Appeal No. UKEAT/0206/14/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 7 November 2014
Judgment handed down on 14 April 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

MR J ANDERSON APPELLANT

CHESTERFIELD HIGH SCHOOL RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EDWARD MORGAN (of Counsel) Instructed by: Brabners LLP Horton House Exchange Flags Liverpool Merseyside L2 3YL
For the Respondent	MR EDMUND BEEVER (of Counsel) Instructed by: Qdos Consulting Limited Windsor House Troon Way Business Centre Humberstone Lane Thurmaston Leicestershire LE4 9HA

SUMMARY

UNFAIR DISMISSAL

Reason for dismissal including substantial other reason

Contributory fault

Polkey deduction

The Claimant is a politician in Local Government and is currently the elected Mayor of Liverpool. This is an executive post and regarded as full-time. The position carries with it an annual allowance of almost £80,000. The Claimant had previously held positions as Councillor of Liverpool City Council, the Leader of the opposition on the Council and ultimately at the time of his election as Mayor, Leader of the Council, which was in effect a full-time post with an annual allowance of approximately £50,000. Prior to his election as Mayor, the Claimant was employed by a neighbouring Local Authority, Sefton Metropolitan Borough Council ("Sefton") at Chesterfield High School and once elected Leader of Liverpool City Council had ceased to work at the school. The Claimant and Sefton agreed that he should continue as an employee but on the basis that he would be paid the maximum allowed as paid leave to enable employees to hold public office by section 10 **Local Government and Housing Act 1989** (208 hours per annum). His post was held open and Sefton also continued to pay pension contributions.

This arrangement continued until the school became an Academy when the Claimant's employment transferred by a TUPE transfer to the Respondent, now independent of Sefton.

The Respondent was concerned that the arrangement was "inequitable" principally because the Respondent was paying some £4,500 per annum to the Claimant but the pupils at the school

received no benefit. The Respondent accordingly terminated the agreement. The Claimant claimed, *inter alia* that he had been dismissed unfairly.

The Employment Tribunal found that he had remained an employee and had been dismissed for "some other substantial reason", a potentially fair reason. However, the dismissal procedure was unfair, and his claim for unfair dismissal was upheld. He was entitled only to a basic award but subject to a 100% **Polkey** deduction and 25% deduction for contribution under section 122(2) **Employment Rights Act 1996** but no compensatory award.

The Claimant appealed. The Employment Appeal Tribunal upheld the decision of the Employment Tribunal on the basis that the deductions were justified on the facts found by the Employment Tribunal and that the Respondent had acted reasonably in taking the view that a continuation of an arrangement whereby the Claimant was paid (albeit a modest amount) by a publicly funded school without having to provide any services, for an indefinite period was of no value to the Respondent and might lead to significant criticism. It was entitled reasonably to regard the arrangement as inequitable and unsustainable and to terminate the Claimant's employment.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. The Claimant is the elected (executive) Mayor of Liverpool, a post which carries an allowance of almost £80,000 per annum.

2. Notwithstanding that, the Claimant was formerly Leader of Liverpool City Council and later Mayor of Liverpool, both in effect full-time appointments with the benefit of substantial allowances, the Claimant has drawn a modest salary and had the benefit of pension contributions from Sefton Metropolitan Borough Council ("Sefton"), because Sefton treated him as an employee, although for a substantial period he was not required to provide any services. Chesterfield High School was formerly maintained by Sefton, in which it is situated, rather than in Derbyshire. The Claimant has done no work for the school since May 2010. The Claimant's employment transferred by TUPE from Sefton to the Respondent School when it achieved an Academy status and independence from Sefton.

3. The proceedings relate to a claim by the Claimant for unfair dismissal and for compensation for unfair dismissal. This is an appeal by the Claimant from the Decision of the Employment Tribunal in Manchester sent to the parties on 28 January 2014. The Tribunal was presided over by Employment Judge Franey, who sat with lay members Mrs Bolton and Mr Humphreys. The Claimant had made claims for unfair dismissal, direct discrimination because of philosophical belief, failure to permit reasonable time off for public duties, for unlawful deductions from pay between August 2012 and 13 September 2012 and in respect of holiday pay.

4. The claim of unfair dismissal was found to be well founded; the complaint that the Respondent failed to permit reasonable time off for public duties failed and was dismissed. The claim in respect of unlawful deductions succeeded. By consent, the claim in respect of holiday pay succeeded.

