Neutral Citation Number: [2021] EWCA Civ 1322

Case No: A2/2020/1458/EATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE CHOUDHURY, MRS G SMITH AND MR M WORTHINGTON
UKEAT/0206/18/VP

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/09/2021

Before :

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE NUGEE

- -

Between :

GWYNEDD COUNCIL	**Appellant**
- and -	
SHELLEY BARRATT AND IOAN HUGHES	**Respondents**

- -
- -

Owain James (instructed by **Gwynedd Council Legal Services**) for the Appellant (Defendant)
Claire Darwin (instructed by **Mark Underhill, NASUWT**) for the Respondents (Claimants)

Hearing date: 28 July 2021

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Approved Judgment

Lord Justice Bean:

1. The Claimants, Shelley Barratt (formerly Shelley Thomas) and Ioan Hughes, are former employees of the Appellant ("the Council"), which is the local education authority for the county of Gwynedd. Both were employed by the Council as teachers of physical education at Ysgol y Gader, a community secondary school (11-16) in Dolgellau maintained by the Respondent; were dismissed on 31 August 2017 upon the school's closure; and are members of the National Association of Schoolmasters/Union of Women Teachers (NASUWT).

2. Ms Barratt and Mr Hughes brought claims for unfair dismissal against Gwynedd Council. These were heard together by Employment Judge Tobin (sitting alone) at Wrexham on 4 July 2018. The Claimants were represented by Mr Adkins, an official employed by NASUWT; the Council was represented by its solicitor, Mr Edwards. By a reserved decision sent to the parties on 1 August 2018 EJ Tobin upheld the claims for unfair dismissal.

3. Unusually, the case was heard in the ET on the basis of a statement of agreed facts. Paragraphs 3-17 read as follows:-

> "3. On 19 May 2015, having followed the relevant statutory procedures the respondent's cabinet resolved to implement a reorganisation of its primary and secondary education provision in the Dolgellau area.
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> 4. This reorganisation involved the discontinuance (i.e. permanent closure) on 31 August 2017 of Ysgol y Gader as well as all 9 primary schools within the secondary school's catchment, and in their place the establishment on 1 September 2017 of a new community all-through school (3-16) named Ysgol Bro Idris.
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> 5. By the same resolution on 19 May 2015 the respondent approved the establishment of a temporary governing body ("TGB") for Ysgol Bro Idris. That TGB determined the staffing structure of the new school and appointed its teachers, pursuant to powers under regulations 12 and 36 of the Staffing of Maintained Schools (Wales) Regulations 2006 ("Staffing Regulations").
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> 6. Between 19 May 2015 and 1 September 2017 the respondent kept informed affected schools, including the claimants, on the progress of the reorganisation process, including proposed changes and staffing implications. This included inter alia informing affected staff:
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> • that all existing contracts of employment would be terminated as of 31 August 2017.
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> • that the staffing of the new school would be determined by an application/interview process,

• that unsuccessful candidates would be made redundant as of 31 August 2017 unless they were successfully redeployed at a suitable alternative post within the respondent authority,

• the respondent also kept trade unions updated regularly via meetings with its Unions Forum.

7. Each claimant applied [for] posts at Ysgol Bro Idris: a. Head of Health and Wellbeing. b. Physical Education Teacher.

8. Both claimants were interviewed for both posts, on 15 December 2016 for the Head of Health and Wellbeing, and on 25 January 2017 for the Physical Education Teacher. Both claimants were unsuccessful. In each case, the posts were offered to a successful third candidate.

9. By letter to IH on 9 May 2017 and to SB on 24 May 2017 the respondent gave written notice of termination on the grounds of redundancy with expiry on 31 August 2017.

10. Following receipt of these letters, the claimants presented representation via their union representative to the respondent, querying that they had not been given the opportunity to make representations or appeal to the Governing Body of Ysgol Bro Idris [sic – but it is agreed that this reference should be to Ysgol y Gader] in respect of the decision to dismiss, pursuant to regulation 17 of the Staffing Regulations.

11. In response, on 18 August 2017 the Chair of the Governing Body of Ysgol y Gader sent a letter to the claimants' union representative apologising that no such opportunity had been given in this instance. The same letter also pointed out that the failure to allow an appeal did not cause any disadvantage to the claimants, that an appeal would have made no difference as the dismissals were caused by the closure of the school and that no appeal panel would have been able to reverse the fact of closure and thus avoid dismissals.

12. In September 2017 Ysgol Bro Idris opened. Ysgol Bro Idris operates its school from 6 sites, all of which were previously occupied by schools which were discontinued as a result of reorganisation. Primary school education is provided from 5 sites, each one serving a separate catchment area. Secondary education is provided from a single site formerly occupied by Ysgol y Gader.

13. On 4 September 2017 the claimants' union representative emailed the respondent's Senior HR Adviser requesting the authority's response to Ysgol y Gader's failure to follow regulation 17 of the staffing regulations and that the authority offer to pay compensation for this failure.

> 14. In October 2017 the respondent paid the claimants their redundancy payments. SB received £4,401.00 and IH received £7,824.00.
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> 15. On 3 October 2017 the respondent emailed the claimants' union representative, in response to the email of 4 September 2017. The respondent stated that the claimants were not disadvantaged in any way by not [having] been allowed to submit an appeal under regulation 17 of the Staffing Regulations as such an appeal would not have been able to reverse the decision to close the school. The respondent also stated that it believed that the staff were properly compensated by the redundancy payment.
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> 16. On 23 October 2017 the TGB ceased to exist and the Governing Body of Ysgol Bro Idris was formally incorporated. The employment liabilities of the former are transferred to the latter.
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> 17. The parties acknowledge that:
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> > a. prior to dismissal, the claimants were entitled to make representation and appeal to the Governing Body of Ysgol Bro Idris [again this should read "of Ysgol y Gader"] in respect of the decision to dismiss, pursuant to regulation 17 of the Staffing Regulations;
> >
> > b. the claimants were not given an opportunity to make such representations or lodge an appeal;
> >
> > c. without prejudice to the question of whether the dismissal is fair, the claimants were dismissed on the grounds of redundancy;
> >
> > d. exercising the statutory right of appeal under regulation 17 would not have made any difference to the outcome. Had the claimants been given such an opportunity, they would still have been dismissed on the grounds of redundancy."

