EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Dr R Evans v **The London Borough of Brent**

Heard at: Watford **On**: 24 April 2019

Before: Employment Judge R Lewis (sitting alone)

Appearances

For the Claimant: Mr L Wilson, Counsel
For the Respondent: Ms J Thelen, Counsel

RESERVED JUDGMENT

1. The above is confirmed for avoidance of doubt to be the sole respondent.

2. The claimant's claim of unfair dismissal has no reasonable prospect of success and is struck out.

REASONS

This hearing

1. By a claim presented on 26 January 2010, the claimant complained of unfair dismissal and of automatic unfair dismissal. The claim of automatic unfair dismissal is no longer pursued.

2. In the opening moments of this hearing, I told the parties that as I expected to make decisions on the likely outcome of this claim, I would in all likelihood recuse from hearing the case if it were to proceed. At the end of the hearing I told the parties, in reserving judgment, that if the case were not struck out, I would recuse.

The background

3. The claimant had, until his dismissal on 2 November 2009, been employed as Deputy Head Teacher of Copland Community School. He had just over 12 years' service.

4. By detailed response, the respondent defended the claims, and asserted that the claimant was fairly dismissed for gross misconduct. The respondent asserted in the alternative that there was 100% contribution and / or 100% Polkey chance of being dismissed but for any procedural error.

5. The proceedings were stayed pending criminal proceedings, in which in due course, the Crown offered no evidence against Dr Evans. In 2014, Brent issued proceedings in the High Court. Dr Evans was one of six defendants. The proceedings were heard over some six weeks between January and April 2018, and were the subject of judgments issued by Mr Justice Zacaroli on 17 August and 15 November 2018 ([2018] EWHC 2214(Ch); 319-472 of today's bundle).

6. Following the issue of judgment in the High Court, Employment Judge Smail of the tribunal's own initiative directed that this hearing be listed to consider strike out of the claimant's claim or the issue of deposit orders.

7. Dr Evans is claimant in these tribunal proceedings and a defendant in the High Court; the London Borough of Brent is respondent in the tribunal and claimant in the High Court. To avoid confusion, I will refer to them as Dr Evans or Brent in this judgment. Where in this judgment I use page numbers, they refer to the bundle placed before me. Where I refer to paragraphs in the High Court Judgment, I preface the number with the letters HC, so HC578 refers to paragraph 578 of Mr Justice Zacaroli's judgment.

8. The parties had exchanged skeleton arguments before this hearing. Ms Thelin had appeared in the High Court proceedings; Mr Wilson had not. There was a bundle of authorities, of which the most helpful was Nicolson Highlandwear v Nicolson 2010 IRLR 860 (EAT).

9. After introductions at the start of the day, I adjourned to read or re-read the skeleton arguments, as well as a selection of the bundle suggested by both counsel. Each counsel's submissions lasted about one hour, and in order to deal with the alternative of a deposit order, Mr Wilson briefly took instructions on Dr Evans' ability to pay a deposit, if so ordered. In order that no more time be lost, I took the opportunity to list the full hearing provisionally for March 2020. That listing is automatically cancelled.

The High Court

10. Paragraphs HC1-29 are an invaluable introduction to the background, which I respectfully summarise.

11. This case arose out of events at The Copland Community School. Its Head Teacher between 1988 and 2009 was Mr Alan Davies. During his tenure, the school buildings and environment remained poor but academic achievement appeared to improve and the school became highly sought after. It had a delegated budget under the control of the Governing Body and Mr Davies. The judgment states (HC10-13):

> "The sole focus of this case is the recovery of sums paid to [Mr Davies, Dr Evans, and 13 other members of staff] … alleged to be unlawful payments over a six year period from April 2003 and April 2009. …
>
> The overpayments in this case consisted of payments over and above the staff members' basic salaries, which were purportedly justified as bonus payments, or payments for additional responsibilities …..
>
> The sum of all the overpayments is £2,707,391 of which Mr Davies received approximately £950,000 [and]…. Dr Evans received over £600,000 ….. It is common ground that throughout his [Dr Evans'] time at the school he was the line manager for the finance department ….. His finance role included preparation of the annual budget, and reporting to the Governing Body and to the financial management committee on financial matters. Beyond that, however, it was his evidence that he had no day to day control over financial matters …. I broadly accept this evidence ….. There is little evidence, apart from his job title, to suggest that he was closely involved with the dayto day finances of the school".

