Appeal No. UKEAT/0253/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Cardiff Civil & Family Justice Centre
On 13 March 2018
Judgment handed down on 2 May 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

SWANSEA CITY COUNCIL APPELLANT

(1) MRS T REES
(2) MRS E MANN
(3) MRS C GUSTAFSON RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR PETER OLDHAM (One of Her Majesty's Counsel) Instructed by: City and County of Swansea Legal Services Civic Centre Oystermouth Road Swansea SA1 3SN
For the First and Third Respondents	MR RICHARD KEMBER (of Counsel) Instructed by: NUT Solicitors NUT Cymru Unit 18 Neptune Court Cardiff CF24 5PJ
For the Second Respondent	MR RICHARD KEMBER (of Counsel) Instructed by: NASUWT Greenwood Close Cardiff Gate Cardiff CF23 8RD

SUMMARY

Breach of Contract

1. This appeal concerns claims by former teachers in Wales for SEN allowance payable under their contracts. The Employment Tribunal held that the conditions for entitlement were satisfied in each case, and accordingly, that the failure to pay SEN allowance was a breach of contract.

2. The Employment Tribunal erred in so concluding in two respects. First, by construing the conditions of entitlement in paragraph 25.2(d) of the Document so as to give no effect to the requirement that the setting of a teacher's work must be "analogous to a designated special class or unit" to qualify, the Employment Tribunal erred in law. Secondly, the Employment Tribunal erred in its approach to condition (iii) in concluding that the "unit or service" for the purposes of determining whether the claimants had "a greater involvement in the teaching of children with [SEN] than is the normal requirement of teachers throughout… the unit or service" was the whole education authority rather than the home tutoring service.

3. On a proper construction of the Document, and in light of the evidence, the Claimants are not entitled to be paid SEN allowance for the relevant periods because (a) home tutoring was not an analogous setting to a designated special class or unit; and (b) because they did not establish that they had a greater involvement in the teaching of children with SEN than is the normal requirement of teachers throughout the unit or service, when condition (iii) is properly understood and applied to the facts of their case.

4. The appeal is therefore allowed. Further, for the reasons explained in the judgment, their claims for breach of contract fail and are dismissed.

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THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is an appeal from a judgment of an Employment Tribunal sitting at Pontypridd, comprised of Employment Judge P Davies sitting alone, promulgated on 1 June 2017 ("the Judgment"), which upheld claims of breach of contract following termination of employment by Mrs Rees, Mrs Mann and Mrs Gustafson, for non-payment of special educational needs allowances between September 2010 and August 2015. Remedy was not dealt with because the parties were agreed as to remedy if liability was established.

2. The appeal is pursued by City and County of Swansea Council, referred to as the Respondent as below, for ease of reference. For the Respondent, Mr P Oldham QC contends that the ET made two errors of law in misconstruing the relevant contract, each of which is sufficient to vitiate the Judgment. For the Claimants, Mr Kember of counsel contends that the ET reached conclusions that were open to it for the reasons it gave and disclose no error of law. I am grateful to both counsel for the assistance they have provided both in writing and orally.

The legislative matrix

3. It is helpful at the outset, to set out the legislative under-pinning of the contract in issue. By section 119 Education Act 2002, the School Teachers' Review Body ("the Review Body") was established. Section 120 Education Act 2002 provides that its function is to consider any matter referred to it by the Secretary of State relating to the remuneration of school teachers or other conditions of employment of school teachers, which relate to their professional duties or working time. In addition, following consideration of a matter referred the Review Body is required to report to the Prime Minister and the Secretary of State about a consideration to which they are to have particular regard, or a matter on which they are to make a recommendation: s.120(3).

4. Section 122 Education Act 2002 gives power to the Secretary of State to make provision (by order) for the determination of the remuneration of school teachers. The scope of such an order is dealt with by s.123 where it is made clear that an order under s.122 may "confer a discretion on a local education authority or a governing body" (s.123(1)(a)) and may "make provision for the determination of a teacher's remuneration by reference to any matter including, in particular, his qualifications, experience, duties, aptitude or previous salary": (s.123(1)(d)).

