant's behaviour was serious enough to justify permanent exclusion. Exclusion, and whether that should be permanent, were matters to which the Panel under Regulation 8(2) and paragraph 1.1.1 of the Guidance had to have regard. That part of the decision letter shows that the Panel did not have regard to those matters.

44. It is true that the deliberations then went on to consider whether exclusion was justified. However, in doing so the focus was very much upon the second limb namely whether allowing the claimant to remain in School would seriously harm others. It is clear that the Panel should have had regard to both limbs. Further, the determination of the first limb may well impact upon the determination of the second.

45. The need to assess seriousness lay at the heart of the Panel's decision making function. In my judgment, its starting point that it was for the School to judge whether the claimant's behaviour was serious enough to justify permanent exclusion impacts upon the remainder of its deliberations in such a way that any attempt to determine its reasoning without those impacts would involve an impermissible level of speculation.

46. The Panel found that the headteacher was aware of the Policy, but in its deliberations did not grapple with the issues of how the claimant's immediate and maintained admission and apology impacted upon the consideration of the seriousness of his behaviour. It should have done so, especially given the headteacher's inappropriate approach to the apology and the failure to deal with the claimant's admission. Whilst the Panel later on in its deliberations noted and balanced the claimant's remorse, that was in the context of balancing his interests against the interest of other learners and staff at the School. The Panel did not deal with these factors in assessing the seriousness of his behaviour, and it is clear that the reason for that is the Panel took the view that this was a matter for the School.

47. In these key respects, therefore, in my judgment the determination of the Panel did not fulfil its obligation under Regulation 8(2) and did not have regard to the Guidance.

48. That being so, I will deal with the remaining challenges relatively briefly. I have already indicated that the failure of the Panel to assess the seriousness of the claimant's behaviour might impact on the assessment of the second limb of paragraph 1.1.1 of the Guidance namely, whether allowing him to remain in the School would seriously affect others in the School. Any reconsideration will have to assess the second limb in light of any determination of the second limb. Beyond that however, I do not accept that the Panel failed to set out the risks to the welfare of others in the School. In my judgment it is sufficiently clear from the remainder of the Panel's deliberations that what the Panel took into account was the impact upon the teacher and the potential harm to the whole school community if such comments towards female members of staff or pupils were to be allowed without serious sanction. It referred to the health, safety and well-being of the whole school community for whom the School was expected to maintain appropriate behaviour and discipline. In that context, the Panel was entitled to have regard to the evidence before it as to the current issue of sexual abuse and harassment in schools.

The second main issue: alternatives

49. As for alternative solutions, the headmaster stated to the Panel that he had considered these. It was put to him by counsel for the claimant that he accepted that the possibility of internal exclusion was raised with the claimant, and this is the context in which he replied that all options were considered.

50. Mr Williams relies upon the headteacher's evidence to the Governing Body's Committee that no other alternatives or strategies were considered. The note of what the headteacher said to the Committee when questioned on behalf of the claimant, and when it was put to him that the claimant was clear that he used the word in a conversation about the teacher rather than to her, includes this:

> "[The headteacher] said, first of all, no, nothing else had been considered. 1.1.4 mentioned exceptional circumstances. In his opinion it was an exceptional circumstance under 1.1.6, which made it clear that the circumstances mentioned under 1.1.4 were not exhaustive. No managed move was considered…[The claimant] had been clear in his office that he had shouted out the comment to [the teacher]. He had been absolutely clear. He had also written in it in his statement. The investigation had been simplified by the claimant's admission of what he had done."

51. In my judgment, read fairly as a whole, the reference to nothing else being considered, was in the context of the claimant saying after the event that he used the term in conversation overheard by the teacher. The headteacher clearly did not consider that version, because he said that the claimant had admitted to him that he had shouted out the term. He accepted that a managed move, for example, was not considered, but that was because he took the view that permanent exclusion was not a final step in a process as envisaged in paragraph 1.1.3 of the Guidance, but a one-off which exceptionally justified such a conclusion as contemplated in paragraph 1.1.4. This is confirmed in an answer which the headteacher gave to a question posed by a member of the Panel, in which he said that he did not consider that alternatives were appropriate.

52. As I have found that the seriousness of the behaviour was not properly assessed by the Panel, this particular challenge takes the matter little further, if at all. It is clear that the Guidance recognizes, that exceptionally, a one-off incident may be so serious as to justify permanent exclusion. To what extent it is appropriate to consider alternatives is dependent upon how serious the behaviour is. Paragraph 1.5 deals with exclusion generally and is not focused on permanent exclusion, unlike paragraph 1.1.4. So far as the Panel was concerned, its role was limited to that set out in Regulation 7 (5). In my judgment this part of the challenge is not made out.

The third main issue: the holding exclusion

53. I turn now to the challenge to the decision of the Panel for failing to consider whether the headteacher had lawfully issued a fixed term exclusion. Mr Williams submits that the conversion of a fixed term exclusion to a permanent exclusion was disproportionate to the original incident and the Panel failed to consider whether the

imposition of a permanent exclusion subsequently was necessary. This point was put to the headteacher by counsel before the Panel, and he replied that it does happen frequently that there is a sort of "holding exclusion" whilst the school considers its response. He was then asked whether he considered that a fixed term exclusion would have been sufficient, and he responded that it had been a difficult decision which had been based on what was the fairest outcome for all pupils.

54. The point about whether the holding exclusion was unlawful did not loom large in the final comments on behalf of the claimant before the Panel. The focus of those comments was whether the decision to exclude permanently was disproportionate. In my judgment, that is not surprising, given that it was an appeal against permanent exclusion which the Panel was considering under Regulation 7(1), and given its limited powers under Regulation 7(5).

