Appeal No. UKEAT/0044/16/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 October 2016

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MRS J DAVIES — APPELLANT

DROYLSDEN ACADEMY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LOUISE QUIGLEY (of Counsel) Instructed by: BLM Solicitors Kings House 42 King Street West Manchester M3 2NU
For the Respondent	MS JOANNE CONNOLLY (of Counsel) Instructed by: Eversheds LLP Eversheds House 70 Great Bridgewater Street Manchester M1 5ES

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

CONTRACT OF EMPLOYMENT - Damages for breach of contract

The Employment Judge's findings of fact and conclusions on the reason for dismissal and its fairness were permissible in light of the evidence and disclose no error of law. They are adequately reasoned.

However, the Employment Judge misdirected himself in law in relation to the unlawful deductions / breach of contract claim. He referred to the approach to calculating a week's pay for the purposes of the **Employment Rights Act 1996** ("ERA") where an employee has no normal working hours. This is irrelevant. He referred to section 229 **ERA** and the concept of a just apportionment in cases where that is appropriate. This too is irrelevant. By contrast, he made no reference to the relevant provisions at issue, namely sections 13(3) and 27 **ERA**. He made no reference to the requirement to make findings of fact as to the Claimant's contractual entitlement to pay or to payments that were properly payable by reference to her employment, in order to identify whether and to what extent there had been a shortfall. His conclusions at paragraph 56 demonstrate that he misapplied the law by reference to those irrelevant provisions in reaching his conclusion that there was no shortfall.

It being impossible to conclude that there is only one outcome of a proper analysis, this issue only is remitted to a fresh tribunal for re-hearing.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This is an appeal by Mrs Julie Davies against a Judgment with Reasons of the Manchester Employment Tribunal comprised of Employment Judge Sherratt promulgated on 27 August 2015. The Employment Judge found that the Claimant was fairly dismissed because she was redundant and that she had been paid all sums "justly due to her" following the termination of her employment. Both conclusions are challenged. The appeal is resisted by the Respondent, the Droylsden Academy, to whom her employment transferred in circumstances I shall describe.

2. I refer to the parties as they were before the Tribunal. The Claimant appears by Ms Quigley, and the Respondent by Ms Connolly, both of counsel and neither of whom appeared below. They have assisted me with clear submissions, for which I am grateful.

The Facts

3. The facts as found by the Employment Tribunal can be summarised as follows. The Claimant worked for a company known as Schools Plus Ltd ("SPL") as a Venue Lettings Manager from August 2010. SPL provided a service to educational institutions letting the institutions' premises out of school hours. With effect from 22 June 2012 the Claimant was appointed by SPL as the Venue Lettings Manager of the Respondent's school premises. She had a written contract of employment relating to this appointment, signed by her on 20 July 2012 and by a representative of SPL on 21 July 2012. That contract dealt with pay, providing that her base pay is the minimum wage and that there is a discretionary bonus scheme that is

decided by SPL on an annual basis communicated to her. SPL employed two other employees who assisted the Claimant in dealing with the Respondent's lettings contract.

4. With effect from 1 November 2014 the Respondent terminated its contract with SPL having decided to carry on the business of letting its premises on its own behalf; in other words, it decided to take the contract in-house. There was no dispute before the Tribunal that this was a relevant transfer within the meaning of Regulation 3(3) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"), and it was not argued that the conditions referred to in Regulation 3(3) were applicable.

5. The chronology of events leading to the transfer emerged principally from the Claimant's evidence and from correspondence and documents relating to meetings between the Claimant and Karl Mackey, the Respondent's Principal. The Claimant kept notes of meetings she attended. Her evidence was that the Respondent took notes as well, though none of their notes were produced to the Tribunal. Moreover, Mr Mackey did not give evidence.

6. The Claimant and Mr Mackey met on 2 July 2014 with Ian Hilton and Lee Jones, both employees of the Respondent, also present. The Claimant's evidence was that Mr Mackey advised that the Respondent would not be renewing the contract with SPL because it took the view that it could earn more money by running the contract in-house. Mr Mackey said that it was not the intention to keep any of the SPL staff as all jobs would be carried out by the Respondent's own existing staff. He said that he was aware of **TUPE** and that no final decision had been made.