5. Section 125 provides that an order under s.122 may make provision about a matter only if the Secretary of State has referred the matter to the Review Body under s. 120 and considered their report:

> **"125. (1) An order under section 122 may make provision about a matter only if the Secretary of State has –**
>
> **(a) referred the matter to the School Teachers' Review Body under section 120, and**
>
> **(b) considered their report".**

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Accordingly, there is no obligation on the Secretary of State to follow the recommendations of the Review Body but their report must be considered.

6. Section 127 provides that the Secretary of State may issue guidance about the procedure to be followed in applying provision of an order under s.122, and that a local education authority and governing body of a school must have regard to guidance issued by the Secretary of State (see s.127(2)) although a failure to have regard to such guidance does not give rise to any civil liability but is something that may be taken into account in any proceedings by a court or tribunal: s.127(3) Education Act 2002.

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7. The Secretary of State makes an order determining teachers' pay and other conditions under s. 122 each year and in 2010 made the School Teachers' Pay and Conditions Order 2010. The 2010 Order changed the approach, so far as relevant to this appeal, to special educational needs allowance ("SEN allowance") but these stayed materially the same thereafter. The 2010 Order makes clear that it makes provision for determining (among other things) the remuneration of school teachers within the meaning of s.122 Education Act 2002 in England and Wales and does that by reference to section 2 of a document entitled "School Teachers' Pay and Conditions Document 2010 and Guidance on School Teachers Pay and Conditions", referred to below and in the ET's judgment as "the Document".

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8. The Document contains provisions relating to the statutory conditions of employment of school teachers in England and Wales. It relates to teachers employed by a local authority or by the governing body of a foundation, voluntary aided or foundation special school in the provision of primary or secondary education. (There are some exceptions but they are not relevant to this appeal).

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9. The Document sets out in detail the terms and conditions of employment for school teachers and makes provision for payment of SEN allowance in the following terms:

> **"<u>Special educational needs allowance</u>**
>
> **25.1. A SEN allowance of no less than £2001 and no more than £3954 per annum is payable to a classroom teacher in accordance with this paragraph.**
>
> **25.2. The relevant body must award a SEN allowance to a classroom teacher -**
>
> > **(a) in any SEN post that requires a mandatory SEN qualification;**
> >
> > **(b) in a special school;**
> >
> > **(c) who teaches pupils in one or more designated special classes or units in a school or, in the case of an unattached teacher, in a local authority unit or service;**
> >
> > **(d) in any non-designated setting (including any PRU) that is analogous to a designated special class or unit, where the post -**
> >
> > > **(i) involves a substantial element of working directly with children with special educational needs;**
> > >
> > > **(ii) requires the exercise of a teacher's professional skills and judgement in the teaching of children with special educational needs; and**
> > >
> > > **(iii) has a greater level of involvement in the teaching of children with special educational needs than is the normal requirement of teachers throughout the**

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school or unit within the school or, in the case of an unattached teacher, the unit or service."

10. There is also guidance provided at paragraphs 92 to 101 about SEN allowance. This makes clear that allowances for SEN may be held at the same time as allowances for "TLR", which are Teaching and Leadership Allowances but that relevant bodies should keep their staffing structures under review and, for example, should not continue to award new SEN payments solely for purposes of recruitment and retention. It states that where the criteria for the payment of SEN allowance are met, the relevant body must award an allowance and specify the amount and reason for the award: paragraph 93.

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11. Finally, in relation to the legislative scheme it is relevant to note that there are definitions in the Education Act 1996 (with application for SEN in Wales) of "school" at s.4, which provides that:

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"(1) … "school" means an educational institution which is outside the further education sector and the higher education sector and is an institution for providing -

(a) primary education,

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(b) secondary education, or

(c) both primary and secondary education, …"

Section 19 deals with the exceptional provision of education in pupil referral units and provides that local authorities must:

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"(1) … make arrangements for the provision of suitable … education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them."

At subsection (2), it provides:

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"(2) Any school established … and maintained by a local education authority which -

(a) is specially organised to provide education for such children … and

(b) is not a county school or a special school,

shall be known as a "pupil referral unit"."

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12. Section 312 of the Education Act 1996 deals with the meaning of "special educational needs" and provides that a child has "special educational needs … if he has a learning difficulty which calls for special educational provision to be made for him". "Learning difficultly" is defined as existing where a child:

"312 (2) (a) … has a significantly greater difficulty in learning than the majority of children of his age,

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(b) … has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age … or

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(c) … is under compulsory school age and is, or would be if special educational provision were not made for him, likely to fall within paragraph (a) or (b) when of … that age."