5. The claim of discrimination in respect of philosophical beliefs was dismissed. The claim arose in this way:

> **"15. Inspired by his parents and a local community activist, the claimant has maintained for as long as he can remember a strong deep-seated conviction and belief in the importance of public service and the need to engender in others a desire and commitment to serve the community for the common good. This has manifested itself in his life in different ways. He has been an active member of the Labour party, he was employed as a Community Development Worker in the area in which he grew up in Liverpool between 1985 and 1986, and he obtained a diploma in social work from Liverpool John Moores University in 1989. During that diploma course he was given a placement at Sefton in the Education Welfare Department, and upon completion of his diploma he accepted an offer of permanent employment with Sefton. Within two years he had been promoted to Senior Education Welfare Officer.**
>
> **16. The claimant's belief in public service also influenced his participation in Local Government. He was elected as a Liverpool City Councillor in 1998, and in 2002 he was elected to the position of Leader of the Labour Group on Liverpool City Council."**

6. The Claimant maintained his belief in public service manifested itself in other ways too: by way of example, he set up a charity called Sefton Welfare of Pupils to raise money to help parents buy school uniforms for children to encourage school attendance; his role in supporting the release of a fan of Liverpool FC, Michael Shields, wrongly convicted in Bulgaria for a crime he was said to have committed while en route to the Champions League final in Istanbul in 2005; his opposition to a proposed new football stadium for Everton FC in Kirkby; his participation in the board that developed a programme of events for Liverpool's position as European City of Culture in 2008; and his long service on the board of Liverpool Vision, an organisation dedicated to economic development for the City of Liverpool:

> **"18. In addition the claimant gave examples in his witness statement of other goals which he successfully pursued whilst Leader or Mayor which contributed to the common good of the City, including relaying and adopting [sic] the roads around Sefton Park; the return of cruise liners to the Port of Liverpool; his support for the Oliver King Foundation; the opposition to the current "Bedroom Tax"; and his work with Tesco to raise money for local food banks. In his manifesto for his campaign to be elected Mayor in 2012 the claimant put as follows …:**

"I am Liverpool, through and through. I have lived and worked here all my life. I raised my children here and I have dedicated my life to working hard for the City and its residents." "

Background

7. In 1998 the Claimant was elected as Councillor of Liverpool City Council, for which he was entitled to receive an allowance of £10,000. At that point in time he was employed as the Senior Education Welfare Officer for Sefton. Sefton adjoins Liverpool. On a date unknown to me (the precise date is immaterial) the Claimant became the Leader of the opposition on Liverpool City Council and was entitled to an additional allowance for his special responsibility of £21,000 per annum.

8. In August 2001 he became the Senior Learning Mentor (a post later renamed Social Inclusion Officer) at the school at an annual salary of £29,000. At that time the school was maintained by Sefton.

9. In order to encourage members of the public to take up public office, section 50 of the **Employment Rights Act 1996** requires employers to grant time off during working hours to employees to enable them to hold public office. Councillors, such as the Claimant, were regarded as holding public office. Section 50 permitted employers to grant them paid leave (which was capped at 208 hours per annum by section 10 of the **Local Government and Housing Act 1989** ("LGHA") to facilitate their performance of public duties). The Claimant was duly permitted the maximum paid leave of 208 hours per annum but otherwise worked normally at the school for 35 hours per week. In May 2010 the Claimant became the Leader of Liverpool City Council. This was in effect a full-time role, and he was entitled to receive significant allowances. Prior to being appointed Leader of Liverpool City Council, the Claimant had received approximately £10,000 per annum for his role as Councillor, together

with a special-responsibility allowance as Leader of the opposition, of approximately £21,000. When these allowances were added to his salary from Sefton for his role at the Respondent his total annual gross income was approximately £66,000. Upon becoming Leader of the Council he was entitled to a further £20,000 approximately. The Claimant made clear that if he were appointed Leader of the Council, he would not draw any additional money from Liverpool funds, and therefore his total income from May 2010 onwards when his salary and allowances were added together remained in the region of £66,000 per annum. Although previous incumbents of the role of Leader of the Council had carried out their duties on a part-time basis, the Claimant was committed to performing the role full-time. This was understood and supported by the Respondent, and consequently from the end of April 2010 the Claimant no longer attended at the Respondent to perform duties under his contract and was treated as being on leave. He has performed no duties at the school since that time.

10. Discussions took place in the summer of 2010 involving the Claimant and Sefton as to his pay, and it was necessary to resolve the issue prior to commencement of the new school year in September. On 21 July 2010 Mr Anderson sent an email to Mr Simon Penney, the Head Teacher of the Respondent. He sought one year's leave of absence from his current employment as from 1 September 2010 until 31 August 2011 on the basis that he would receive four days' unpaid leave of absence per week with one day's paid leave of absence per week. He had originally sought unpaid leave for 80% of the year and paid leave for 20%, but now sought 50% paid leave and 50% unpaid. The employer's contributions should remain in respect of his membership of the local-government pension scheme, and he would maintain his contributions to be deducted from his reduced pro-rata salary. He would continue to accrue holidays, which would be paid annually, and the school would maintain all of the usual communications and consultations as would have occurred had he remained in full-time paid

employment. He also proposed that his substantive post should be kept open for him. The Claimant stated that he had long appreciated the support of the Respondent and Sefton and the opportunity he had been given. He stated:

> **"… I will continue to support the School in whatever way I can on a personal level and as Leader of Liverpool City Council."**

11. On 4 August Sefton replied and pointed out that the annual paid leave was by statute (the **LGHA**) subject to a maximum of 208 hours per annum. The other time off would be treated as unpaid leave subject to an annual review, the first review to take place in June 2011. The Claimant for the purposes of communication of the consultation would be treated as an employee. There was substantial agreement to the Claimant's other requests, but this was not spelled out in the letter. The Claimant would continue to accrue holidays in substitution, it was suggested, for unpaid-leave days. The agreement commenced on 1 September 2010; so, in the financial year, up to April 2011 he would be entitled to 208 hours of paid leave. The Claimant was paid by the Respondent and reimbursed by Sefton from its supply teacher budget.