55. In my judgment, the letters of the headmaster dealing with the 5 day exclusion and then the permanent exclusion are not altogether clear in this regard. The former refers to further investigation, and yet it is now accepted that no further investigation as such was contemplated in light of the admission, as was accepted by the headmaster before the Governing Body Committee. That letter ends by saying that the claimant was expected back at school but also refers to the possibility of permanent exclusion. Before the Panel, the headmaster said that this initial period was needed for him to give anxious consideration to the appropriate sanction, and it is clear that in the meantime he met with the parents.

56. This was not a case where a decision is made to exclude for a fixed period as the appropriate sanction, but then that decision is changed, for example because of new evidence. The letters relating to the 5 day exclusion made it sufficiently clear that that exclusion was to allow for further investigation and that permanent exclusion may follow, although what was contemplated was more in the nature of further consideration of appropriate sanction rather than further investigation as such.

57. I was referred by both sides to authority on the issue of a holding exclusion, but did not find these to be of great assistance on the facts of this particular case. *JR17 for Judicial Review (Northern Ireland)* [2010] UKSC 27, concerned a Northern Irish scheme and a challenge to a decision of a headteacher to suspend rather than permanently to exclude. Mr Oldham refers to the case of *R (V) v Independent Appeal Panel for Tom Hood School* [2010] EWCA Civ 142, [2010] PTSR 1462 as authority for the issuing of a fixed term exclusion which is subsequently converted into a permanent exclusion, but that does not deal with a holding exclusion pending further investigation of an incident.

58. The Guidance does not deal expressly with whether such a holding exclusion is permissible or not, but does make clear that not every situation can be covered by such guidance. In my judgment, it was within the powers of the headmaster, in the event, to act as he did. However, even if it was not, this does not of itself amount to a flaw which meant that important factors were not considered. Given that the proper focus of the Panel was upon permanent exclusion, which is what in the event occurred, in my judgment, it was not incumbent upon it to deal with issues relating to the holding exclusion.

The fourth main issue: exceptionality

59. Finally, Mr Williams submits that the Panel failed to address the issue of exceptionality in relation to the converting of a fixed term into a permanent exclusion and relies upon *(MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192. However, as I have already indicated, in the present case, there was not the sort of conversion that was contemplated by the Guidance. He also submits that the decision letter shows no express consideration of whether the claimant's conduct is of a severity that is set out within the incidents listed at paragraph 1.1.4. The Panel failed to ask itself a relevant question and thus failed to take into account a relevant matter. To that extent, and as already indicated in relation to the first main issue, I accept that point.

60. Mr Williams relies on other points. He submits that the Panel failed to consider that the unrelated incident two days earlier as referred to in the teacher's statement made on the day could have been a causative factor in her subsequent emotional distress. That statement was before the Panel, and counsel put to the headmaster that the claimant's behaviour was not the sole reason for the impact upon the teacher. He replied that he considered this behaviour to be responsible for a large part of the impact. Mr Williams referred to other material relating to the incident, but that was not before the Panel. It was not suggested by or on behalf of the claimant before the Panel that no distress or anxiety had been caused by him, and the Panel did not find that his behaviour was the sole cause. In my judgment there was no failure by the Panel in this regard.

61. Mr Williams further submits that the Panel took into account an irrelevant consideration, namely the current issue of the treatment of females in the media and the Everyone's Invited campaign, and that was a new reason for exclusion. In my judgment, the Panel were entitled to have regard to this as part of the wider context of the claimant's conduct and its doing so did not amount to a new reason.

62. Finally, Mr Williams submits that the Panel failed to take into account material considerations such as the claimant's previous good behaviour, his immediate admission and apology. I have already dealt with this aspect in considering seriousness above.

63. My reasoning above applies to the individual grounds which, like Mr Williams, I do not set out in full in this judgment. I am not satisfied that any remaining points in them have been made out. However, I am satisfied that the key challenges under the first main issue are made out to the extent which I have indicated.

Relief

64. Mr Oldham submits that even if the Panel had fulfilled its obligation and have regard to the Guidance in these respects, then it is highly likely that the outcome for the claimant would not have been substantially different. If so, then I must, pursuant to section 31(2A) of the Senior Court Act 1981, refuse to grant relief. He realistically accepts that the threshold in this regard is a high one (see *R (PCSU and others) v Minister for the Cabinet Office* [2017] EWHC 1787 (Admin).

65. On any view, the claimant's behaviour, as the Governing Body's Committee found, involved an offensive term which was extremely disrespectful which caused significant emotional distress to the teacher. Neither the claimant nor his parents

have at any stage suggested otherwise. However, in my judgment it cannot be said that if the Panel made its own assessment of the seriousness of the behaviour in context, including the immediate and maintained admission and apology, it is nevertheless highly likely that his permanent exclusion would have been upheld.

66. Although he is now attending another school and has no wish to be reinstated at Olchfa, I accept that the determination of permanent exclusion stigmatises him and is likely to impact adversely upon his future career prospects (see *R (CR) v Independent Review Panel of the London Borough of Lambeth* [2014] EWHC 2461 (Admin) paragraph 64 and *R(CHF) v Newick CE Primary School* [2021] EWHC 2513 (Admin) paragraph 23(vi)). In those circumstances it is just that the decision of the Panel is quashed. I did raise with counsel whether, if that were my determination, I should remit the matter to the Panel, but Mr Oldham responded that the Panel, and indeed the interested parties, may wish to have that opportunity, without necessarily deciding to take it. Accordingly that is the course I shall adopt.

67. I am grateful to counsel for their thorough presentation of their respective cases. They helpfully indicated that any consequential matters which cannot be agreed can be dealt with on the basis of written submissions. A draft order, and any such submissions, should be filed within 14 days of hand down.