"Special educational provision" is defined by s.312(4) in relation to a child in the area of a local authority in Wales as meaning:

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> **"(a) in relation to a child who has attained the age of two, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the local authority (other than special schools) … and**
>
> **(b) in relation to a child under that age, educational provision of any kind."**

There are also provisions for identifying and assessing children with special educational needs at sections 321 to 324 Education Act 1996.

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The facts

13. The facts can be shortly summarised by reference to the Judgment. The Claimants are all home tutors and were employed by the Respondent as home tutors for differing periods of time. Their respective employments all came to an end on 31 December 2015. During their employment they worked full-time on the terms set out in the Document which applied to each of their employments. Mrs Rees was employed between 22 April 2002 and 31 December 2015. Mrs Mann was employed between 1 September 1997 and 31 December 2015. Mrs Gustafson was employed between 15 April 2002 and 31 December 2015.

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14. The evidence they gave to the Tribunal was accepted: Mrs Rees said that between 80 and 100% of her time was spent teaching children with special educational needs. This was mostly done in the children's own homes but occasionally she taught children in small groups, for example, at an education centre and the Tribunal found that this might be twice or three times a week (paragraph 7). In fact, it is clear by reference to the agreed note of evidence produced by the parties that her evidence was that her teaching was mostly on a one-to-one basis at home and she only taught in the small groups referred to for a year or two. Mrs Mann said that about 75 to 80% of the children she taught had special educational needs. Mrs Gustafson said at least 80% of the children she taught had special educational needs.

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15. The Tribunal found that the three Claimants were part of a "home tutoring team". They were all qualified teachers and, save for Mrs Mann who had a postgraduate degree in special educational needs, did not require special qualifications to undertake the work they did. The ET drew a contrast (paragraph 12) between the work undertaken by the Claimants as part of the home tutoring team with teaching in mainstream schools, finding that in mainstream schools special educational needs children may be taught in classrooms with five to 10 children and two teaching assistants, whereas home tutors teach mainly one-to-one at primary and secondary level and about 90% of the work is with an aim to get the children back to mainstream schools. Again, this appears to be a misunderstanding of evidence given by Mark Sheridan, employed by the Respondent as Head of Additional Learning Needs Unit ("ALNU") and principal education psychologist. At paragraph 17 of his witness statement, which was not challenged by the Claimants, he explained:

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> **"All dedicated STF [specialist teaching facilities] teachers are entitled to be paid an SEN allowance as STFs are designated units or classes specifically for children and young people with SEN. These teachers only teach pupils with SEN. They are required to have appropriate experience and knowledge of SEN and in particular facilities are expected to have additional qualifications and training. The organisation of staff within the STF can differ from school to school but the base funding is for one teacher and two teaching assistants to groups of 5 to 9 pupils depending on the funding band of the STF. As well as providing separate classes as appropriate for pupils in small groups, STF teachers provide advice and support to the mainstream class teachers in relation to the teaching of the pupil when in a mainstream class".**

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The fact that a teacher had teaching assistants supporting the group of between five to nine pupils does not mean, as the Employment Judge appeared to conclude, that those teaching assistants were performing the role of teachers. They were not, as is common ground.

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16. As far as the home tutoring teams themselves are concerned, the Tribunal held that the establishment, in other words, the home tutoring team, had 6.3 full-time equivalents at the time of the hearing, although there were 11 home tutors, but the numbers fluctuated over time. The team had a supervisor, who was then Miss Judy Marks, and home tutors were required to keep up-to-date records of students' attendance and progress. They produced regular reports liaising with students, parents, carers and school staff (paragraph 16).