4. It is convenient to refer, as counsel did before us, to Ysgol y Gader as "School 1" and Ysgol Bro Idris as "School 2".

5. In the ET1s lodged by NASUWT on behalf of each Claimant the Council had been named as the First Respondent and the governing bodies of the two schools as Second and Third Respondents. However, it is common ground, as it was before the ET and EAT, that the Claimants were employed by the Council, not by the governing body of either school; the decision to dismiss was in law that of the Council alone; and that accordingly the Council was the correct Respondent to the claims for unfair dismissal. At paragraph 23 of his decision EJ Tobin, after referring to the decision of this court in *Abergwynfi Infants School Governors v Jones* [2011] EWCA Civ 92 said:-

> "This case confirms Mr Edwards' contention that the respondent is capable of being directly liable for the claimants' dismissal in similar circumstances. I am not sure that this issue was still in dispute at the hearing because the respondent accepts that it is the correct – and only – party to these proceedings and at the hearing Mr Adkins raised no dispute in this regard."

Community schools

6. Community schools in England and Wales were established by Part 3 of the Education Act 2002 ("the 2002 Act"). They are maintained by funds provided by local authorities. Section 19(1) of the 2002 Act provides that every maintained school shall have a governing body, which is a body corporate constituted in accordance with regulations. The conduct of a maintained school is under the direction of the governing body: s 21 of the 2002 Act.

7. The governing body of a community school in Wales must consist of certain prescribed categories of governors (for example staff governors and parent governors); and must include five local authority governors.

8. While at some types of school, for example voluntary aided and foundation schools, teachers are directly employed by the governing bodies of those schools, in community schools the teachers are employed by the relevant local authority. Section 35(2) of the 2002 Act provides that:

> "Any teacher or other member of staff who is appointed to work under a contract of employment at a school to which this section applies is to be employed by the local authority."

The Employment Rights Act 1996 ("the 1996 Act")

9. Section 98(4) of the 1996 Act deals with the fairness of dismissals. It provides:

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

10. Section 139 of the 1996 Act deals with redundancy. It provides:

> "(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

> (a) the fact that his employer has ceased or intends to cease –
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business –
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish.
>
> …….
>
> (3) For the purposes of subsection (1) the activities carried on by a local authority with respect to the schools maintained by it, and the activities carried on by the governing bodies of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them)."

The Staffing Regulations

11. Before returning to the contents of the Claimants' ET1s I should set out regulations 12 and 17 of the Staffing of Maintained Schools (Wales) Regulations 2006.

12. The Staffing Regulations govern the appointment of staff at maintained schools. Regulations 10 and 11 deal with the appointment of head teachers and deputy head teachers. Regulation 12 deals with the appointment of other teachers. So far as is relevant, Regulation 12 provides:

> "(1) Subject to paragraph (2) [which is not relevant here], paragraphs (6) to (14) apply in relation to the filling of a vacancy in any teaching post (whether full-time or part-time) at the school, other than the post of head teacher or deputy head teacher.
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> …
>
> (6) before taking any of the steps mentioned in paragraphs (7) to (14), the governing body must –
>
> (a) determine a specification for the post in consultation with the head teacher, and
>
> (b) send a copy of the specification to the local authority.

(7) The local education authority may nominate for consideration for appointment to the post any person who appears to the authority to be qualified to fill it and who at the time of his or her nomination either:

(a) is an employee of the authority's or has been appointed to take up employment with the authority at a future date, or

(b) is employed by the governing body of the foundation, voluntary aided or foundation special school maintained by the authority."

(8) No person who is employed at any school maintained by the authority is to be nominated by the authority under paragraph (7) without the consent of the governing body of that school.

(9) The governing body may advertise the vacancy at any time after it has sent a copy of the specification for the post to the local authority in accordance with paragraph (6), and must do so unless either –

(a) it accepts for appointment to the post a person nominated by the local authority under paragraphs (7) and (8), or

(b) it decides to recommend to the authority for appointment to the post a person who is already employed to work at the school.

(10) Where the governing body advertises the vacancy, it must do so in a manner likely in its opinion to bring it to the notice of persons (including employees of the authority) who are qualified to fill it.

(11) Where the governing body advertises the vacancy, it must –

(a) interview such applicants for the post and such of the persons (if any) nominated by the local authority under paragraphs (7) and (8) as it thinks fit, and

(b) where it considers it appropriate to do so, either recommend to the authority for appointment one of the applicants interviewed by it or notify the authority that it accepts for appointment any person nominated by the authority under paragraphs (7) and (8).

(12) If the governing body is unable to agree on a person to recommend or accept for appointment, it must repeat the steps mentioned in paragraph (11), but it may do so without first re-advertising the vacancy in accordance with paragraph (10).

(13) Where a person is recommended or accepted for appointment by the governing body and the person meets all

> relevant staff qualification requirements, the local authority must appoint the person.
>
> …"

13. As the EAT noted, it is apparent from these provisions that the local authority does have a limited role in relation to the appointment of teachers, other than head teachers and deputy head teachers, at maintained schools in that it may nominate for consideration for appointment to a post any employee or future employee of the authority who appears to the authority to be qualified to fill it. The governing body may accept a person so nominated, but is not obliged to do so. If it does not do so, then it must advertise the vacancy. In those circumstances, the local authority's nominated candidates may be interviewed by the governing body, along with other candidates, but only if the governing body thinks fit to do so. Once the governing body is in a position to recommend a candidate for appointment and that candidate meets all relevant staff qualification requirements, the local authority must appoint that person: Regulation 13. (The EAT observed at paragraph [73] of their judgment that they had been told that the two vacancies for PE teachers at School 2 were eventually filled by external candidates, suggesting that the roles were advertised.)