7. The next event was a letter dated 4 July 2014 by which the Claimant wrote to Mr Mackey setting out the options as she saw them. She said that there were three options: the Respondent could continue to run the operation using Academy staff or could employ a new team of staff, or the Respondent could continue with the employees of SPL. She very much advised the latter. Ultimately, as indicated, the Respondent decided that the operation should be taken in-house. A Lettings Committee was set up. It met on 4 September and redacted minutes of the meeting made clear that those present included Mr Jones and Mr Hilton, Facilities and Finance Managers of the Respondent respectively, together with Moira Madden, who was the Respondent's Finance Assistant. A recommendation was made that a subsidiary company should be set up as soon as possible, and the minutes indicated that Ms Madden was to take the lead and that:

> **"… the Academy needs someone to deal with the queries, development, finance, marketing with a view to growing the business to full capacity."**

8. That, according to the Claimant, represented the main functions of her role. The Tribunal referred to the fact that the minutes recorded Mr Mackey as saying that it was not known whether the Claimant was part of the **TUPE** arrangements. The actions indicated that Mr Mackey was to speak with the Area Manager of SPL, Mike Deakin, with regard to the **TUPE** arrangements for the Claimant.

9. There was a further meeting of the Lettings Committee, on 15 September 2014. The Claimant's position was discussed but without any conclusions being reached. There was then a meeting on 19 September between the Claimant, Ms Madden, Mr Hilton and Mr Mackey. Again, the Claimant made notes according to which she was told that following a rethink Mr Mackey was going to keep the two Assistants in their current roles but advised that the Claimant would not be needed as a manager since Ms Madden was going to do her job. The

Claimant was told that the Respondent would consider her for a position similar to that of the two Assistants but on lower pay and conditions. Alternatively, she was told that her contract would be terminated and that there would be no redundancy or anything else given to her. She was told that the outcome of that meeting would be confirmed in writing, but, in the event, that was never done.

10. By letter dated 6 October 2014 from the Respondent to SPL, Mr Mackey informed SPL that the Respondent was proceeding on the basis that **TUPE** would apply to the proposed transfer. Mr Mackey sought information about each of the employees assigned to the contract between SPL and the Respondent, who would be transferring. He also sought particular information about the Venue Manager (that is to say, the Claimant) and in particular information about how her pay was calculated, where she carried out her duties and how much time she spent each week carrying out those duties. He said he needed the information to help the Respondent assess whether as a matter of law the Claimant was assigned to the undertaking being transferred. Under the heading "Measures information", he said:

> **"The Academy envisages that it may need to make a reduction in the numbers of staff that it employs following the transfer and that this may impact upon the role of Venue Manager, which may be at risk of redundancy. This is envisaged due to an anticipated overstaffing in the area of the Academy to which the transferring employee will be locating in the event of her transfer."**

11. The letter dealt with consultation and asked for permission to consult directly with the Claimant as soon as possible for the purposes of properly consulting and exploring potential redeployment opportunities. Having been told about the request to approach her directly, the Claimant responded to Mr Mackey by email dated 8 October. She said that she was confused by his request bearing in mind the earlier meetings they had had, and she referred in particular to the meeting on 19 September when, she said, Mr Mackey had informed her that when the transfer took place there would be no role for her in her existing capacity as her job was to be

done by school staff already in employment, though she could if she chose, take on a role similar to that of the Assistants. She referred to the fact that she was told that the Respondent would be confirming its proposals in writing but that these had not been received, and she asked for written proposals before any further meeting took place.

12. By email dated 9 October, SPL responded to Mr Mackey's request for information, attaching information relating to the Claimant's employment. SPL confirmed that 100 per cent of the Claimant's time for SPL related to the Respondent's lettings contract so that she formed part of the organised grouping of employees allocated to that contract. SPL confirmed that the allocation was consistent throughout the year and that her role was a full-time role allowing her to work either at the school or at any other location, such as her home. Salary and bonus information was provided. The Tribunal made no reference to that email in its decision.