12. The finding of the High Court was that Dr Evans had received over £250,000 in over-payments; the judgment against him was for £46,091, the Court finding that the remainder was statute-barred. In the same judgment, Mr Davies was ordered to pay Brent a total of £1,395,839, including interest.

13. Both Counsel had the invidious task of seeking to summarise in a written skeleton and brief submission the content of a multi-week High Court trial, the judgments from which ran to over 150 pages. It was not surprising that each focussed on specific portions of the judgment of the High Court. Much of the judgment concerned the five defendants other than Dr Evans, and much of it consisted of detailed analysis of the causes of action, and the legal framework, including limitation, which do not arise in this claim.

14. I understand the following overview.

15. The High Court found that Mr Davies was a domineering personality, which in part contributed to his effective leadership of aspects of the school.

16. Mr Davies and Dr Evans were each paid a basic salary, which was subject to standard statutory terms and conditions for teachers of their level. Their basic pay was very close to, or at, the top of those scales.

17. With the assistance of others, Mr Davies introduced the payment of bonuses to a number of members of staff, including himself and Dr Evans. Mr Davies engaged in other forms of irregular financial conduct in relation to which there was no finding against Dr Evans.

18. The bonuses were described in language which the High Court found misleading. They came to represent a significant proportion of annual and/or pensionable pay. Some of them were described as payment for additional responsibilities which the High Court found were not real responsibilities, or which formed part of normal responsibilities to be

covered by every day pay. The court found that some bonus payments were counted double or more. Authority for these payments was signed off by two Governors (who were the fifth and sixth defendants). The court made a general finding that Mr Davies failed to provide all relevant and necessary information about the bonuses to all those with a legitimate interest in having it.

19. The court rejected that part of Dr Evans' evidence in which he denied having seen memos requiring such payments (HC237). It found that the Governors' remuneration committee was misled (HC281), and in particular that it was misled about salary enhancements to Dr Evans (HC383).

20. Striking findings related to savings made by the school from the retirement of a former deputy head, Mr Ali. The court found that having redistributed part of Mr Ali's salary to himself and Dr Evans, Mr Davies repeated the process more than once, so that the purported saving was a total sum many times more than the actual saving (HC410).

21. Another instance related to Chalkhill Primary School, to which Copland made staff available, including Dr Evans. Those staff were then paid sums for working at Chalkhill in addition to their normal Copland salary. The High Court noted (HC 454) that Mr Davies and Dr Evans could not

> 'offer any satisfactory explanation for why the teachers themselves were paid for assisting at Chalkhill, as opposed to Copland being compensated for having provided its teaching staff.'

22. A third related to payments to Mr Davies and Dr Evans for their role in a potential project for construction of a new school, including development. The court found that such payments made to Dr Evans were "particularly difficult to justify" (HC432).

23. The court considered whether Dr Evans had such knowledge of the payments made to him, "as to make it unconscionable for the Defendant … to retain the benefit of the receipt" (HC558). The court defined the test of what was unconscionable as (HC 565),

> "Where the relevant Defendant was aware of matters which would have caused a reasonable person in their position to appreciate the risk that the claimant was an improper use of school funds, and would have made enquiries of the Governing Body before accepting it."