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17. The Tribunal accepted the evidence of Mr Sheridan that provision is made by the Respondent for special educational needs teaching in five different ways. First, in mainstream schools where teaching is conducted within the school itself, in mainstream classrooms. Secondly, within mainstream schools some have STF and Mr Sheridan identified 17 primary and 13 secondary schools with STF. Thirdly, there were within the Swansea area two special schools providing special educational needs education. Fourthly, there was a pupil referral unit in Swansea which had three educational centres and a Pathways team. Finally, there was the home tuition team. The manager of the home tutoring team was one of Mr Sheridan's five direct reports. At paragraph 17 the Tribunal referred to a table for the period 2012-2016 provided by the Respondent identifying the schools it managed and setting out the level of special educational needs provided by those schools. The percentage provision varies from school to school, but within mainstream schools in the Respondent's area most schools had a significant proportion of special educational needs provision. By way of example, provision in school 7 varied between 2012 and 2016 from 44.1% to 74.6%. Some schools (like number 47 on the list) had a lower percentage over that period.

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18. The Tribunal accepted the experience of the Claimants: they were all highly experienced teachers who had many years of dealing with a wide variety of children with behavioural and other difficulties. All were in a position to and did make proper assessments, by reports and individual plans or educational plans of the extent of learning difficulties or disabilities of pupils for whom they were responsible. The Tribunal found that:

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> **"They were able from their own experience and knowledge and qualifications as teachers to know whether a child that they taught had special educational needs" (paragraph 31).**

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19. As far as the claims are concerned, there was no dispute that the Document provided the contractual conditions for the payment of SEN allowance. Paragraph 25 (set out above), and in particular paragraph 25.2, set out the criteria for determining whether SEN allowance should be paid. It was common ground that the Claimants did not teach pupils in designated special

classes or units in a school, local authority or service; rather they were home tutors. That meant in order to qualify for SEN allowance they had to bring themselves within paragraph 25.2(d) of the Document.

20. In dispute between the parties was the question whether paragraph 25.2(d) contained three conditions of entitlement set out at (i) to (iii) or whether, in addition to those three conditions of entitlement, there was a separate condition that required the teacher to show that he or she was a teacher in a non-designated setting that was "analogous to a designated special class or unit". On this question the Tribunal concluded, in agreement with the Claimants, that the phrase "analogous to a designated special class or unit" was not a separate requirement from the conditions at (i) to (iii) but was qualified by the three conditions. In other words, in order to be analogous to a designated special class or unit, the post had to satisfy the conditions at (i) to (iii).

21. The conditions at (i) and (ii) are no longer in issue between the parties, the Tribunal having held that they were established as a matter of fact, and there being no challenge on this appeal to those conclusions.

22. The third condition, namely that the post "(iii) has a greater level of involvement in the teaching of children with special educational needs than is the normal requirement of teachers throughout the school or unit within the school or, in the case of an unattached teacher, the unit or service" is a disputed condition. The Tribunal dealt with it at paragraph 34 as follows (though the phrasing and construction of the paragraph is at times difficult to understand):

> **"34. The third requirement and the contrast which needs to be made. The analogy. The comparator comes in. Is the normal requirement of teachers throughout the school or unit within the school or because there was no school here in the case of the unattached teacher such as the home tutors the unit of service. I reject the submission of the Respondents that that must mean the home tuition team. It is an irrational interpretation. It would offend common sense because it would mean that no home tutor could ever qualify for an SEN allowance. The 3 Claimants were spending the vast majority of their time with children with special education needs. What does the word 'service' mean? The service is the service that a Local Authority gives to children and must be given a wider interpretation. This wording wold make sense and be rational and give a logical interpretation which flows from what is the aim of this particular provision. If there is a need for assistance as background one looks to the report where the wording is not service it is authority. That is support for the proposition that a wider interpretation is appropriate and not the narrow one that is contended for by the Respondents. For that reason also I find that it is that wider interpretation is correct [sic]. The contrast is between what a teacher is doing for the vast majority or substantial amount of time compared to a teacher in the service of the Local Authority, not teaching pupils with special education needs a substantial amount of time. A clear distinction is the point and purpose of this provision because in the objective one has to look at what it intended by the parties in accordance with the *Brogden* principles, that is to reward teachers who spend a considerable and the majority of their time "substantial amount" of time with special education needs children and dealing with their situations."**

23. The ET accordingly rejected as irrational that the unit or service to be compared was the home tutoring team itself. Then, notwithstanding the fact that neither the Respondent nor the Claimants contended that the unit for comparison was the authority, the Tribunal held that the comparison was with the whole of the local authority's education service. On the ET's findings, the contrast to be made was between what a teacher was doing for the vast majority or substantial amount of time as a home tutor compared to a teacher in the service of the local authority not teaching pupils with special educational needs for a substantial amount of time.