13. Thereafter, there was further correspondence between the Claimant and Mr Mackey, including as follows. By letter dated 23 October Mr Mackey informed the Claimant that her role would transfer on 1 November 2014 under **TUPE** but that there may need to be a reduction in staff, such that the role of Venue Manager was at risk of redundancy. He invited her to meet with him to begin consultation about that proposal. The Claimant responded by email dated 26 October, setting out her concerns. She set out in detail the history of the meetings between them and what she said she had been told at the two meetings in July and September. There was then a meeting on 30 October between the Claimant and her husband on the one hand, and Mr Mackey and his Financial Controller on the other. The Claimant's evidence was that notes were taken of the meeting, but none were produced by the Respondent, and the Tribunal had only her notes of that meeting to go on. The Tribunal found that at the start of the meeting Mr

Mackey handed the Claimant a letter dated 30 October. The letter included the following paragraph, quoted by the Tribunal at paragraph 21:

> **"You have said that, during the consultation meetings, I indicated that you would not be retained as an employee following the transfer. Again, I want to reassure you that this was not my intention. While, at this stage, the Academy envisages that it may need to make a reduction in the numbers of staff that it employs following the transfer and that this may impact upon your role as Venue Manager, the Academy has not yet made any final decision in relation to your potential redundancy. In the meantime, and for the avoidance of doubt, your employment will continue with the Academy from 1 November 2014."**

14. Mr Mackey was recorded by the Claimant as saying in the course of that meeting that he could not remember saying at the meeting of 19 September that unless the Claimant took a lesser role she would receive nothing. He said that in fact no decisions had been made concerning her future and that it was wrong for her to believe that there was no future role for her. The meeting was not to be about redundancy but was to look at the employment situation moving forward. Mr Mackey, again according to the Claimant's note, said that he expected her to transfer over on 1 November unless something different was agreed at the meeting. He did, however, go on to explain that there would be duplication in the role that she was doing after the transfer and a reduced requirement for the kind of work she was performing with SPL. He explained that he did not know how suited to the role she would be with the Respondent as this would differ from that with SPL and he needed to know what hours she was working to understand how her salary would be calculated in future. He said that once the business transferred to the Respondent the existing payment structure would need to be sorted out and that it would have to be taken away, in effect, from the existing payment structure, which did not coincide with the Respondent's own payment structure.

15. By the end of the meeting he advised the Claimant that her role was at risk and that if there was a redundancy based on her current contract, her annual wage was understood to be £28,500. He is also recorded as saying a little later in the meeting that if the Claimant was not

successful in gaining a role as Venue Manager with the Respondent, she would be considered for any other suitable role provided she wanted that. The Claimant responded that she was open to considering another role, Mr Mackey asked her for proposals for avoiding redundancy, and she asked him to tell her what other roles were available. At some point during the meeting the Claimant asked Mr Mackey whether anyone else had been considered for redundancy, and he said that no one else had been selected at that stage. He went on to say that one other person was at risk of redundancy but was not prepared to say who that was and would not confirm whether that redundancy had anything to do with the same issues that were being discussed: in other words, the lettings contract and the role of Venue Manager. The inference that the Claimant drew from that discussion was that the other redundancy was a totally separate issue and that there was no one else under threat of redundancy as a result of the SPL contract being taken in-house.

16. Following that meeting, by email dated 31 October the Claimant sent Mr Mackey her CV. She said that she had looked at the Respondent's website and found that there were no current vacancies shown. She then turned to address her transfer, stating that she understood that it was Mr Mackey's wish that she carry on in her existing role until matters of consultation had been concluded, and she expressed that she was happy to do that but needed assistance. She explained that she would have difficulty performing her job as matters currently stood and that she would be without any email address, telephone number and access to booking systems, and nor did she have knowledge of other staff to be involved or the systems for entering into contracts or for accessing invoices. She provided Mr Mackey with her mobile telephone number and invited him to address her concerns. He responded to say that he was on holiday but would ensure that all of her queries were dealt with on Monday morning, and it is clear and not in dispute that that never occurred. Instead, the Tribunal found that between November

2014 and February 2015 four out of the six members of the Respondent's leadership team were either dismissed or left of their own accord, Mr Mackey himself resigned in November 2014, and the Tribunal accepted this inevitably had an impact on the management of the Claimant's situation.