12. The Claimant was not happy with the limited paid leave, and in a letter of 8 September 2010, which is not in my bundle, but the content is referred to at paragraph 32 of the Decision of the Employment Tribunal:

> **"… [The Claimant] pointed out that both of his immediate predecessors as Leader had received additional paid time off from their respective employers, being Merseyside Fire and Rescue Service and Knowsley Council. He referred to precedents with other public appointments in the area, including the appointment of Mark Dowd as Chair of Merseytravel. He made an appeal to reasonableness, fairness and consistency across the Merseyside Authorities. His position was supported by the argument that section 10 did not impose any limit of 208 hours for his post as Leader because that post was effectively Chairman of the Council and therefore outside the ambit of the limit by section 10(1)(b)."**

13. No concern appears to have been given as to what the public perception might be of the expenditure of public money to a full-time politician who was not expected or required to provide any services in return.

14. At some time prior to October 2010 the Claimant was removed from the Respondent's payroll list and put onto Sefton's payroll list. The Claimant was apparently never moved onto the central Sefton payroll but remained on the Respondent's establishment payroll, and that was because, like other staff at the school, the Claimant was technically in the employ of Sefton. The Employment Tribunal had found that payments from the Respondent's staff budget were internally reimbursed by Sefton through an increase in the supply teaching budget, but it concluded that the precise administrative arrangements between Sefton and the Respondent were not of significance.

15. The Claimant's post was filled by a promotion made permanent later in 2010, and a temporary member of staff in the Claimant's department was made permanent. The Claimant remained on leave, but "technically" his post was being held open for his return.

16. In 2011 the Respondent began the transition towards academy status, when it would cease to be maintained by Sefton and there would be a **Transfer of Undertakings (Protection of Employment) Regulations** ("TUPE") transfer of staff from Sefton to the school. Staff were informed of this by an email of 9 February 2011 (an email the Claimant maintained he did not see as he no longer had access to school emails). The Respondent achieved academy status on 1 October 2011, and the Claimant's employment consequently transferred under **TUPE** from employment with Sefton to direct employment by the school. As from 1 April 2011 the Claimant was engaged for the full calendar year, his hours were reduced to four hours per week for the period 1 April 2011 to 31 March 2012. For that financial year his 208 hours' unpaid leave had to be spread over the whole of the year rather than only 26 weeks as had been the case in the previous year.

17. The Claimant's position was considered at a meeting of the staff and curriculum sub-committee on 26 April 2011:

> ***"Secondment***
>
> **Joe Anderson's 12 month period of secondment was discussed. Although Sefton are currently covering the cost of the secondment, it does cause instability with the school.**
>
> **It was agreed Full Governors would discuss the recommendation that the secondment should be ended on 31 August 2011."**

18. It is to be observed that the term "secondment" is an unusual way of describing the position of the Claimant vis-à-vis the Respondent. The meeting was obviously concerned that while until the Respondent achieved academy status in October the Claimant was reimbursed by Sefton through the supply teaching budget in respect of sums paid to the Claimant, but this would not continue after the transition to academy status. As the Employment Tribunal noted, coincidentally the Claimant was also considering his position at this time, and he sent an email to Margaret Carney, the chief executive of Sefton, saying that it was six months since he had become Leader of Liverpool City Council, had been extremely disappointed with his situation and was "quite shocked" that Sefton's pension contributions had been paid at his reduced salary rate and, to add insult, he was not getting any paid leave. He stated that he had asked Liverpool City Council to go down the route of putting in a grievance or look at unfair dismissal on his behalf, which they were willing to do and which he was now willing to proceed down. He went on to ask that "given the unique circumstances" Sefton should consider a request for voluntary early retirement.

19. On 23 May 2011 the Respondent's Governors considered the position and agreed that:

> **"… Although Sefton is currently covering the cost of the secondment, the absence of the post holder does cause instability within the school. It was agreed that the secondment should be ended on 31 August 2011."**

20. The Respondent emailed Mr Mark Dale, the head of Sefton's corporate personnel department, to ask what to do. The Claimant was not informed at this time.

21. Ms Carney replied to the Claimant's letter of 11 May on 23 May 2011 and reiterated that the statutory position was that Sefton could not offer more than 208 hours for paid leave and payments for outstanding leave would be dealt with by the personnel team. The Claimant's response was that he would ask for Liverpool City Council and his trade union to support a grievance and possibly a claim for constructive dismissal; neither of these matters appeared to have been taken further at this point in time.