24. The discussion of how that applied to Dr Evans is set out at HC584-599, from which I draw the following (at HC585-587):

> "He was also aware, that apart from a few exceptions, the payments were not revealed to the remuneration committee.
>
> Most important, Dr Evans was aware of the cumulative effect of all the payments made to him …
>
> He cannot fail to appreciate that to earn 70% of his salary again, he would have to be spending all his available spare time on school matters. Equally, therefore, he must

> have known the time spent by him on any further additional duties must have been during the time he was already being rewarded -- either by way of his basic, or his additional salary".

25. I note in particular HC588:

> "In light of the sheer size and frequency of the payments made to him …. the point was reached – certainly by the time of payments made to him would fall within the limitation period (that is after 10 July 2008) – that he must have appreciated at least the risk that the payments could not be justified."

26. The court found that but for being time barred, it would have found Dr Evans liable to repay payments which he received from March 2006 onwards. It ruled that the effect of the time bar was that he was in fact liable to repay payments received after July 2008.

27. Dr Evans accepted at this hearing, as indeed he could hardly fail to, that that judgment was fully binding of him.

The disciplinary process

28. It was common ground that the conduct of Mr Davies and others came to light when a member of staff, Mr Roberts, sent a dossier about the school's governance to Brent which suspended Mr Davies and Dr Evans on 13 May 2009. At the same time the Governing Body was suspended and replaced with an Interim Executive Board, and the school's budgetary powers suspended. A formal investigation was begun.

29. Dr Evans, accompanied by his sister, was interviewed on 30 July 2009 as part of an audit review process. On 28 September he was informed that a report of the investigation had been received and that there would be a gross misconduct enquiry against four members of staff, including Dr Evans. The other three resigned their employments before any disciplinary step was taken. Dr Evans was notified on 15 October that the disciplinary meeting would take place on 3 November. On 21 October, he received a copy of the investigation report and annexes. According to the unchallenged pleading, he received 805 pages of paperwork.

30. Dr Evans applied for a postponement of the disciplinary hearing. His sister was abroad at that time and he wished her to accompany him. He also wanted to have sufficient time to master the paperwork. He also quoted his unavailability on 3 November (it is not clear whether this led to the meeting being brought forward). Postponement was refused and the disciplinary meeting proceeded in Dr Evans' absence on 2 November. The bundle before me included the resulting dismissal letter of 3 November (206A-E).

31. The dismissal letter dealt first with the refusal of postponement. The disciplinary panel appears to have been displeased by the fact that Dr Evans had not attended on 2 November to ask in person for a

postponement. It pointed out that he could have chosen another representative, and wrote (206B):

> "The Panel noted that the documentary evidence was significant; however, they did not consider it an insurmountable amount of reading to undertake. You had received the documents on 21 October, some 12 days before the hearing. Every member of the Panel was able to read the documents within the same time scale, and the Panel therefore could not accept that you were unable to do the same."

32. The dismissal letter then set out a number of findings, of which Ms Thelen asked me to consider only the first three, although the letter should be read in full. The first proven allegation was that Dr Evans had enjoyed the receipt of bonuses which were unlawful under teachers' standard terms and conditions. I agree with Ms Thelen that that bare fact has been found by the High Court.

33. The second allegation was that Dr Evans had allowed and participated in the payment of allowances related to the retirement of Mr Ali. I agree with Ms Thelen that the High Court has found all elements of that allegation as fact.

34. The third allegation was that payments to Dr Evans for work managing the construction project should not have been made, or accepted. I agree with Ms Thelen that the High Court has, broadly, made a finding to that effect.

35. It was common ground that the parties are bound by the material findings of the High Court. It was also agreed that the High Court made no finding about the statutory test of unfair dismissal.

The framework

36. This was a claim for unfair dismissal only. Assuming that all formal hurdles had been met (that the claimant was an employee of the respondent, with sufficient length of service, and has brought the claim in time) the matter comes for hearing before the Employment Tribunal composed, since 2012, of an Employment Judge sitting alone.