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The Tribunal concluded that must be what was intended by the parties because the intention was to "reward teachers who spend a considerable and the majority of their time … with special education needs children and dealing with their situations".

24. The Tribunal accordingly concluded that all three Claimants fell within the definition of paragraph 25.2(d) of the Document and were therefore entitled to SEN allowance for the relevant periods.

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The appeal

25. Against that background I turn to consider the grounds of appeal. There is no dispute that the correct approach to the construction of the Document in this case, as with any contract, is to consider the language used by the parties and to determine what a reasonable person with all the background knowledge available to the parties in that situation would have understood by the words used.

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26. The first ground of appeal argues that the Tribunal failed to give effect to a condition for the grant of SEN allowance, namely that the setting for the Claimants' work had to be "analogous to a designated special class or unit" or to the extent that there was an attempt to give effect to that condition, the Tribunal applied the wrong meaning to it or reached a perverse conclusion in respect of it.

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27. Mr Oldham QC submits that the words at the beginning of paragraph 25.2(d) create a separate condition relevant to the setting of a teacher's work and that the Employment Tribunal's construction has the effect of simply ignoring those words. He draws a contrast between the words in the first part of paragraph 25.2(d), which relate to setting and the three conditions at (i) to (iii), which are conditions relating to the posts themselves. In other words, the separate parts of paragraph 25.2(d) are doing two different things: the first part is setting a qualifying condition for the setting that must be analogous to a designated setting and the second part is setting qualifying conditions that relate to the post itself.

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28. For his part, Mr Kember submits that the Judgment must be considered as a whole and by reference to all the facts found by the ET. Mr Kember submits that the ET was both entitled and correct to read the word "where" in paragraph 25.2(d) ("in any non-designated setting…that is analogous to a designated special class or unit, where the post – (i) involves…") as if it meant or was synonymous with the word "because". In other words the reason why the setting is analogous with a designated unit is because the post satisfies the three conditions identified at (i) to (iii). Mr Kember submits that if the Respondent was correct the condition in paragraph 25.2(d) would have been clearly and separately identified and the word "and" would have appeared before the word "where" so that it was clear that there were four separate conditions to be fulfilled. He points out that whereas paragraph 25.2(a) identifies posts that attract SEN allowance and 25.2(b) and (c) set out the settings that are designated for the purposes of attracting SEN allowance, paragraph 25.2(d) is looking at non-designated settings that are comparable or where the work required to be performed is comparable to that performed in the designated settings identified by paragraphs 25.2.(b) and (c). That is the approach adopted by the ET and was correct. Moreover, the ET was supported in that approach by the 19th Report produced by the Review Body ("the Report").

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29. The Report was referred to and relied on by the ET. Its purpose was to consider:

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> **"What revised criteria should be introduced for SEN allowances in light of the increased inclusion of pupils with SEN and disabilities in mainstream settings including in respect of unattached teachers working in alternative provision and within the existing cost basis whether the value(s) remain appropriate" (paragraph 2.1)**

The Report deals with the award of SEN allowance at paragraphs 2.40 to 2.43 in the following

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terms:

> **"2.40. As set out earlier, we recognise that the inclusion agenda and other developments have led to an increase in the number of children assessed as having significant special educational needs being taught in ordinary classes in mainstream schools. As a result, the teaching and learning of these children is increasingly regarded as part and parcel of every teacher's core responsibilities. Given this is the case, our expectation is that allowances for those working in ordinary classes should continue to be the exception rather than the rule and be restricted to those whose predominant role is teaching pupils with special educational needs.**
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> **2.41. However, where a school or local authority structures its special educational provision so that some teachers are deployed in a way that is analogous to teachers in designated special classes or units, we believe that payment of an SEN allowance is appropriate.**
>
> **2.42. We believe, therefore, that teachers in mainstream schools and unattached teachers should receive an allowance where they are teaching in a post that:**
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> > **• involves a substantial element of working directly with children with special educational needs;**
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> > **• requires the exercise of a teacher's professional skills and judgement in the teaching of children with special educational needs; <u>and</u>**
> >
> > **• has a greater level of involvement in the teaching of children with special educational needs than is the normal requirement of teachers throughout the school or authority.**
>
> **2.43. We believe that the provisions set out in paragraphs 2.41 and 2.42 above will cover the**
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> **vast majority of situations in which it is appropriate for teachers working in non-designated settings to receive an SEN allowance. However, given the diversity of arrangements for making special educational provision, we are conscious that there may be other, exceptional circumstances where schools or authorities organise their provision in a different fashion but which still make demands on teachers providing special education which they consider to be equivalent to those placed on teachers in special schools or classes. In such instances, we believe that payment of SEN allowances should be at the discretion of the school or authority."**