22. On 26 May 2011 Mr Penney emailed Mr Dale to inform him of a vote of the Governors and asked Mr Dale to let the school know how to proceed. Mr Dale wrote that his understanding of the situation was that the Claimant continued to be employed by the Respondent, save that Sefton had agreed to fund some of the cost from the supply teacher budget. He said he would be grateful to have a discussion with Mr Penney in respect of the situation generally:

> **"… as this person remains an employee of your school there may be a way in which we can between us resolve the matter."**

23. The move to academy status was approaching, solicitors for Sefton, Messrs Browne Jacobson, commenced a TUPE consultation exercise, and it was agreed that all employees of the Respondent and five other schools would be subject to TUPE transfer. There was no specific reference to the Claimant's position, but his name was shown on the list of transferring employees.

24. Mr Penney took the view that the Claimant was not in fact an employee of the school but he did not wish to make an issue at this point in time in case it delayed the change to academy status. There was apparently some query about the contractual hours the Claimant would transfer under TUPE, and Sefton confirmed to the Respondent that the Claimant was contracted for 4 hours per week on a temporary arrangement but his substantive post was for 36 hours.

25. On 1 October 2011 the Claimant was informed of the TUPE transfer and invited to raise any queries, but he did not do so. On 7 February 2012 Liverpool resolved to institute the post of elected Mayor. Unlike the position of Leader of the Council (which was not for a determinate term) the post of elected Mayor would be for a fixed four-year term. The post of Leader of the Council could change at the Council's annual general meeting and was of course dependent on political changes within the group of Councillors who elected him. A Mayor, on the other hand, could only be removed on the grounds of health or misconduct, or on the basis of a referendum following a petition. Both the Respondent and Sefton were well aware that the Claimant proposed to stand as Mayor; he was duly elected by a very large majority on 3 May 2012. Both the Claimant and Sefton considered there was a continued contractual relationship, because when the Claimant had been Leader of the Council his entitlement was for an allowance of £79,500. In accordance with his election pledge, he only drew so much as was necessary to keep his gross income from the school and from his public duties at about £66,000.

26. On 3 July 2012 the solicitor to Liverpool City Council wrote to Mr Penney raising various questions, including whether the 208 hour payment limit in section 10 of the **LGHA** applied any longer. (It is unclear to me why the legal department of Liverpool should have been acting on behalf of the Claimant in his private capacity.) This was found by the Employment Tribunal to be implicitly a request for the Claimant to be paid more by the

Respondent than he was getting at the time, but, "In truth his desire was to increase his pension contributions". Since any additional sums had been paid by the Respondent, the Claimant would have reduced the amount he drew from Liverpool City Council in line with his election commitment. Sefton apparently responded by saying these were now matters for the school as his employer to consider. The letter from the solicitor to Liverpool City Council stimulated consideration on the part of Mr Penney and on the part of the Governors about whether it was appropriate for the arrangement whereby the Claimant received payment from the Respondent to continue. A "chairs' meeting" was arranged for 12 September, the first meeting of the academic year. The meeting was attended by the Chair of Governors and the Chairs of each individual committee, together with the Head Teacher, and effectively they acted as an executive committee of the full board of Governors. Prior to that meeting the Claimant received payment on 15 August of his monthly pay. The next payment was due on 15 September 2012. Mr Penney was aware that if the Chairs' meeting resolved that payment should not continue, it might be too late to stop the September payment. He therefore took it upon himself to instruct Arvato, the company to whom payroll administration had been entrusted, to stop the payment to the Claimant after the August payment. Arvato sent a letter to the Claimant dated 10 September 2012 accompanied by a P45, which gave the Claimant's leaving date as 31 August 2012. The P45 was accompanied by a pro-forma covering letter in which the relevant box had been ticked electronically and began with the sentence, "We have been informed by your manager that your employment has ended". Mr Penney had given no instruction to Arvato to send the letter or P45. The Employment Tribunal accepted Mr Penney's evidence that his intention was not to terminate the arrangement with the Claimant but only to stop further payments, in case the Governors decided to terminate the Claimant's employment. His position was that the advice he had been given by Browne Jacobson was that the Claimant was no longer an employee, he therefore did not regard himself as dismissing the

Claimant from employment and made the point it was outside his powers to dismiss a member of staff in any event; that would require the approval of the Governors.