17. The Tribunal found that the Claimant's employment transferred on 1 November but no arrangements were made for her to take up her employment. She was not given instructions, did not attend work at the Academy because she was permitted to remain at home, and was not paid as she should have been. The Tribunal found she attempted to make contact with the Respondent to discuss matters with various people in the period that followed but nobody seemed to get to grips with the situation. Ultimately, the Tribunal found that she sent an email dated 20 January 2015 expressing the view that she had been treated outrageously, ignored, overlooked and lied to; her wages had been withheld, she was awaiting instructions but had become increasingly frustrated and bewildered at the total lack of interest that the Respondent had shown towards her and at the way she had been treated. Needless to say, those concerns appear to have been justified concerns on her part.

18. That email was followed up with a further email, dated 28 January 2015, in which she advised that she wished to make a formal complaint and invoke the grievance procedure. That email produced an immediate response. The Chair of Governors, Peter Ryder, became involved. He instructed an HR Consultant, Susan Brady, to act on his behalf and arranged for an interim payment to be made to the Claimant of £1,500. So far as Ms Brady is concerned, the Tribunal found she started off by asking questions of the Human Resources Department about the situation involving the Claimant and was told that there was little documentation and that the Claimant had refused to come to work at the Academy, having worked from home before

the transfer, and that after 1 November three people had been carrying out the Claimant's role, all existing members of staff. As a result of that information, Ms Brady formed the view that the Claimant was at risk of redundancy and started a consultation process dealing with that risk. The first letter she sent to the Claimant was a standard redundancy consultation letter, dated 18 February 2015. The second letter set out Ms Brady's understanding that there were issues involving the Claimant's work location, her pay and her role at the Academy.

19. The Claimant responded by saying that she did not understand why there was to be any consultation with Ms Brady, decisions having been made earlier, and that she did not wish to meet but would rather communicate via email. Ms Brady provided her with a link to the Academy vacancies, which at that time, the Tribunal found, were for an English Teacher, a Maths Teacher, and a Business Manager. The Tribunal found no meeting took place and Ms Brady moved forward to make her own assessment of the situation. She tried to consult with the Claimant but the Claimant would not attend a meeting. She notified the Claimant of all vacancies, none of which were suitable for the Claimant. She felt that the Claimant's role was effectively redundant as the duties were taken up by employees of the Academy along with their existing duties so that her role was no longer needed.

20. At paragraph 37, importantly, the Tribunal found that Ms Brady considered whether the pool for redundancy should be broadened to include the Respondent's employees who were performing the lettings management duties. She concluded that they performed other duties as well and that lettings management was only a small part of their roles, in contrast to the Claimant, for whom lettings management formed the entirety of her role. Ms Brady therefore concluded that the Claimant was effectively in a pool of one given the unique nature of her role within the school and that in all the circumstances it was appropriate to dismiss her by reason of

redundancy. That decision was confirmed in a letter dated 11 March 2015, and the Claimant was told that she would be entitled to a redundancy payment based on six weeks' salary at the statutory maximum and was given the right to appeal but did not exercise that right.

21. Against that background the Tribunal reached three conclusions that are material to this appeal. First, the Employment Judge concluded that the transfer was not the sole or principal reason for the dismissal but that the sole or principal reason was an economic or organisational reason entailing changes in the workforce after the relevant transfer because the reason for dismissal (as set out by Ms Brady) related to the Claimant's role being redundant as a result of the restructure (paragraph 47). Secondly the Employment Judge found that the dismissal by reason of redundancy was fair. He accepted the evidence of Ms Brady that the Claimant was in a pool of one and that the consultation conducted by Ms Brady was adequate. Moreover, he was satisfied that there was no suitable alternative employment (paragraphs 50 to 54). Thirdly, so far as the unlawful deductions breach of contract claim is concerned, the Employment Judge found that the Claimant's pay was variable, with a base salary and bonus that varied according to performance of the lettings business. Tasked, as he interpreted it, with whether to look back over a period of 3 or 12 months in order to determine average pay, he decided that 12 months was the "just method of dealing with it and a reasonable response to the position" in which the Respondent found itself. For that reason, the Claimant was not underpaid (paragraph 56).