14. Regulation 17 deals with the dismissal of staff and appeals. So far as is relevant, it provides:

> "17.—
>
> (1) Subject to regulation 18, where the governing body determines that any person employed or engaged by the authority to work at the school should cease to work there, it must notify the authority in writing of its determination and the reasons for it.
>
> (2) If the person concerned is employed or engaged to work solely at the school (and does not resign), the authority must, before the end of the period of fourteen days beginning with the date on which the notification under paragraph (1) is given, either—
>
> (a) give him or her such notice terminating his or her contract with the authority as is required under that contract, or
>
> (b) terminate that contract without notice if the circumstances are such that it is entitled to do so by reason of his or her conduct.
>
> (3) If the person concerned is not employed or engaged by the authority to work solely at the school, the authority must require him or her to cease to work at the school with immediate effect……..
>
> (6) The governing body must—

> (a) make arrangements for giving any person in respect of whom it proposes to make a determination under paragraph (1) an opportunity of making representations as to the action it proposes to take (including, if he or she so wishes, oral representations to such person or persons as the governing body may appoint for the purpose), and
>
> (b) have regard to any representations made by him or her.
>
> (7) The governing body must also make arrangements for giving any person in respect of whom it has made a determination under paragraph (1) an opportunity of appealing against it before it notifies the [local authority]1 of the determination…….
>
> (11) The [local authority]1 must not dismiss a person employed by it to work solely at the school except as provided by paragraphs (1) and (2)…….

The Modification Order 2006

15. I gratefully adopt the reference in the judgment of the EAT to the Education (Modification of Enactments Relating to Employment) Wales Order 2006 ("the 2006 Order")*:*-

> "27 … Although, as set out above, it is the local authority that employs staff at maintained schools, the 2006 Order has the effect that the employer is, for certain purposes, deemed to be the Governing Body. In particular, references in specified legislation, such as the 1996 Act, include references to dismissal by the authority following notification of a determination by a Governing Body under Regulation 17(1) of the 2006 Regulations: see Article 3(1)(d) of the 2006 Order. In other words, the Governing Body is treated as the employer wherever the local authority dismisses a member of staff following a determination by the Governing Body."
>
> 28. Article 4 of the 2006 Order provides:
>
> > "Without prejudice to the generality of article 3, where an employee employed at a school having a delegated budget is dismissed by the authority following notification of such a determination as is mentioned in article 3(1)(d) –
> >
> > (a) section 92 of the 1996 Act has effect as if the governing body had dismissed him and as if references to the employer's reasons for dismissing the employee were references to the reasons for which the governing body made its determination; and
> >
> > (b) Part X of the 1996 Act has effect in relation to the dismissal as if the governing body had dismissed him, and

> the reason or principal reason for which the governing body did so had been the reason or principal reason for which it made its determination."
>
> 29. Thus, not only is the Governing Body deemed to be the employer where there is a dismissal following a determination, its reason for making the determination is deemed to be the reason for dismissal.
>
> 30. Although the 2006 Order is mentioned by the Tribunal, it seems that no argument was presented to it that the Governing Body of either School 1 or School 2 should be treated as the employer for any purpose. That may be because there was no determination by the Governing Body of School 1 within the meaning of Article 3(1)(d) of the 2006 Order. It is common ground that the decision to dismiss the Claimants was that of the Respondent local authority alone. In those circumstances, the deeming provisions under the 2006 Order would not apply."

16. The Transfer of Undertakings (Protection of Employment) Regulations ("TUPE") did not apply in this case because the council was the employer throughout. There was no transfer of the Claimants' employment to any other body, nor would there have been if they had remained employed after 31 August 2017.

The ET1s

17. The claim forms in each case were drafted by NASUWT. The First Claimant's began as follows:-

> "1) The Claimant, Shelley Thomas, was employed as a teacher at Ysgol y Gader, Dolgellau. This school came under the control of the First Respondent, Gwynedd County Council. The school closed on 31 August 2017 and was replaced by a new one, which covered pupils from the ages of 3 - 19, which opened on 1 September 2017. The new school is also under the First Respondent's control.
>
> 2) As a consequence of the pending closure all members of staff at Ysgol y Gader, as well as the staff in a number of neighbouring primary schools, were informed that all existing contracts of employment would be terminated as of 31 August 2017. They were also advised that the staffing structure for the new school would be determined by an application/interview process. Unsuccessful candidates were advised that they would be made redundant as of 31 August 2017 unless they were successfully re-deployed to a suitable alternative post within the First Respondent Authority.
>
> 3) As a result of the selection process the Claimant was unsuccessful in obtaining a post within the new school and on 27

> May 2017 received a letter dated 24 May 2017 from the First Respondent with the opening two paragraphs stating:
>
> > "Following a decision of the Council that Ysgol y Gader is to close I write to inform you that your job as a teacher will come to an end.
> >
> > This means that your employment will formally end on 31 August 2017. This letter gives you 3 months' statutory notice that your employment with Gwynedd Council will end on 31 August 2017."
>
> 4) Following receipt of the letter the First Respondent did not provide the Claimant with an opportunity to make representations nor to appeal to the Governing Body of Ysgol y Gader against the decision to dismiss the Claimant as of 31 August 2017. [Regulation 17 (6)-(7) was then set out.]".

18. The ET1s then referred to items of correspondence between the parties. The first was a letter of 18 August 2017 from the Chair of the governing body of School 1 to NASUWT acknowledging that the governing body should have given the union's members the opportunity to appeal under Regulation 17 before notifying the council of its decision to dismiss the staff but arguing that an appeal would not have made any difference as the dismissals were caused by the closure of the school, and no appeals panel would have been able to reverse that fact and thus avoid dismissals. NASUWT complained in a further letter of the denial of statutory rights under Regulation 17 and asked the authority to offer compensation. A reply on 3 October 2017 from the Council's senior HR advisor repeated the argument that the appeal would not have been able to reverse the decision to close the school and therefore would not have made any difference.