27. The Chairs' meeting took place on 12 September. The discussion about the Claimant appeared as a confidential item:

> **"Meeting brought up to date regarding Mr Anderson. He is currently paid for 208 hours per year and post kept open. Since elected Mayor he is not entitled to any payment. School inherited existing arrangements upon conversation from Sefton LA. Letter received from Liverpool City Council solicitors which was passed to Browne Jacobson. Unsure what was actually being requested.**
>
> **Browne Jacobson prepared letter to be sent from school informing Mr Anderson that his payments were to be terminated."**

28. The Governors, it was said, had now reviewed the arrangement and in conducting the review had taken the following factors into account:

> **"You receive a salary in your post as Mayor of Liverpool;**
>
> **It does not appear to be an appropriate use of school funds to pay you additional money, particularly where you have not provided any services to the school since May 2010; and**
>
> **We understand the payment of 208 hours originally agreed comes from the Local Government and Housing Act 1989. This legislation specifically excludes the Mayor of the Council.**
>
> **The conclusion of the review is that payments will cease with immediate effect. Your last payment was received on 15 August 2012. However, as you were elected on 3 May 2012, you should not have received any money from the School since your election. We would request that you return the sum of £1,605.64 which was paid to you in error.**
>
> **We have also concluded that it is no longer appropriate for your role to be held open."**

29. The Employment Tribunal considered it important to note (see paragraph 66) that from the Claimant's perspective the Arvato letter with his P45 together with the letter from the Chair of the Governors were the response to his letter of 3 July 2012. He had not been informed that the Governors were considering terminating the payments or the arrangement, and he had been afforded no opportunity to have his say. There followed correspondence between the solicitor for Liverpool City Council, the Respondent and Sefton in which the Respondent and Sefton expressed the view that the Claimant should not be paid by the school when he had available a

substantial salary as the elected Mayor of Liverpool. The Claimant therefore commenced proceedings, and I have already indicated that his claim as to unfair dismissal succeeded. I shall come shortly to the circumstances in which that claim succeeded and the reason that the Claimant is appealing that Decision.

The Decision of the Employment Tribunal

30. The Employment Tribunal set out the facts as I have briefly summarised them and gave a self-direction as to the law. There is no issue raised as to any part of this self-direction. The case for the Respondent was that the Claimant ceased to be an employee of the Respondent after he became elected Mayor of Liverpool. The Employment Tribunal found he remained as an employee and was unfairly dismissed by reason of a combination of the return of his P45 and the letter from Arvato. The Employment Tribunal concluded that the dismissal was for a combination of reasons:

> **"121. The first and principal reason was that the arrangement had become "inequitable", which was shorthand for three considerations.**
>
> **122. Firstly, the school had inherited an arrangement made by Sefton but the school was no longer part of the Local Authority,**
>
> **123. Secondly, the school was making a payment of approximately £4,500 per annum to the claimant but the pupils of the school were getting no benefit in return for that expenditure.**
>
> **124. Thirdly, the annual payment to which the Mayor was entitled was significant enough to mean that the claimant could not be financially reliant on the income from the school."**

31. The second reason for dismissal was "instability", which the Employment Tribunal concluded was much less significant than the factor that I have set out above. The Employment Tribunal also concluded there was a third reason in the mind of the Chairs' meeting. The sentiment of the meeting was that the Claimant had, without consulting the Respondent, fundamentally changed the nature of the agreement by becoming elected Mayor rather than simply the Leader of the Council and a Councillor. As his tenure was now a four-year term

rather than subject to annual review, there was a sense that the Respondent should have been consulted:

> **"127. We found that the principal reason, the inequitable nature of the arrangement, was a substantial reason for terminating the claimant's employment with the school. It was not trivial or insubstantial, but was the sort of reason which could lead to a fair decision to dismiss."**

32. The Employment Tribunal went on to consider whether the dismissal was fair or unfair and reminded itself of the obligation to apply the test of the band of reasonable responses and not to substitute its own view for that of the employer. On the facts the Employment Tribunal rejected the Respondent's submission, that the dismissal was not unfair (paragraph 129):

> **"Even though the respondent had in our judgment a potentially fair reason for dismissing the claimant the procedure was woefully deficient. The claimant had not even been told of the proposal that his employment be terminated, let alone given any chance to have his say. In an ordinary employment case that would be patently unfair."**

On the facts of the case the decision to dismiss was not within the reasonable band of responses. It was also outside the band of reasonable responses not to offer the Claimant any right of appeal against the dismissal.

33. The Employment Tribunal then went on to consider the question of contributory fault. It reminded itself of the test in **Nelson v BBC (No. 2)** [1979] IRLR 346 that an award can only be reduced for contributory fault if the conduct in question was culpable, blameworthy and therefore unreasonable and that a reduction was only appropriate if the Tribunal was satisfied the conduct in question contributed to the dismissal and that it would be just and equitable to reduce the award. The Employment Tribunal considered that it was culpable and blameworthy on the part of the Claimant not to have made any contact with the Respondent about standing for Mayor; this was a different post to that of Leader and not simply a different title for the same role:

> **"136. … Further, the election as Mayor was effectively a commitment for the next 4 years, whereas that as Leader might be said to run from year to year. In those circumstances we concluded that it was seriously remiss of the claimant not to have bothered to contact the school to have ascertained whether this made any difference to its position on paid leave, particularly because he was aware that the school was no longer maintained by Sefton but was a freestanding Academy. We considered this to be unreasonable conduct which could properly be characterised as culpable and blameworthy within the context of this case."**

34. The Employment Tribunal concluded that this had contributed to the dismissal and had the Respondent been informed in advance of his intention to stand for election the ramifications of a successful election campaign could have been discussed and agreed in advance. Some discussion would have gone some way to lessening the understandable impression of Mr Penney and his colleagues that without reference to the Respondent the Claimant had committed himself to a four-year post and despite an entitlement to remuneration (by allowances approaching £80,000 per annum) he had simply written to them asking for more money: "That was not an entirely accurate impression, but it was not far off the mark." The Employment Tribunal concluded that the failure of the Claimant to make contact with the Respondent to discuss his intention to stand as Mayor and any impact upon his employment and position made it just and equitable to reduce any compensation (in respect of the basic award) by 25%.