37. In a case of unfair dismissal, the first question for the tribunal is to ask what was the reason for the dismissal. The reason is the set of factual circumstances in the mind of the decision maker when the decision is taken. The label attached by the decision maker is not as important as identifying the relevant set of facts.

38. Having found the reason, the tribunal then asks whether the reason which it has found is one of the potentially fair reasons provided for in section 98 (2) Employment Rights Act 1996. Mr Wilson's skeleton conceded that, "Misconduct is accepted as the reason for the dismissal". Misconduct is a potentially fair reason for dismissal.

39. The tribunal must next to consider whether the requirements of s.98(4) ERA have been met. That subsection provides that,

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reason showed by the employer) – … depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case."

40. That subsection is to be approached through the guidance of the Employment Appeal Tribunal in BHS v Burchell 1978 IRLR 379, although the tribunal must bear in mind that the burden of proof now is not that which it was when that case was decided.

41. The tribunal must take care not to substitute its own view for that of the employer, and at each step when the employer is entrusted with a choice or discretion, the tribunal must not ask what it would have done in that situation, but whether the decision or step taken was within the range of reasonable responses.

42. Following the Burchell guidance, the tribunal will ask whether, in dismissing Dr Evans, the dismissing panel genuinely believed that he had committed misconduct; whether it believed it after a reasonable enquiry and on reasonable evidence; and whether dismissal was within the range of reasonable responses.

43. The task of the tribunal is not to decide if the claimant in fact committed the misconduct for which he was dismissed. It is trite to say that an employee can be fairly dismissed for something he did not do, and unfairly dismissed for something that he did do.

44. If a claim succeeds, the powers of the tribunal are set out at sections 112 to 124A ERA.

45. Section 112(1) provides:

> "This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well founded".

I pause there to note that the statute provides no declaratory remedy, unlike, for example, section 124 Equality Act 2010.

46. The claimant in this case has stated that he seeks financial remedy. That is considered under two headings. A basic award may be thought of as a formula for acknowledging and rewarding past service before dismissal. Section 122(2) provides as follows:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce … accordingly".

47. The tribunal has power to award a compensatory award under section 123 to compensate for losses after dismissal. Section 123(1) provides:

> "The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer".

48. Section 123(6) provides:

> "Where the tribunal finds that the dismissal was, to any extent, caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

49. In Nicolson, the tribunal had refused to award costs against an unmeritorious claimant who had no prospect of receiving a financial award, giving as one reason that,

> "Claimants are, in any event, entitled to seek simple findings of unfair dismissal without the object of obtaining money."

50. In allowing the appeal, the EAT in Scotland said at paragraph 39 that,

> "The employment judge was wrong to approach matters on the basis that it is open to a claimant to pursue an unfair dismissal claim purely for the purpose of obtaining a declaration that he was unfairly dismissed ….. It may be that she had in mind that when a claimant alleges discrimination, there is provision in the relevant legislation for declaratory orders to be made. However, so far as unfair dismissal is concerned, there is nothing in the relevant position of the ERA 1996 (sections 94, 98, 111 …. [to] 123) to suggest that the obtaining of a declaratory order is a remedy that can be sought in an unfair dismissal claim."

51. The present application was brought under rule 37 of the Employment Tribunal Rules 2013 which provides so far as material:

> "At any stage of the proceedings, either on its own initiative or on the application of a party, the tribunal may strike out all or part of the claim or response on any of the following grounds:
>
> (a) It is scandalous or vexatious or has no reasonable prospect of success."

52. Rule 39 provides as follows:

> "Where at a preliminary hearing … the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party… to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."