The Appeal

22. Each of those three conclusions is challenged on this appeal. There are six grounds of appeal advanced by the Claimant, but they give rise essentially to three issues: first, whether in determining the reason for dismissal and the fairness of the dismissal the Tribunal erred in law by focusing only on what Ms Brady thought and did without looking at the whole of the so-

called redundancy process (in other words, the whole picture, starting with what happened before the transfer in meetings with Mr Mackey); secondly, whether in determining that there was no suitable alternative employment the Tribunal erred in law in failing to consider the availability of the Ms Madden vacancy or reached a perverse or unreasoned conclusion in that regard; and thirdly, whether the Tribunal's approach to the breach of contract or wages claim was in error of law. I deal with each of those three issues in turn.

Issue 1: Reason for dismissal and its fairness

23. There was no dispute that the Claimant was fully assigned to the contract between SPL and the Respondent prior to the transfer and the transfer was a relevant transfer within the meaning of **TUPE**. The issue before the Tribunal was the reason for the Claimant's dismissal and whether that dismissal was either automatically unfair or was for a fair reason and fair within the meaning of section 98 of the **Employment Rights Act 1996** ("ERA"). Regulation 7(1) of **TUPE** (as amended) makes it clear that dismissals for which the sole or principal reason is the transfer itself are automatically unfair. However, by virtue of Regulation 7(2) and (3), where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce - referred to as an "ETO reason" - this is potentially fair, subject to the test of reasonableness in section 98(4) **ERA**.

24. The onus is on the dismissing employer to establish an ETO reason. There are two limbs to the requirement. First, there must be an ETO reason: that is to say, an organisational, economic or technical reason. An 'organisational reason' can include a reason relating to the management or organisational structure of the incoming business. Secondly, the dismissing employer must show that the reason entails changes in the workforce; that is to say, the reason

must necessarily entail changes in the workforce so that if the employer's plan is to achieve such changes in the workforce and such changes are an objective of the plan, that would suffice, but it would not be sufficient if such changes are merely a possible consequence of the employer's objective or plan. So far as the meaning of 'changes in the workforce' is concerned, this means either changes in the numbers of the workforce overall or in the functions of members of that workforce. Changes in the identity of the individuals who make up the workforce do not constitute changes in the workforce itself so long as the overall numbers and functions of the employees looked at as a whole remain unchanged.

25. It is trite law that the reason or principal reason for a dismissal is a question of fact for the Tribunal. That is to be established by direct evidence or inference from primary findings of fact made by the Tribunal. The reason is the set of facts that operates on the mind of the decision maker when dismissing the employee. It is for the employer to establish the reason for dismissal and that it was a potentially fair reason. Where an employee positively asserts that there was a different, inadmissible reason for dismissal, if evidence is produced by the employee that there was an inadmissible reason for dismissal, then the Tribunal will need to decide on the evidence as a whole, having made findings of fact, what the reason or principal reason was or is.

26. In this case, the Claimant's case was that she was pre-selected for redundancy by Mr Mackey who did not want her after the transfer. Her principal duties and functions were allocated to Ms Madden, an existing member of staff, in the run-up to the transfer, and accordingly the Claimant was no longer needed. She submits that her fate was sealed before the transfer and there was a lengthy process following the transfer at the end of which Ms Brady took decisions about her future, but these were built on what had happened earlier and

incapable of being considered in isolation. In effect, Ms Quigley submits on her behalf that the process was "corrupted" by the earlier dealings of Mr Mackey. She contends that by failing critically to assess what happened earlier in the process and by focusing on the decisions of Ms Brady in isolation, the Employment Judge failed to engage with the Claimant's case and made an error of law.

27. I have come to the conclusion, albeit without any real enthusiasm, that I do not accept this argument. The Tribunal concluded that the sole or principal reason for the dismissal was not the transfer because the Judge was satisfied that the sole or principal reason for the dismissal was an ETO reason entailing changes in the workforce. His reasoning is compressed and could have been clearer. Nonetheless, from paragraph 47 the following building blocks of that reasoning emerge: first, the Claimant's employment did transfer; secondly and thereafter, the reason for her dismissal was as set out by Ms Brady; thirdly, it related to her role being redundant as a result of the restructure; and fourthly, this was an organisational reason that entailed changes in the workforce.