35. The Employment Tribunal then went on to consider whether any deduction fell to be made pursuant to **Polkey v A E Dayton Services Ltd** [1987] IRLR 503. The Employment Tribunal considered the guidance given in **Software 2000 v Andrews** [2007] IRLR 568. The Employment Tribunal recognised that it should not be deterred from considering the issue because it involved some element of speculation but that it needed to be careful to ensure any such exercise was based on evidence heard in the case. The Employment Tribunal also was conscious of the fact that any **Polkey** reduction was predicated on the assumption that the Claimant would not succeed in his primary claim to be reinstated. If the reinstatement remedy

were pursued, it would then have to be determined at a further remedy hearing, and were the Claimant successful in achieving an order for reinstatement then the findings as to **Polkey** would fall away:

> **"140. The question we had to answer was this: what would have happened had the school invited the claimant to a meeting in September 2012 to discuss the possible termination of the arrangement?**
>
> **142. In considering that question we were informed not only by the evidence as to the position of Mr Penney and Mr Battersby towards the arrangement, but also to the claimant's own view of his relationship with the school. It was apparent to us that, save for very limited exceptions in relation to the awards evening and in dealing with two specific queries made of him, since becoming Leader in April 2010 he had shown no commitment to or involvement in the life of the school in any way. Nor had he shown any commitment to his own professional development in his professional role. His commitment to public service for the common good had led him into entirely different areas. It was plain to us that he regarded his relationship with the school as one of significance not for the payment of 208 hours per year itself (since if that were withdrawn then he would in principle have been able to increase the amount he drew from his civic allowances), but rather for the continuing contributions to the Local Government Pension Scheme which those payments entailed.**
>
> **142. Had there been such discussions in September 2012, and had the claimant made his position clear (including those matters on which he asserted the school drew a benefit from his participation in public life as set out in his witness statement), we were satisfied nevertheless that it was 100% likely that the school would have ended the payment of 208 hours per year in light of the school's conversion to Academy status and the lack of any tangible benefit to the school and its pupils from that payment. There is, therefore, no financial loss to the claimant resulting from the unfairness of the procedure by which the payment was stopped."**

36. The Employment Tribunal concluded that it was 100% likely that the Respondent would have ended the employment altogether following a proper and fair consultation. Although the concern about the inequitable nature of the payment was the primary concern, that regarding instability was also genuinely held. Given that the Respondent could realistically expect no service at all from the Claimant for the remainder of the mayoral term and given that the Respondent had already had no service from him since April 2010 the Employment Tribunal concluded that it was 100% likely that the school would have dismissed the Claimant fairly at the end of 2012 had a fair procedure been undertaken. The Employment Tribunal therefore concluded that were the Claimant not successful in his primary claim to be reinstated it would be appropriate only to award compensation and he would be entitled to a basic award subject to a reduction of 25% for contributory fault but no compensatory award.

37. The Employment Tribunal then went on to consider and dismiss the claim for direct discrimination on the grounds of the Claimant's philosophical belief as being a protected characteristic. The Employment Tribunal was satisfied that the Claimant's belief did constitute a protected characteristic but that he had not suffered less favourable treatment be reason of his beliefs. This is not an issue that arises on the appeal, and it is unnecessary to say any more about it, nor is it necessary to consider other claims that were dismissed such as failure to grant time off for public duties, nor is it necessary to say anything about unlawful deductions for holiday pay.

The Notice of Appeal and Submissions

38. I note at the outset that the principal basis of appeal is against the decisions as to deductions for contributory fault and **Polkey**. Neither of these findings is recorded as being part of the order or Judgment of the Employment Tribunal. Generally speaking, the Employment Appeal Tribunal has jurisdiction to entertain appeals only against "decisions" of the Employment Tribunal rather than against findings (section 21(1) **Employment Tribunals Act 1996**). The term "decision" is not defined in the Act but is defined in paragraph 1(3)(b) of the **Employment Tribunal Rules of Procedure 2013** as:

> **"(3) An order or other decision of the Tribunal is either -**
>
> **…**
>
> **(b) a "judgment", being a decision, made at any stage of the proceedings … which finally determines -**
>
> **(i) a claim, or part of a claim, as regards liability, remedy or costs …**
>
> **(ii) any issue which is capable of finally disposing of any claim or part of a claim, even if it does not necessary do so …"**

39. The provisions of this rule may provide a commonsense definition of a "decision" of the Employment Tribunal for the purposes of an appeal to the Employment Appeal Tribunal. Notwithstanding that, it would have been preferable if the findings as to **Polkey** and

contribution were set out in the formal part of the order of the Employment Tribunal, I am satisfied that these findings relate to a Decision of the Employment Tribunal that will be binding upon the parties at any remedy hearing and can be said to finally determine the parts of a claim relating to remedy. Neither party has shown any enthusiasm for arguing that I do not have jurisdiction to entertain the appeal.