Submissions: Brent

53. I understand Ms Thelen's meticulous written skeleton and oral submission to be as follows in my summary.

53.1 There was a substantial overlap between the evidence on which the disciplinary Panel dismissed Dr Evans, and that on which the High Court based its findings;

53.2 The first three stated reasons for dismissal (206A-C) have all been said by the Court to be well-founded. They were (1) that the overpayments were unlawful under teachers' pay and conditions; (2) that the payments in respect of Mr Ali's pay were unjustified and double-counted; and (3) that the payments in respect of the construction project were unjustified and excessive in a number of respects;

53.3 The Court rejected Dr Evans' two main lines of defence, which were that the payments were (a) justified by his responsibilities and performance (eg HC 425, 431, 432), and (b) made with full knowledge of the Governing Body (eg HC 281 ['misled'], 585 ['not revealed']);

53.4 Those two lines overlap with Dr Evans' lines of attack in the ET1, and with his reasons for asking for a postponement of his disciplinary hearing;

53.5 The Court has found that Dr Evans was in unconscionable receipt of over £250.000: the absence of a finding of dishonesty is not relevant to the Court, or in the tribunal;

53.6 In light of an overpaid sum of that amount, a 100% finding on contributory fault and Polkey is inevitable; further, and given that the Court found itself unable to order Dr Evans to repay over £200,000 of that sum, a tribunal would not find it 'just and equitable' to order Brent to make any further payment to Dr Evans.

Submissions: Dr Evans

54. I understand Mr Wilson's submissions on behalf of Dr Evans to be, in my summary, the following.

54.1 The Court's Judgment does not address the issue of Dr Evans' dismissal, or consider its fairness, or the application of s.98(4);

54.2 The Court's findings of unconscionable receipt should be scrutinised in the overall employment context, which means by the specialist industrial jury;

54.3 Significant portions of Brent's allegations against Dr Evans were rejected by the Court;

54.4 Even if Brent had dismissed Dr Evans solely for the reasons later upheld by the Court, that dismissal would have been outside the range of reasonable responses;

54.5 Dr Evans is entitled to judicial scrutiny of the material elements of his case, such as Brent's knowledge of the alleged overpayments;

54.6 A point which has not been considered is an interpretation of the events by which:

> 'It may be said that the implementation of proven private industrial methods of reversing poor performance, by using bonuses as incentives, in order to turn around the destiny of a previously failing school, has fallen foul of the lack of statutory approval, such that the payments had no lawful basis despite many believing them to be appropriate.'

54.7 Mr Wilson accepted that the use of the word 'appropriate' about dismissal in his written skeleton could be seen as an invitation to the tribunal to substitute its own view for the correct sanction; he agreed that that would be the wrong approach.

54.8 Even if the claimant were to receive no financial award, a determination of unfairness was a valuable consideration in the teaching profession.

Discussion and conclusions

55. My task is limited. The first question for me is whether to strike out; if I do not, the only other question which arises is deposit orders. I approach this matter through a number of separate strands. The first is to ask how the tribunal, as a matter of law and approach, might deal with this case differently from how the High Court dealt with its task. Mr Wilson was at pains to stress the differences, to support his submission that the claim in the tribunal should be allowed to proceed. I then go on to consider how the selements in a claim of unfair dismissal might proceed in the tribunal. I take care to bear in mind that I am not conducting the trial of this claim; and that an analysis of prospects of success is a matter of judgment based on experience, not an exercise in speculation.

Differences in law and approach

56. It was, as said above, common ground that the Court had not considered the elements of a statutory claim of unfair dismissal, and had therefore not made a determination on fairness. For reasons set out below, broadly I accept Ms Thelen's submission that the judgment of the Court addresses the substance of unfair dismissal.

57. Mr Wilson submitted that the approach, experience and technique of the tribunal as 'industrial jury' differ significantly from those of the High Court. I respectfully agree with that statement of general principle. My task is to consider how those differences might in practice impact on Dr Evans' prospects of success. Mr Wilson said less about the specifics. A first step is to consider the experience which the tribunal brings to its cases.

58. It was common ground that the tribunal has greater experience of everyday conduct in the workplace. I am confident that the High Court understood that the case before it arose out of events in a state school, which was the workplace of Dr Evans and three of the other defendants.