28. Those conclusions are based on a number of critical findings of fact. First, at paragraph 25, the Tribunal found that the Claimant's employment did transfer. The fact that no arrangements were made for her to take up employment, no instructions were given to her and that she was not paid are all matters that put the Respondent potentially in repudiatory breach of contract. They entitled the Claimant, if she chose to do so, to resign and claim constructive dismissal. Such a claim may well have been successful. However, the Claimant did not rely on any repudiatory breach. Instead, and I make no criticism of her at all, she allowed the situation to continue until Ms Brady came along to take control of the situation. In those circumstances,

it seems to me, the Employment Judge was entitled to conclude that her employment did transfer notwithstanding the Respondent's failings and poor treatment of her.

29. In any event, it seems to me that had the Employment Judge focused on the situation at the point of transfer or considered that there was a dismissal as at 1 November 2014, on the Claimant's case there appears to have been an organisational reason entailing changes in the workforce even at that stage that would have justified her dismissal. The Respondent did not wish to have a dedicated manager for the lettings business once it was taken in-house. The Respondent preferred instead to distribute the Claimant's management duties among existing members of staff. That amounted to an organisational change that would result in the loss of a dedicated manager as part of the Respondent's workforce. That was accordingly, or would have been, an organisational change entailing changes in the workforce. The Tribunal found that after 1 November there were three people (already employed) who carried out the role of the Claimant, and her duties were allocated to those existing members of staff and were performed. Thus even if the Employment Judge had considered the position as at the date of transfer it seems to me to be inevitable that he would have concluded that the reason for dismissal was an ETO reason even at that stage.

30. The second critical finding made by the Employment Judge is that Ms Brady, when she took control of a situation that had been allowed to continue in a woeful way, made her own assessment of the situation and made the ultimate decision to dismiss. Ms Connolly submits, and I accept, that this was an acceptance by the Tribunal that there was a fresh and genuine analysis of the situation by Ms Brady. Although not expressly stated by the Tribunal, it is implicit in that finding that Ms Brady was not being dictated to, controlled or manipulated by Mr Mackey. Indeed, there is no evidence to suggest that was the case. Once the Tribunal was

satisfied that Ms Brady was the relevant decision maker in this case, it was her thought process that had to be analysed and addressed, and the absence of any analysis of Mr Mackey's thinking in the period prior to the transfer or in the immediate aftermath of the transfer is fully explained by that conclusion. Here, the Tribunal found as a fact that Ms Brady was the decision maker. The Tribunal found as a fact that three members of the Respondent's existing staff had carried out the Claimant's role since 1 November and that the Claimant had not performed any of those duties. That formed the underlying basis for Ms Brady's conclusion that the role that the Claimant had performed was no longer needed in the current structure. It could instead be carried out by other employees alongside their existing duties.

31. So far as the question of selection and appropriate pools is concerned, the Tribunal made express findings in this regard at paragraph 37, as I have already indicated. The Tribunal found that there was express consideration given to whether the pool for redundancy should be limited to the Claimant or broadened to include other members of staff who were performing the lettings management function alongside their existing duties. For rational reasons that fell well within the range of reasonable responses Ms Brady concluded that since they performed other duties alongside the lettings management function, which formed only a small part of their roles - in contrast to the Claimant, where it formed the entirety of her role - the Claimant was effectively in a pool of her own and in a unique position. Those were all findings of fact that identified the relevant decision maker, what was in the mind of the decision maker and how the decision was formed. They were permissible decisions on the evidence, and it seems to me, without rearguing the primary facts or the merits of this case by reference to the underlying documents, there was no error of law.