19. The ET1s each concluded:-

> "9. It is the Claimant's argument that an appeal on her behalf would not have been against the decision to close Ysgol y Gader but against the failure of the First Respondent to allow the Claimant the right of appeal against the decision to not appoint the Claimant to the staff of the new school.
>
> 10. Therefore the Claimant claims she has been unfairly dismissed – both procedurally and substantively – contrary to the Employment Rights Act 1996 and brings a claim for the same under this Act."

The ET3s

20. The ET3s filed by the Council were summarised by the ET, so far as material, as follows:-

> "vi. The respondent accepts that the claimants were dismissed but denied that the claimants were unfairly dismissed. The claimants were dismissed by the respondent directly and not by

the Governing Body of Ysgol y Gader or the Governing Body of Ysgol Bro Idris. As the Governing Body of Ysgol y Gader did not dismiss the claimants it could not be held liable for unfair dismissal. The TGB was entitled to determine whomever it wished to recommend for appointment to posts at school. It owed the claimant no duty to offer employment whether suitable alternative employment, or at all. Neither the TGB nor the constituted governing body could be held liable for unfair dismissal. accordingly, the respondent could not be held vicariously liable for unfair dismissals by the TGB or the Governing Body of Ysgol Bro Idris.

vii. The claimants were dismissed for a potentially fair reason, namely redundancy. Ysgol y Gader was closed down as a result of reorganisation, therefore, this amounted to a redundancy situation. The fact that the building formerly occupied by Ysgol y Gader is now occupied by another school [Ysgol Bro Idris] is immaterial to the question of whether there was a redundancy situation.

viii. The respondents acted reasonably in treating the claimants' redundancy as a reason for dismissal. The respondent did all it could in the circumstances to avoid the claimants' redundancy, including the provision of practical guidance in drawing their attention to potentially suitable alternative [vacancies] in schools within the respondent's area. Due to the operation of the Staffing Regulations the respondent was unable by itself to offer suitable alternative employment to the claimants at any of its maintained schools, including Ysgol Bro Idris. The respondent cannot be held liable for the Governing Body of Ysgol Bro Idris' decision not to recommend the appointment of the claimants.

ix. The respondent disputed the claimants' argument that their appeal was against the decision not to appoint them to the staff of the new school, as follows:

a. The claimants' statutory right of appeal under regulation 17 of the Staffing Regulations could only lie against the Governing Body of Ysgol y Gader and only against a determination that the claimants should cease work at the school.

b. Such an appeal could not lie against the respondent or the Governing Body of Ysgol Bro Idris for any decision made by them.

c. The decision of who [was] to be appointed at Ysgol Bro Idris lay with the Governing Body of Ysgol Bro Idris itself and the respondent could not be held liable for that Governing Body's decision not to appoint claimants.

> x. The respondent contended that in all the circumstances it acted within the range of reasonable responses in treating the claimants' redundancy as the reason for dismissal.
>
> xi. In the alternative, the claimants' dismissal arose from the schools' reorganisation and amounted to a fair dismissal for some other substantial reason.
>
> xii. Finally, the respondent contended that if the claimants' dismissal was procedurally unfair, the respondent asserts that they would have been dismissed in any event under *Polkey v A E Dayton Services Ltd* [1987] ICR 142."

Pleading points

21. Despite the best efforts of Mr James to persuade us to the contrary, I do not accept that the claims for unfair dismissal before the ET were limited to allegations of breach of a statutory duty under Regulation 17 of the Staffing Regulations. The allegation (which was not disputed) that the Claimants had not been afforded their statutory right of appeal certainly figured prominently, but even if, which I doubt, the jurisdiction of the ET could have been limited by the pleadings, paragraphs 9 and 10 of the ET1s (cited above) made it clear that the claims were of unfair dismissal both on procedural and substantive grounds.

22. The next pleading point arises out of paragraph 17d of the statement of agreed facts presented to EJ Tobin at the outset of the hearing. As noted above, and as the Respondents had written more than once in correspondence, this stated that "exercising the statutory right of appeal under Regulation 17 would not have made any difference to the outcome". This did not constitute an admission by Mr Adkins of NASUWT that his members had no case of unfair dismissal, for three reasons. Firstly, it only referred to the statutory right of appeal under Regulation 17. Secondly, paragraph 17c of the agreed facts made it clear that the parties' agreement that the reason for dismissal was redundancy was expressly without prejudice to the question of whether the dismissals were unfair. Thirdly, on a fair interpretation of paragraph 17d, especially in combination with 17c, it is subject to the implied gloss that "rightly or wrongly" the exercise of the statutory right of appeal would not have made any difference to the outcome. The Claimants' case was that the Respondent Council had wrongly closed their mind to any alternative solution.

The decision of the ET

The effectiveness of the dismissals

23. After setting out the agreed facts and other aspects of the history, EJ Tobin observed that the dismissal of a teacher, even if *ultra vires* because of failure to accord a statutory appeal, was nevertheless effective. He said:-

> "24 *Pinnington v (1) The Governing Body Ysgol Crug Glas School & (2) City and County of Swansea* EAT/1500/00 settled the issue of whether a teacher could, in fact and in law, be dismissed in circumstances where this appeared to be *ultra vires*