Notice of Appeal and Submissions in Support

40. The Notice of Appeal originally contained five grounds and various sub-grounds of appeals on the grounds of "error of law" and also a perversity ground. By order dated 25 June 2014 HHJ Eady QC ordered that grounds (a) to (d) inclusive only of the appeal (all alleging errors of law) be referred to a Full Hearing but dismissed the remaining grounds of appeal. All four grounds of appeal with which I am concerned are directed to the findings in relation to the **Polkey** deduction and the deduction for contribution to the dismissal pursuant to section 123(6) of the **Employment Rights Act 1996**.

41. There is no appeal, perhaps somewhat surprisingly, against the finding that the Claimant was employed by the Respondent under a contract of employment.

42. It was submitted on behalf of the Claimant that the Employment Tribunal did not identify the person or persons taking the decision to dismiss and so the Employment Tribunal was deprived of necessary information required for its analysis of both **Polkey** and contributory fault. It is said that the Employment Tribunal gave no consideration to the questions of waiver or affirmation and the extent to which these were available to the Claimant.

43. It is then said the Employment Tribunal should have considered if the dismissal was effected by Mr Penney at the time he suspended payments but confined consideration to the "ratification" of his decision on 12 December 2012. It is then said that the reason for dismissal was not identified and accordingly it was impossible to say whether or not dismissal was within the range of reasonable responses, neither was there any proper investigation of whether the Respondent had a reasonably held belief as to the facts relied upon as would justify dismissal. If the Governors had ratified Mr Penney's decision to dismiss, then there was no engagement with the matters they were required to consider before dismissal.

44. It was inappropriate to make a **Polkey** deduction, because no reason for the dismissal had been found. The Employment Tribunal would have had to consider the process required for a fair dismissal and correctly found that it could not say how the Claimant might have reacted if he had been consulted and might have agreed, for example, only to keep his place in the pension scheme. This matter was not investigated. The Employment Tribunal should also have asked, but did not, what the Claimant might have done. The Employment Tribunal was required to form a sufficiently reliable scenario before making the deduction and in its determinations left the factual findings too riddled with uncertainty.

45. Insofar as contribution was concerned, it is said that the Employment Tribunal failed to give adequate consideration to the appropriate threshold for contributory conduct. The Employment Tribunal had found that the Claimant's appointment as Mayor made no change to his contractual relationship with the Respondent and his position as Mayor was entirely consistent therefore with existing contractual arrangements.

46. The Respondent was aware of the Claimant's decision to stand for election yet took no action. There was no contractual obligation on the Claimant to report or communicate with the Respondent, nor was he required to do so for any other reason. The Employment Tribunal therefore wrongly classified the absence of any communication as culpable, and thus justifying the finding of contribution, and there was consequently a misdirection as to the quality of the act that might justify such a finding.

The Respondent's Submissions

47. The Respondent submitted that the basis of my consideration should be the straightforward application of the relevant statutory provisions. The Employment Tribunal had set out correctly the relevant legal principles and given itself a correct self-direction.

48. It was not correct to say that no decision-maker had been identified; it was submitted that the Claimant had laid too much stress on the position of Mr Penney rather than on the committee at the Chairs' meeting, and it is clear that the Employment Tribunal concluded that the dismissal was not effected by Mr Penney but by the Governors (see paragraphs 61 to 64 of the Decision and the terms of the letter of 13 September set out at paragraph 65).

49. The dismissal was not effected by Mr Penney alone; he did not intend to dismiss and had no authority to dismiss. He suspended but did not stop payments. His reason for suspending payment was as set out in paragraph 62, in order to prevent payment being made because of the proximity of the Chairs' meeting at which the matter was to be determined. In any event Mr Penney's actions could not amount to a dismissal per se. I would interpose that Mr Penney's actions might have been construed as a repudiatory breach of contract such as would have entitled Mr Anderson to treat his contract with the Respondent as discharged. There is no

suggestion however that he did so. There were two separate decisions understood by the Employment Tribunal: firstly, to terminate payments and whatever contractual relationship there may have been; and secondly, to stop holding open the Claimant's post . These decisions constituted the dismissal. It was pointed out by the Respondent that the letter of dismissal was signed by the Chair of the Governors, Mr Battersby. Paragraph 118 of the Decision is explicit that the Employment Tribunal found that the Claimant "was dismissed from his employment".