32. Similarly, so far as the fairness of the decision was concerned, the Tribunal made express findings at paragraphs 50 to 54 about the redundancy process. The Employment Judge dealt with the selection of the pool as I have just indicated. He dealt with consultation both prior to the transfer and afterwards, and with alternative employment. His conclusion that the dismissal was by reason of redundancy and fair was, again, a permissible conclusion on the evidence, and I can detect no error of law in that conclusion. Given that Ms Brady made a fresh assessment by herself, having taken control of the situation, and given the Employment Judge's acceptance of that, he was entitled to focus on the decision itself and to consider fairness by reference to the point in time at which the decision was made. In any event, it is clear that the Employment Judge had regard to the period of consultation prior to the transfer, as he expressly identified at paragraph 52. A tribunal's reasons are not required to be elaborate or formalistic. They must contain a summary of the factual conclusions and a statement of reasons that led to those conclusions on the facts found sufficient to enable the parties to know why they have won or lost. It seems to me, although not as full as might have been the case, these reasons do discharge that function. The Claimant can understand by reference to these reasons why her case failed.

Issue 2: The Ms Madden vacancy

33. So far as the second issue is concerned, the Employment Judge expressed himself satisfied on the basis of the evidence that there was no suitable alternative employment available to be offered to the Claimant. He gave no reasons or explanation for that finding at paragraph 53, but his earlier findings of fact make reference to the fact that the Claimant was provided with a link to the Academy's vacancies, which were for an English Teacher, a Maths Teacher and a Business Manager, and to the fact at paragraph 36 that Ms Brady had notified the Claimant of all vacancies, none of which were, according to Ms Brady, suitable for the

Claimant. There has been no suggestion before me, and there was apparently no suggestion before the Tribunal, that the Claimant was in fact suitable for any of those roles.

34. The Claimant's criticism and the foundation of this ground of challenge relates to the position of Ms Madden. She had been given primary responsibility for the functions that formed the Claimant's role prior to the transfer, and the Claimant discovered subsequently that she left the Respondent's employment in December 2014. The Claimant was not informed of any vacancy created by her departure. The Claimant argued that Ms Madden's role was suitable alternative employment for which she should have been considered. In the Respondent's witness statements exchanged before the hearing there was no attempt to deal with Ms Madden's position or any vacancy created by her departure.

35. Although the Employment Judge's Notes of Evidence show that when asked about Ms Madden's role, Ms Brady answered that she had no idea why the Claimant was not considered for it. The Claimant was herself questioned about that role, and, again, the Notes of Evidence appear to show that she accepted that there were no suitable vacancies and that so far as Ms Madden's job is concerned it was never identified as a vacancy on the website. The Claimant said:

> **"… Had it been a vacancy they would have told me. School would not want to make redundancies unnecessarily.**
>
> **If considering me for vacancy: they would have told me about a role suitable for me.**
>
> **I say if there were suitable vacancies the school would have advised me of them. Had there been a vacancy - they would have told me."**

36. In light of that evidence and indeed the finding at paragraph 32 that three people were responsible for carrying out the role of the Claimant after 1 November, it seems to me that the Tribunal was entitled to proceed on the basis that Ms Madden's departure did not create an

open vacancy; rather, the Claimant's duties, just as they had been shared between existing staff, including Ms Madden, continued to be performed by existing staff but not including Ms Madden. The evidence entitled the Employment Judge to conclude there were no suitable alternative vacancies without further exploration of the position of Ms Madden in those circumstances. His conclusion was therefore a permissible one and sufficiently reasoned.

Issue 3: Breach of contract and/or deduction from wages

37. The Judge set out his understanding of the relevant law in relation to this aspect of the Claimant's claim at paragraphs 44 and 45. He referred to the approach to calculating a week's pay for the purposes of the **ERA** where an employee has no normal working hours. That was on any view irrelevant. He referred to section 229 and the concept of just apportionment in cases where that is appropriate. That too was irrelevant. The fact that those provisions were relied on by the Claimant, a litigant in person and not legally qualified, does not justify this approach. The Judge made no reference to the relevant provisions at issue, namely sections 13(3) and 27 **ERA**, which together define wages as including bonus or commission payments; or to the requirement to identify whether payments that were properly payable by reference to an individual's employment were paid or not. He made no reference to the requirement to make findings as to the Claimant's contractual entitlement to pay or, as I have indicated, to payments that were properly payable by reference to her employment in order to identify whether and to what extent there had been a shortfall. Ms Connolly fairly accepts that if I read the Judge's decision as applying section 229 that was an error of law. I am in no doubt that paragraph 56 and the reference to a 'just method' is just such an approach and that the Employment Judge did apply section 229 in error of law.