> under the legislation. The case dealt with the School Standards and Framework Act 1998. The legislation provided that the Governing Body of the school having determined that an employee shall cease to work at their school had first to give the employee the opportunity for an appeal to be lodged. If no appeal was lodged, then the Governing Body may notify the LEA of their decision and the LEA was thereafter obliged to dismiss the employee. However, where an appeal was lodged, the Governing Body was obliged not to notify the LEA – and thereby set in course the employee's dismissal – until the outcome of that appeal. So, where an employee appealed against such a determination, the scheme necessarily involved that the employee's employment with the LEA should continue at least until the outcome of the appeal and then only if the appeal was unsuccessful did the employee's employment come to an end. That case involved an ill-health (i.e. capability) dismissal and the timing of the dismissal when the statutory scheme indicated that a dismissal could not be valid until the statutory right of appeal had been exhausted. The situation was confused by possible redeployment and/or the offer of new employment. Mr Edwards was correct in his assertion [that] this case gives authority to the proposition that irrespective of the lawfulness of the dismissal, if the employee's notice of dismissal is clear and acted upon it is, in law, an effective dismissal which can be the subject of an unfair dismissal challenge……
>
> 26. The mere fact that the respondent did not follow the correct statutory provision to end the claimants' employment does not invalidate the notice given. That matter is arguably a separate breach of contract; however, it is clear from the facts agreed that notice was given to the first claimant on 24 May 2017 and to the second claimant on 9 May 2017. The Particulars of Claim say that each of the claimant received their notice of dismissal on 27 May 2017 and this was before the requisite 3-month period prior to the dismissals taking effect. Therefore, the claimants' effective dates of termination was 31 August 2017 and, irrespective of whether the notice of dismissal was contractually permissible or otherwise, the claimant's contracts terminated at the date. The notice was clear and irrevocable notification of the termination of their employment so it was consistent with *Pinnington* and brought the claimant's employment to an end a little over 3 months from the date that the dismissal notice was received."

This has not been disputed before us.

Were the Claimants genuinely redundant?

24. I have noted that the list of agreed facts stated at paragraph 17c that, without prejudice to the question of whether the dismissals were fair, it was agreed that the Claimants had been dismissed on the grounds of redundancy. The Employment Judge had his doubts

about this, as well he might in my view, but he was content to proceed on the agreed basis and this court should do the same. He said at paragraphs 27-30:-

> "27. It is clear from the pleadings and from the statement of agreed facts that the parties rely upon the claimants' redundancy situation as being activated by the closure of Ysgol y Gader, i.e. a closure or cessation of the employer's business (i.e. the school). I am not convinced that this was, in fact, a closure of the employer's business or organization because the day after Ysgol y Gader closed Ysgol Bro Idris opened. Liabilities and assets transferred from the "old" school to the "new" school and there was a need for teachers of physical education in the secondary part of the new school at least (irrespective of whether they were described as Head of Health and Wellbeing and Physical Education Teachers). So whilst I accept that a redundancy situation arose because of the closure of Ysgol y Gader, I do not accept that dismissal were inevitable. The vast bulk of the school staff were not dismissed because of the closure of Ysgol y Gader. Rather than deal with the redundancy situation in the established way of consultation, pools of affected staff, selection criteria and suitable alternative employment, with consultation on each of these matters the respondent chose to circumvent this establish process. The respondent chose to warn staff of dismissal and to get staff to apply for their jobs or equivalent jobs at the new school. The respondent has conflated two issues. The claimants were not dismissed because a redundancy situation arose, they were dismissed because of the method (and an atypical method) that the respondent chose to deal with the redundancy situation.
>
> 28. It would be normal in a redundancy case, when considering fairness, to look not only at the nature of the proposed redundancy, but at the consultation process carried out, the pool of employees involved, and the selection criteria used. From the information presented to me, it is clear that the claimants were not involved, or consulted with, in respect of the decision to dismiss all staff of the 10 schools affected by the reorganization and to recruit staff for the replacement school through an application and interview process. This appears an unusual and controversial decision as it does not provide for effective consultation, as opposed to communication, in respect of the dismissals. Indeed, it is difficult to discern the parameters of the various pools of employees involved and there was no consultation over the selection criteria used for recruiting to "vacancies" at the new school. I cannot see any effective consultation – as opposed to mere communicating decisions made – with the claimants in respect of the whole process leading to their dismissal arising from the council's decision of 19 May 2015.

> 29. I am not convinced by the respondent's argument that it was unclear which Governing Body was responsible for the dismissal and by extension a right of appeal. The respondent chose to pursue a convoluted reorganisation process involving various temporary, elapsing and newly constituted Governing Bodies. It should have been foreseeable that any affected employees might want to appeal or grieve against the procedures adopted, so arrangements should have been put in place at that time to deal with these issues.
>
> 30. Although this situation may not fit in easily to the definition of redundancy, it probably fits better into that category than a dismissal for some other substantial reason (i.e. a reorganisation of the educational resources of the Dolgellau area) under s98(1)(b) ERA. The parties accept that this is a redundancy dismissal, so other than note my points above, I accept that it is appropriate to categorise this as redundancy dismissals."

Denial of an appeal and the "truly exceptional circumstances" issue

25. EJ Tobin said:-

> "31. Although it was a feature in the *Polkey* case that the dismissed employees were not allowed the right to appeal their dismissals, this was not a feature in the determination of the issue of whether the employer was acting reasonably in the circumstances of the case.
>
> 32. *Robinson v Ulster Carpet Mills* [1991] IRLR 348 dealt with the Fair Employment (Northern Ireland) Act 1989 so different legislation applied. The Court of Appeal in Northern Ireland determined that special reasons justified a departure from the employer's usual policy in relation to selection for redundancy to remedy an imbalance between Protestants and Catholics in the workforce. In this instance, it was not open to a tribunal to find that a failure to allow an appeal was unfair when this was not in contravention of the employer's grievance and disciplinary procedure which had been compiled in consultation with the trade union.
>
> 33. In *Taskforce (Finishing & Handling) Ltd v Love* EATS/0001/2005 the Employment Appeal Tribunal took a very wide interpretation of the *Robinson* decision determining that, in a redundancy dismissal, the employee was not conferred with a free-standing entitlement to have an appeal hearing and to be entitled to be advised of a right to be accompanied at such a hearing. The *Robinson* case affected 3 employees who were dismissed on grounds of redundancy in circumstances which did not give them a right of appeal against the redundancy situation. The EAT did not consider the circumstances where an employee had a contractual and/or statutory entitlement to an appeal

against dismissal as Ms Barratt and Mr Hughes did, and which had been denied. Furthermore, in my judgement, much in employment practices and the case law has moved on since 2005. The right to appeal any dismissal is now so ingrained in employment practices that it is rare that an employee would be dismissed without being given the right of appeal. Such a right has virtually become second nature for all but the most cavalier employer. Although, I do not need to distinguish the *Taskforce* case, with the greatest of respect to Lady Smith, I would have difficulties in following her rather brief reasoning in extending the applicability of the *Taskforce* case to this determination. Had the *Taskforce* case being decided more recently then I am sure that the outcome would have been different, or Lady Smith's reasoning would have been more elaborate.