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30. Mr Kember relies on the fact that the Review Body concluded that SEN allowance should be available to those whose "predominant role is teaching pupils with special educational needs" (paragraph 2.40). He submits that paragraph 2.41 is a general recommendation but recommends no separate requirement at all. However by the use of the word "therefore" in paragraph 2.42, the Review Body sets the three conditions to be fulfilled for those teachers in mainstream schools or unattached teachers in order to receive a SEN allowance. The conditions in paragraph 2.42 define and explain deployment of teachers "in a

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way that is analogous to teachers in designated special classes or units" as referred to in paragraph 2.41. Moreover, he relies on the distinction drawn between mainstream schools and unattached teachers at paragraph 2.42, and the fact that 2.42 sets out as bullet point conditions that should apply, virtually identical conditions to those set out at paragraph 25.2(d) of the Document. He submits that it is irrational to take a different view of either the Report or the Document itself.

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31. I do not accept Mr Kember's submissions and prefer the submissions made by Mr Oldham on this issue for the following reasons. On the construction adopted by the ET and

supported by Mr Kember the words at paragraph 25.2(d) "analogous to a designated special class or unit" are simply redundant and could be deleted. These are words included under statutory authority and to ignore them is impermissible. The scheme of paragraph 25.2(a), (b) and (c) is to identify specialists by reference to post, unit or school and it would be odd in those circumstances if paragraph 25.2(d) simply brought in the vast majority of teachers in mainstream schools. In my judgment this is not what it does. It requires the unit or setting to be analogous. Read fairly and objectively, those words are directed at the setting in contradistinction to the post: they describe a condition that is different to and separate from the three conditions affecting the post itself. Furthermore, if the condition of "analogous setting" is not separate so that SEN allowance is payable simply if the conditions at (d)(i) to (iii) are fulfilled, all teachers in a mainstream school teaching an ordinary class which happens to have more SEN pupils than is average for teachers at that school would be entitled to SEN allowance. On that reasoning a very significant of number of mainstream classrooms countrywide are to be regarded as "analogous to a designated special class or unit". It seems to me that is not a rational or reasonable construction to adopt. On any rational view, mainstream classes are not analogous to a designated special class or unit. To put the point another way, on the Tribunal's conclusion the quality of the setting as being analogous or not is dependent only on whether a teacher happens to teach more than the average number of SEN pupils. That, it seems to me, is not consistent with the meaning of "analogous" for these purposes, and would, if correct significantly expand entitlement to SEN allowances.

32. While I accept, as Mr Kember submits, that if the consequence of a proper construction of the Document is that most teachers in mainstream schools are entitled to SEN allowance, it must follow and cannot dictate a different approach, it is significant that the Review Body itself made clear, first, that its remit was to consider what revised criteria should be introduced for SEN allowance in light of the increased inclusion of pupils with SEN and disabilities in mainstream settings, including in respect of unattached teachers, but expressly said it had to do so within the existing cost basis (see paragraph 2.1 of the Report). Secondly, at paragraph 2.40, the Review Body recognised that the 'inclusion agenda' had led to an increase in the number of children assessed as having SEN being taught in ordinary classes in mainstream schools, so that as a result, the teaching and learning of those children was increasingly regarded as part and parcel of every teacher's core responsibilities. Given this, as the Review Body said, it expressed the expectation that SEN allowance for those working in ordinary classes would and should continue to be the exception rather than the rule (paragraph 2.40). The approach of the Tribunal leads to the opposite result.