50. The Employment Tribunal's reasoning includes concerns about misuse of public funds. It is also clear from paragraph 118 of the Decision that Mr Penney reported to the committee before it reached a decision. Waiver and affirmation, therefore, had nothing to do with this case. The Respondent submitted that at paragraphs 122 to 124 the Employment Tribunal set out the reasons for the dismissal, or the termination, of the Claimant's contract which clearly amounted to some other substantial reason ("SOSR"). For a dismissal to be regarded as fair, the employer has the burden or proving that the principal reason for the dismissal is for a potentially fair reason (section 98 **Employment Rights Act 1996**). Such reasons include capability, conduct and redundancy (section 98(2)) or "some other substantial reason" of a kind such as to justify the dismissal of an employee holding the position which the employee held (referred to by employment lawyers as "SOSR").

51. If a fair reason is established the Employment Tribunal must go on to determine whether the sanction of dismissal was within the reasonable range of responses of a reasonable employer.

52. I agree with this submission which is uncontroversial.

53. I do not need to say much about the law as there is no issue as to the self-direction of the Employment Tribunal. The issue in the case relates to the application of the law to the facts in relation to **Polkey** deduction and to the deduction for contribution in respect of the basic award under section 122(2) of the **Employment Rights Act 1996**. I have already referred to the principle set out in **Nelson v BBC (No. 2)** [1979] IRLR 346 that a deduction can only be made under this head if the conduct of the employee can be regarded as culpable or blameworthy.

54. The **Polkey** deduction may apply if the Employment Tribunal thinks there is a doubt whether or not the employee would have been fairly dismissed in any event, this element may be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

55. There is no suggestion that the Employment Tribunal misapprehended the law in these regards.

Discussion and Conclusions

56. So far as the identity of the person who was the decision maker who dismissed the Claimant, I do not see any difficulty about this. The dismissal was effected by a decision of the Governors. Mr Penney had no authority to dismiss the Claimant and did not purport to do so. Mr Penney's action in stopping the salary payment and the sending of the Claimant's P45 did not effect a dismissal. There may have been a breach of contract, such as would entitle the Claimant to treat his contract as discharged, but that is not what happened. It is apparent from paragraph 63 that the Employment Tribunal was, as was submitted by the Respondent, alive to the question of when the dismissal was determined upon and was satisfied that it was determined upon at the meeting of the Governors of 12 September 2012. The dismissal was

effected by the letter of 13 September 2012. There was no ratification of the decision to dismiss, only of the decision to stop payments. There are two decisions, (a) to terminate the contractual arrangement and (b) to no longer hold open the Claimant's post. As pointed out by the Respondent, the letter of 13 September 2012 was signed by the Chairman of the Governors, Mr Battersby.

57. In my opinion the principal reason for the "dismissal" was obvious. The realisation that a continuation of an arrangement whereby the Claimant, an elected official of a neighbouring Local Authority, was paid (albeit a modest amount) by a publicly funded school without having to provide any services for an indefinite period was considered to be of no value to the Respondent and might lead to significant criticism if the arrangement became public. The Respondent was reasonably entitled to regard the arrangement as inequitable and unsustainable. It was also the case that the Respondent considered that the arrangement (including the indefinite holding open of the Claimant's post) led to some instability within the school.

58. The Employment Tribunal's conclusions on the **Polkey** deduction and deduction for contribution were conclusions to which it was entitled to come. Its conclusion that the Claimant was party to a misuse of public funds was certainly within the range of reasonable responses of a reasonable employer. Further, the Claimant's conduct can reasonably be regarded as culpable or blameworthy. The finding that the Claimant would have been dismissed in any event had a "fair" dismissal procedure been followed is unassailable as a finding of fact that the Employment Tribunal was entitled to make. I am unable to see how consultation would have made any difference. If the Claimant wished to secure continued participation in his pension scheme, he should have raised the matter with Sefton, the Respondent, or Liverpool City Council; but never did so.

59. It seems to me as though the Claimant has simply not given sufficient attention as to how the arrangement he made with Sefton and so continued with the Respondent might look to outsiders. The Claimant was entitled to receive almost £80,000 per annum from Liverpool for his role as elected Mayor, yet also procured a payment (albeit modest) from public funds for which he provided, and was not expected to provide, any service. It was, more likely, considered to be a reverse form for a zero hours contract, whereby the Respondent was bound to make payment of salary but the Claimant was not bound to provide any services. It is certainly fairly arguable that this arrangement may strike members of the public as constituting a misapplication of public monies. I asked Mr Morgan on several occasions what benefits there might be that accrued to the Respondent for the payments and for preserving the Claimant's post for an indeterminate period. The only answer that I received was that it gave "kudos" to the school to be associated with the Mayor of Liverpool.

60. What most people would consider the Respondent's desire to extricate itself from this arrangement, which could have been a public relations disaster for the school, would seem to me to be a clear example of SOSR for ending the employment relationship with the Claimant. I am satisfied that this is the conclusion to which the Employment Tribunal came and to which it was clearly entitled to come. In the circumstances, the appeal is dismissed.