34. In *Alvis Vickers Ltd v Lloyd* EAT/0785/2004 the employee was dismissed by reason of redundancy, significantly, with an appeal against dismissal. One of the 4 grounds of unfairness found in the decision to dismiss at first instance was that the appeal process did not give rise to a "genuine, independent and fair-minded review of the decision to dismiss". The ratio of this case is that where the company provides for an appeal, it was incumbent upon the company to conduct the appeal process properly. The appeal process had, in the words of the tribunal, to "be fair and procedurally sound"."

35. Mr Sion Amlyn's email of 8 June 2017, on behalf of the claimants, did not set out any grounds of appeal. He merely challenged the Chair of Governors (for Ysgol y Gader) with regard to the claimants' dismissals that occurred in circumstances where there was a statutory (and contractual) right of appeal. The response of the Chair of Governors, Mr Dyfrig Siencyn, is extraordinary. He did not invite Mr Amlyn or the claimants to submit their grounds of appeal so that he could consider this further. He merely dismissed Mr Amlyn's representation with an ill-conceived assertion that denying the claimants their rights of appeal did not cause them any disadvantage. In this point Mr Siencyn was emphatically wrong. At the very least he denied the claimants their statutory and contractual entitlements on a fundamentally important issue at a crucial time. The injury was significant as an appeal is a fundamental part of a dismissal process. It affords the employer another opportunity to look at the dismissal and, as articulated in Tipton, it offers the employees the opportunity to show that the employer's reason for dismissing them could not be treated as reasonable.

36. An appeal is ingrained in principles of natural justice and, although I do not say that the absence of an appeal would render every dismissal unfair, I do determine that it requires truly

> exceptional circumstances to refuse an employee the right to appeal against their dismissal. Such exceptional circumstances do not exist in this case, particularly where the claimants have a statutory and contractual right of appeal. It was substantively and procedurally unfair to deny the claimants in the case their right of appeal. Furthermore, no reasonable employer would refuse to consider an appeal in circumstances where an employee had a clear right of appeal.
>
> 37. Mr Siencyn was also wrong in his contention that the claimants' appeals would have challenged the closure of the school. Both he and the respondents conflate the closure of Ysgol y Gader with the inevitable dismissal of the claimants. The claimants were merely 2 teachers of many. They had never complained about the reorganisation of educational provision in general nor the decision to close Ysgol y Gader. There is no factual basis to support the contention that the claimants were opposed to the reorganisation affecting their school. Indeed they cooperated with the Governing Bodies by applying for their jobs/substantially similar jobs in the new school. It is a fiction (and indeed disingenuous) for Mr Siencyn to say what the claimants appeal would have been about without asking them."

The ET's conclusions on reasonableness

26. EJ Tobin continued at [37]:-

> "The vast bulk of teachers were not dismissed and were able to continue their employment with the respondent as the new school. It is very clear that the claimants sought similar treatment. The Particulars of Claim contend that the claimants' appeals would have been in respect of the decision not to appoint them to the staff of the new school and Mr Adkins confirmed this in his oral submission to me at the hearing.
>
> 38. The respondent ignored the established method of dealing with redundancy, as set out in paragraph 11 above. I have not been provided with a copy of the claimants' contracts of employment, therefore, I cannot discern any contractual obligation for the claimants to apply for their own jobs or broadly similar jobs, either on a periodic basis or in the event of a reorganization by the respondent.
>
> 39. Threatening to dismiss staff and compelling them to apply for their own jobs or similar jobs ignores years of jurisprudence on dealing with potential redundancy situations. It abrogates the employer's responsibilities and seeks to circumvent employment rights. Mr Adkins submitted that the appeals would have challenged the respondent's approach to this reorganisation/ redundancy and this was something that Mr Siencyn should have allowed. No reasonable employer of the size of the respondent

> with similar administrative resources available to it would have rejected the claimant's attempt to exercise their contractual and statutory rights of appeal with these issues in contention.
>
> 40. In accordance with the case of Tipton, the claimants were denied the opportunity of demonstrating that the reason for their dismissal were not sufficient for the purposes of S98(4). The reason given for the dismissal was redundancy. The claimants were invited to apply for their own jobs. There is no contractual requirement that they apply for their own jobs, either periodically or at all. Furthermore, the very act of applying for their jobs demonstrates that either an identical job or a substantially similar job existed or, at least, such was the similarities between the roles that they amounted to suitable alternative employment. The lack of any appeal or review of this process is both substantively and procedurally unfair. I determine that this is also outside the band of reasonable responses available to a reasonable employer.

The Polkey issue

27. Finally, EJ Tobin wrote:-

> "41. I am concerned by the respondent's assertion that had the claimants been given the opportunity to appeal then this would have made no difference and that they would have been dismissed in any event. This highlights a resolve by the respondent to dismiss the claimants in any event. It was committed to its course and would not be deflected. I cannot see how this can be consistent with the respondent's *Polkey* argument. Some processes adopted by the employer are so unfair and so fundamentally flawed that it is impossible to formulate the hypothetical question of what would be the percentage chance the employee had of still being dismissed even if a correct process had been followed: see *Davidson v Industrial Marine Engineering Services Ltd* EAT/0071/2003. This is an instance where the breach of a proper process was fundamental and profound. I am not prepared to make a *Polkey* deduction is such circumstances."

The appeal to the EAT

28. The council gave notice of appeal to the EAT. After some grounds of appeal had been weeded out by Judge Eady QC (as she then was) at a preliminary hearing, a full hearing took place before the President of the EAT, Mr Justice Choudhury, sitting with Mrs Smith and Mr Worthington, on 30 January 2020. By a reserved judgment handed down on 3 June 2020 - to which neither Mr James nor Ms Darwin referred to in oral argument before us (but had referred to in their written skeleton arguments) - they dismissed the appeal. I granted permission for a further appeal on 9 January 2021.