38. Nonetheless, Ms Connolly seeks to persuade me that even if the Employment Judge applied the law correctly to the facts of the claim, the inevitable outcome would have been the same. She submits that the Claimant bore the burden of proof that there were unlawful deductions from her wages and/or a breach of contract by reference to which she suffered loss. She submits that the Claimant sought to prove that by reference to a claim based on average pay in the period prior to the transfer and by comparing that with her pay afterwards. The Claimant, she submits, did not seek to advance the claim by reference to the formula identified by Mr Deakin to Mr Mackey in the email of 9 October 2014 timed at 11.39pm. She did not submit that applying that formula to the income from the lettings business produced a shortfall in her pay, nor did she seek disclosure from the Respondent in relation to the level of business, the licence fee to the school, the income payable to schools plus HQ, nor indeed did she identify what the "keep the change" bonus deal was or how it worked.

39. I am unable to accept Ms Connolly's submission, persuasively though it was advanced. This is a case where the Claimant established some evidence to the effect that she was paid less after the transfer than before, her case being that this was an unauthorised deduction from wages or a breach of contract. Indeed, the Tribunal appears to have accepted as much at paragraph 57, albeit on the basis of an apparent misunderstanding as to where the error lay, whether it was the Respondent's error in making too high a deduction or HMRC's error. Once evidence of a possible shortfall emerged, it should have been addressed correctly in accordance with the correct principles of law and the Employment Judge ought to have considered what was properly payable to the Claimant before the transfer both by reference to her contract and in terms of what was properly payable referable to her employment. He should have made findings as to precisely what she was paid in order to determine whether there was a shortfall.

40. The Claimant's contract does, as Ms Connolly reminds me, refer to a discretionary bonus. Nevertheless, the email of Mr Deakin, also before the Tribunal, suggests that discretion played no or little part in calculating what was due by way of bonus by the stage of the transfer. It may be that the Claimant's contract had been varied. Equally, it may be that the Respondent is correct to say that there was a discretionary bonus only and that because that discretionary bonus was calculated by reference to systems that could not be replicated in the Respondent it was entitled to provide a bonus that was substantially equivalent to what had been provided before. However, without findings of fact on any of these issues or even the evidence to support findings that might have been made by the Tribunal, it is impossible for me to conclude that only one outcome is possible in relation to this question.

41. In those circumstances, the Tribunal erred in law and this question must be remitted. Whichever tribunal tries this issue will, it seems to me, need to hear evidence from the Claimant and the Respondent as to the Claimant's entitlement to a bonus, the nature of that entitlement, how her bonus was calculated and whether what was properly payable by reference to her employment was in fact paid.

Conclusion

42. For all these reasons. I am satisfied that the appeal on the third issue must be allowed, but have otherwise concluded, for reasons just given, that the Tribunal's decision in relation to dismissal was permissible in light of the evidence and not in error of law. I will hear counsel on the question whether there should be remission to the same tribunal or to a different tribunal to deal with the third issue. It may be that with some flexibility on both sides the matter can be resolved without resort to a further hearing by discussion and agreement, but if that is not possible, the matter will have to be remitted.

Disposal

43. I have concluded that the matter should be remitted to a fresh tribunal. Although this is not a case where the whole decision is totally flawed, I am satisfied that the approach of the Employment Judge to this issue was totally flawed. Moreover, additional evidence will have to be heard and the process started from scratch in light of the errors. So, it seems to me that there would be no cost saving and none of the advantages that would otherwise have arisen in remitting the case to the same Employment Judge. Further, there may be an advantage to the parties in remitting the case to a fresh tribunal to deal with it because that may be capable of being put into effect more quickly. For all those reasons, having regard to the overriding objective and questions of proportionality, the appropriate course here is to remit to a fresh tribunal for rehearing and reconsideration in light of the correct legal provisions the breach of contract and wage deduction claim.