33. As to the Report, it cannot change the natural meaning of the words used in the Document (a statutory instrument). In any event, there is no basis for assuming (as the Tribunal appears to have done) that the framers of the Document intended to give effect to the Report as the ET understood it. I agree with Mr Oldham that the wording of the Document leaves no doubt: whatever the framers of the Document understood the Report to mean, they chose to insert the analogous setting requirement in paragraph 2.41 of the Report into the conditions for receipt of SEN allowance at paragraph 25.2(d). This recognised that the three bullet points in 2.42 of the Report alone would not retain the exceptionality of the entitlement to SEN allowance, a restriction recognised by the Review Body in the Report itself.

34. I agree with Mr Oldham, accordingly, that as a result of its error in ignoring the "analogous setting" condition, the Tribunal's view that conditions of payment were fulfilled was clearly based entirely on its finding that these Claimants were spending the majority of

their time teaching pupils with SEN. I am therefore satisfied that the Tribunal was in error in failing to treat the analogous setting requirement as a separate condition.

35. What is the consequence of that conclusion? I am satisfied that had the Tribunal applied the correct approach, the only rational conclusion available would have been that the setting for home tutoring was not "analogous to a designated special class or unit".

36. I reach that conclusion because there was no evidential basis for a finding that one-to-one (or even two-to-one, if that was the Tribunal's finding) tutoring was a setting which was "analogous" to the setting of a special class or unit. First, a special class or unit is by definition restricted to pupils with SEN. The Claimants tutored pupils with and without SEN, as the ET found. Further, it is clear from the unchallenged evidence of Mr Sheridan that the Respondent has special schools for pupils with the most significant SEN. It has special units (STFs) within mainstream schools for SEN pupils and other pupils with SEN are educated in mainstream classrooms. In mainstream schools, pupils with SEN make up a significant proportion of some mainstream classes as the table to which I have referred indicates. There is no basis in this evidence for any conclusion that home tutoring is an analogous setting to any of these. It may be that by reference to the conclusions expressed at paragraph 18 of the Judgment, which plainly misinterpret the evidence given by Mr Sheridan about STFs, the Tribunal intended to indicate that a home tutor who occasionally tutored two pupils at the same time was in the same position as a teacher in a STF teaching pupils in a class of up to nine with two teaching assistants. If that was the Tribunal's thinking, it is incorrect. Teaching assistants are not teachers and are not subject to the Document and not within the definition of "school teacher" for purposes of s.122, so that a teacher within a STF is a teacher for all nine children no matter how many teaching assistants are available.

37. It is also of note that at paragraph 40 of his witness statement, again unchallenged, Mr Sheridan said:

> **"Home tutors are, in effect, mainstream classroom teachers or perhaps, more accurately, analogous to mainstream classroom teachers who happen to teach pupils in a one to one environment outside the classroom. They are not required to teach any differently to a mainstream classroom teacher or have additional qualifications or experience."**

Most teachers in mainstream classrooms do not qualify for SEN allowances.

38. In those circumstances the only rational conclusion available to the Tribunal on the evidence and applying paragraph 25.2(d) as properly understood, was that the Claimants were not teachers in a non-designated setting that was analogous to a designated special class or unit. Ground one accordingly succeeds and this conclusion is substituted for the conclusion reached by the ET on this point.

39. Ground two is a separate challenge to the Tribunal's conclusion in relation to condition (iii) on the basis that the ET failed to give effect to the further condition that each Claimant had to have "a greater level of involvement in the teaching of children with [SEN] than is the normal requirement of teachers throughout … in the case of an unattached teacher, the unit or service". Alternatively, it is argued that to the extent that the Tribunal attempted to give effect to that condition, it applied the wrong meaning to it or reached a perverse conclusion in respect of it.

A

40. Mr Oldham submits that the appropriate comparison for the purposes of this condition is a comparison within the particular unit or service itself. That was not the ET's approach. The Tribunal adopted the entire local authority service, to make the comparison when this was not a case advanced by either party. The Respondent contended that the unit or service was and could only be the home tutoring service. The Tribunal however regarded that as an irrational interpretation that would offend common sense because it would mean that no home tutor could ever qualify for an SEN allowance. Further, in reasoning (at paragraph 34 of the Judgment) that the word "service" meant the whole local authority and was to be given a wide interpretation because it was rational and made logical sense, the Tribunal relied on the Report, which uses the word "authority" rather than "service". Mr Oldham submits that if the unit is, as the Respondent contended, the home tutoring team, and if home tutors spend more time than other home tutors within that team and have a greater level of involvement in the teaching of children with SEN than is the normal requirement of other home tutors within the home tutoring team, then they could qualify for the allowance contrary to the Tribunal's reasoning.