The grounds of appeal

29. The grounds of appeal to this court are as follows:-

> "Ground 1: Erred in law in finding that the dismissal by the Respondent was unfair because:
>
> i. the Respondent itself could not have afforded an appeal against dismissal
>
> ii. the ET failed to identify to whom an appeal should have been made
>
> iii. any appeal against dismissal should have been made to School 1
>
> iv. the Claimant's pleaded case was that the dismissal was unfair because they should have had an appeal under regulation 17 of the Staffing of Maintained Schools (Wales) Regulations 2006 to the governing body of School 2 when no such right of appeal existed
>
> v. there could not have been an appeal to School 2 against the decision of the Respondent to terminate the employment of the Claimants when it closed School 1
>
> vi. there could not have been an appeal against the decision of School 2 when in reality an appeal against dismissal is about preserving existing rights not about the refusal to grant employment rights
>
> vii. Regulation 12(9) of the Staffing of Maintained Schools (Wales) Regulations 2006 does not afford a right of appeal and it did not form part of the Claimants' case on unfairness before the ET;
>
> viii. It was an agreed fact that exercising a right of appeal was futile and is one of the exceptional circumstances in line with the decision in Polkey v AE Dayton Services Limited [1988] UKHL 8
>
> Ground 2: It was an error of law to apply a test of "truly exceptional circumstances" in determining the fairness of the lack of a right of appeal
>
> Ground 3: It was an error of law, perverse and contrary to the agreed facts for the ET not to make a 100% Polkey reduction or, alternatively, not to make some assessment of the outcome in circumstances where School 2 had refused to employ the Claimants and it could not be compelled to reconsider its decision or to offer them employment

> Ground 4: Alternatively, if at the liability hearing the ET had felt that there were insufficient facts in order to properly consider the issue it should have adjourned consideration of the same to the remedy hearing at which evidence could be given."

Ground 1

30. In my view the issue of Regulation 17, which scarcely featured in argument before the ET, is a distraction. The Regulation provides additional protection to teachers in some cases, but it does not give local authorities an escape route to circumvent their obligations as employers under the general law.

31. Mr James accepted in oral argument that his case on Ground 1 could be summarised as follows: (1) the decision of the governing body of School 1 to dismiss the Claimants cannot be criticised because School 1 was closing; (2) the decision of the temporary governing body of School 2 cannot be criticised either, because (TUPE being inapplicable) they were under no obligation when School 2 opened to offer employment to the Claimants; (3) the Council cannot be liable for the decisions of governing bodies which are independent of them in law.

32. I accept Ms Darwin's submission that such a strange result cannot be derived from the Modification Order. That Order deems the governing body of the maintained school employing a teacher to be the employer for certain purposes. But this does not mean that the governing body is the *de facto* employer of the teachers at its school, nor that the teachers have two employers. The local authority remains the employer of the teachers, save for limited purposes such as the exercise of powers under the Staffing Regulations; and even then the Order only applies where the governing body *has* exercised its power under the Regulations. In the case of the present Claimants this never happened. Accordingly the Modification Order is irrelevant, and the Council remained the Claimants' employer at all material times and for all material purposes.

33. One aspect of the case which puzzled me was a submission by Mr James that the Claimants were employed by the Council "to work solely at" School 1. If they were, then Regulation 17(2) would apply and the Council would apparently be obliged, in the event of a notification being given to the Council by the governing body of School 1 of its intention to dismiss the Claimants, to give notice terminating their contracts. However, it was not suggested in the agreed statement of facts, nor argued before the ET, that the Claimants were employed by the Council "solely" to work at School 1; the contracts of employment were not produced to the ET; and in those circumstances it cannot now be open to the Council to derive any comfort from Regulation 17(2). It is therefore unnecessary to pursue this issue further. Moreover, since the Governing Body of School 1 never gave any notification to the Council of its intention to dismiss, Regulation 17(2) was inapplicable in any event.

34. The Staffing Regulations plainly do not produce the result that when a teacher is dismissed in the course of a reorganisation of a local authority's schools there is no Respondent against which he or she can bring an effective claim. The Council, as employer, remains subject to its obligations under the Employment Rights Act 1996. These include, where teachers are made redundant, the obligation to ensure that a fair process is followed.

35. I would therefore reject Ground 1 of the Council's appeal.

Ground 2: "truly exceptional circumstances"

36. There is no general rule that any dismissal on the grounds of redundancy without an appeal must be unfair where no internal appeal mechanism is provided for in the contract of employment, as the Northern Ireland Court of Appeal held in *Robinson v Ulster Carpet Mills* [1991] IRLR 348. The court in that case attached importance to the fact that the employees' handbook, compiled by the management in consultation with their trade union, expressly made provision for an internal appeal against dismissals for misconduct but not against dismissals for redundancy. *Robinson* is not of assistance in a case where an internal appeal mechanism is provided for in the contract of employment, or is incorporated into the contract of employment by statute, and the employee is nevertheless denied the opportunity to appeal.

37. Mr James relied on some dicta of Lady Smith giving the judgment of the EAT sitting in Scotland in *Taskforce (Finishing and Handling) Ltd v Love,* 20 May 2005, unreported. She said:

> "31. We are satisfied that there is no rule, in a redundancy case, that the employee has a right to be accompanied at any consultation meeting. Nor is there any rule that a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure or, indeed, the type of appeal procedure provided in the event that there is one. The matter was specifically tested in the case of Robinson where three employees dismissed on grounds of redundancy claimed that they had been unfairly dismissed in circumstances which did not give them a right of appeal against the redundancy situation although employees dismissed for misconduct were afforded such a right. The Court of Appeal in Northern Ireland, taking account of the decisions in two Scottish cases, clearly determined that, in the absence of special facts, an appeal procedure was not required before a dismissal for redundancy could be found to be fair. Further, even in redundancy cases, the absence of appeal or review procedure does not of itself make a dismissal unfair; it is just one of the many factors to be considered in determining fairness, as was determined in the case of Shannon. *Accordingly, it would be wrong to find that a dismissal on grounds of redundancy was unfair because of the failure to provide an employee with an appeal hearing*. Similarly, it would be wrong to find that a dismissal on grounds of redundancy was unfair because of the failure to have an appeal hearing conducted by someone other than the person who took the original redundancy decision. [emphasis added]