B

C

41. Mr Kember resists those submissions. He contends that the Tribunal was entitled to interpret paragraph 25.2(d)(iii) of the Document having regard to the contents of the Report, and was in particular entitled to conclude that the word "service" could be widely interpreted to include "authority". He relies on paragraph 2.40 of the Report and in particular the intention that those whose predominant role is teaching pupils with special educational needs should be entitled to the SEN allowance as supporting that approach. Moreover, he submits that the Tribunal gave reasons for its approach which he adopts. The Report supports the construction adopted by the Tribunal and although, by reference to this construction, he accepts that the word "unit" in condition (iii) is redundant, that does not alter the position.

D

42. Once again, I prefer the submissions of Mr Oldham in relation to the proper interpretation and application of this condition. It is significant that neither side contended that the entire authority or service was the "unit or service" for the purposes of the comparison required to be performed in paragraph 25.2(d)(iii), and in my judgment, this interpretation cannot be right. If the framers of the Document meant "authority" they would simply have referred to "the authority". The reference to "unit or service" must be a reference to part only of a local authority's education function rather than to the totality of the function. Both words, unit and service must be given meaning: the Tribunal's interpretation renders the word 'unit' redundant.

E

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43. Further, the Tribunal was not entitled to allow the Report to displace the clear words used in the Document made under statutory authority. Its task was to construe the Document. Furthermore, I do not accept that the purpose of the Document was as the ET recorded it "to reward teachers who spend a substantial amount of time" teaching pupils with special educational needs. There was no dispute that the vast majority of pupils with SENs are taught in mainstream schools and virtually all teachers accordingly spend substantial time with such pupils. If this had been the purpose of paragraph 25.2 of the Document, virtually all teachers would be entitled to SEN allowance. This was plainly not the purpose of the Document (or the intention of the Review Body which referred expressly to allowances for those working in ordinary classes continuing to be the exception rather than the rule). This reasoning does not support the ET's approach.

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44. Whether or not the correct interpretation of the Document would make it more difficult or not for home tutors to receive SEN allowance could not dictate the proper construction of it,

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but it does seem to me that Mr Oldham is right in submitting that even if the unit is the home tutoring team itself, a home tutor can qualify for the allowance if he or she has greater involvement in teaching children with SEN than is the normal requirement of teachers in their unit. In any event, even if the proper construction leads to the conclusion that home tutors cannot generally qualify, that does not mean that the interpretation advanced by the Respondent is inevitably an irrational one as the ET wrongly concluded.

B

45. For all those reasons, I am satisfied that the Employment Tribunal erred in law in construing the word "service" as the whole of the Respondent's educational function in this case. The only rational approach to condition (iii) as applied to the facts of this case is that the 'unit or service' in question was the home tutoring team itself.

C

46. Mr Kember frankly accepts that there was no evidence led by the Claimants below as to the level of involvement of other teachers teaching pupils with SEN in mainstream schools or in the education authority more generally for the purposes of comparison. The only evidence given by the Claimants was about their own involvement in teaching pupils with SEN. There was therefore no basis for a comparison between the level of involvement of the Claimants and others, whether in the home tutoring team or in any other unit or service. In those circumstances, there being nothing to remit as Mr Kember accepts, the conclusion that the Claimants satisfied the condition at paragraph 25.2(d)(iii) cannot stand and I substitute for it a conclusion that they did not satisfy that condition, and for this separate reason their claim to SEN allowance must fail.

D

Conclusion

47. In conclusion, both grounds of appeal succeed. The appeal is therefore allowed and the Judgment that the Claimants are entitled to be paid SEN allowance is set aside.

E

48. The Claimants are not entitled to be paid SEN allowance for the relevant periods because (a) home tutoring was not an analogous setting to a designated special class or unit; and (b) because they did not establish that they had a greater involvement in the teaching of children with SEN than is the normal requirement of teachers throughout the unit or service, when condition (iii) is properly understood and applied to the facts of their case. Their claims for breach of contract accordingly fail and are dismissed.

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