38. This decision of the EAT remains unreported 16 years after it was given and is not even referred to in the six volumes which currently comprise *Harvey on Industrial Relations and Employment Law.* That suggests that it does not lay down a general principle. I agree with the proposition that in redundancy cases the absence of any appeal or review procedure does not of itself make the dismissal unfair – that is to say, if the original

selection for redundancy was in accordance with a fair procedure the absence of an appeal is not fatal to the employer's defence. But the sentence I have italicised goes too far unless it is qualified by saying that it would be wrong to find a dismissal unfair *only* because of the failure to provide the employee with an appeal hearing. As Lady Smith had said in the previous sentence, the absence of an appeal is one of the many factors to be considered in determining fairness.

39. Mr James submits that EJ Tobin was wrong in law to hold that "it requires truly exceptional circumstances to refuse an employee the right to appeal against their dismissal". As to this, the EAT in the present case said:

> "55. It is trite that in considering the question of unfairness under s.98(4), the Tribunal is to have regard to all the relevant circumstances including the size and administrative resources of the employer's undertaking. In our judgment, a fair reading of the whole judgment reveals that, notwithstanding that reference to "truly exceptional circumstances", the Tribunal did not in fact approach the question of fairness as if the absence of an appeal automatically or almost invariably rendered the dismissal unfair. At paragraph 36 of the Reasons, the Tribunal expressly stated that it does "not say that the absence of an appeal would render every dismissal unfair". The Tribunal was not therefore applying a general rule that absent an appeal a dismissal would be unfair. Furthermore, at the end of paragraph 36, the Tribunal concludes that "it was substantively and procedurally unfair to deny the claimants their right of appeal and that no reasonable employer would refuse to consider an appeal in circumstances where an employee had a clear right of appeal". These passages demonstrate that the Tribunal was applying a test of fairness and was considering whether the employer's approach in this case fell within the band of reasonable responses. It is also relevant to note, as Ms Darwin points out, that the Tribunal was concerned not just with the absence of an appeal but the absence of any opportunity to grieve or be consulted about the dismissals. Thus, the Tribunal refers at paragraph 28 to the absence of "any effective consultation"; at paragraph 29 to the fact that "it should have been foreseeable that any affected employees might want to appeal or grieve against the procedures adopted, so arrangements should have been put in place at that time to deal with these issues"; at paragraph 35, that Mr Siencyn was "emphatically wrong" to say that denying the Claimants their right of appeal did not cause them any disadvantage; at paragraph 40, that the Claimants were "denied the opportunity of demonstrating that the reason for their dismissal were not sufficient for the purposes of s.98(4)" ; and, in the same paragraph, that, "The lack of any appeal or review of this process is both substantively and procedurally unfair". These references are concerned with the question of fairness overall and do not reveal any unduly narrow approach that treated the absence of appeals or means of review as determinative."

40. I entirely agree. Even if the EJ was wrong to hold that there is a test of truly exceptional circumstances, that did not invalidate his conclusions on overall fairness. I would therefore reject Ground 2.

41. Mr James did not have a separate ground of appeal relating to the EJ's finding at [38]-[40] of his decision that the Council ignored the established method of dealing with redundancies. This shows good judgment on his part, because any such ground would have been without merit. The obligations of an employer carrying out a redundancy exercise were considered in the classic cases of *Williams v Compair Maxam* [1982] ICR 156 (EAT, Browne-Wilkinson P presiding) and *Polkey v AE Dayton Services Ltd* [1988] AC 344 in the House of Lords. It is sufficient to cite one well known passage from the speech of Lord Bridge of Harwich in *Polkey*:-

> "In the case of redundancy the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."

42. An employer's "organisation" includes, in the private sector, associated employers; and, for maintained schools, other schools within the area of the same local education authority: see section 139(3) of the 1996 Act and the decision of the EAT in *Northamptonshire County Council v Gilks* UKEAT/05979/05/CK.

43. Employers must usually give priority to employees at risk of redundancy over external candidates when seeking to fill available vacancies, provided that the vacancies constitute suitable alternative employment. Where there are fewer vacancies than employees at risk a selection process may be held, and it is then for the ET on a complaint of unfair dismissal to decide whether the process fell within the band of reasonable responses. All this is very well trodden territory for employment lawyers.

44. The EJ's robust findings at [39]-[40] were entirely open to him on the evidence.

Grounds 3 and 4: Polkey deduction

45. In granting permission to appeal I identified as a particularly arguable point the refusal of the ET to make any *Polkey* deduction, for the reasons the judge gave in his paragraph [41] cited above. Ms Darwin has, however, persuaded me that my concerns were unjustified. The parties had expressly agreed that the *Polkey* issue should be determined at the liability hearing. The Respondents took a stand on principle, saying that any defect in the procedure, including the denial of the appeal to which the Claimants were entitled, was immaterial since they would have been dismissed in any event; and did not adduce any evidence to show (for example) what consideration was given to placing the Claimants elsewhere, nor why the Council did not attempt to nominate them for vacancies at School 2 or elsewhere under Regulation 12 of the Staffing Regulations. In those circumstances EJ Tobin was entitled to take the view that it was impossible to formulate, or at any rate to answer, the hypothetical question of what percentage chance either of the Claimants would have had of being dismissed even if a correct process had been followed. In my view fairness does not require that the Respondents be allowed to re-run the *Polkey* argument at the remedy hearing which, because of the appeals to

the EAT and this court, has yet to take place despite the lapse of four years since the dismissals.

Conclusion

46. I would dismiss the Council's appeal.

Lady Justice Asplin:

47. I agree and would dismiss the appeal for the reasons given by Bean LJ.

Lord Justice Nugee:

48. I also agree.