59. I accept that the tribunal is entitled to approach this case from a broad overview, and not adopt the technique of the Court. The reason is not necessarily that the Court is (as Mr Wilson put it) more 'cerebral' ('mathematical' might have been a better word). The tribunal is first not tasked with calculating a sum to be repaid by the overpaid employee; and secondly the tribunal need not be unduly troubled by the precise number of overpayments received by Dr Evans, or by whether they total tens or hundreds of thousands of pounds.

60. The Court had to answer the question, what had Dr Evans done; the tribunal asks, what did Brent reasonably believe he had done. The Court applies to the parties' conduct its own definition of the appropriate legal tests; the tribunal takes care not to substitute its own view for that of the employer.

61. The Court's short answer to its question was, in overview, that Dr Evans (1) over a period of time; (2) on multiple occasions; (3) in concert with others; (4) was party to the production of documents which were untrue and / or misleading and / or unlawful; (5) from which he drew substantial personal financial benefit which was (6) out of all proportion to his (a) work, (b) permitted remuneration and (c) the resources of the school.

62. The tribunal has significant experience of cases arising from misconduct at work. Many of those cases involve some form of financial irregularity which the employer finds to be a breach of trust. The tribunal's experience includes instances where dismissal follows from any breach of trust, particularly one with an element of financial loss, even if the trigger event is (unlike this case) isolated, spontaneous, or for a paltry amount.

63. The tribunals' experience includes many cases from public service. It will have heard cases which involve stewardship of public or charitable funds. It will understand the sense of financial responsibility and accountability which managers in those sectors bring to their work. It may well find the overview summarised at paragraph 61 above troubling and exceptional.

64. When considering Mr Wilson's 'incentivisation' point, the tribunal may well draw on experience of cases involving forms of performance-related salary enhancement. That experience is likely to create the expectation that forms of salary enhancement, whether designated as bonus, commission or incentive, are (a) devised independently of those who stand to benefit from them; (b) recorded in writing; (c) subject to review in practice; (d) published to the defined group of employees to whom they apply; (e) financially related to objective, job-related performance criteria (or 'targets'); and (f) often capped at an annual maximum figure or proportion. None of that applied in this case.

65. Drawing the above together, my conclusion is that I can see nothing in the structure, approach or experience of an employment tribunal which, in my judgment, has a positive bearing on Dr Evans' prospects of success.

The elements of unfair dismissal

66. I now seek to apply the test of rule 37 to the elements of a Burchell type case, while recording that that form of analysis is, in my view, not strictly necessary.

67. The reason for dismissal is agreed. Misconduct is a potentially fair reason for dismissal within section 98 (2) ERA.

68. Did Brent genuinely believe that the claimant was guilty of misconduct? While it is open to Dr Evans or his representative to cross examine a decision maker, I can see no prospect of the sincerity of belief being impugned.

69. Was that belief based on reasonable evidence? I did not have before me the full 800-page bundle which was before the disciplinary panel, only the report and the dismissal letter. Brent cannot logically rely on findings made in the High Court on evidence in 2018 to demonstrate the reasonableness of its belief in some of the same evidence in 2009. It can, however, rely on the High Court having made the same findings, or reached the same conclusions, as it did in dismissal. Broadly, I accept at paragraphs 32-34 above Ms Thelen's submission that in essence the material before the disciplinary panel had substantial overlap with the evidence before the High Court.

70. Had there been reasonably inquiry? I had no information about this, save that there was an audit investigation which took some five months or so and evidently produced a heavy volume of paperwork. The claimant was one of those who was interviewed at length. I did not understand Mr Wilson to argue that the process failed to meet the tribunal's standard of reasonable inquiry, bearing in mind the guidance in Sainsburys Supermarkets -v Hitt 2003 IRLR 23. An inquiry is reasonable if it is within the range of reasonable inquiries; it need not cover absolutely every point.

71. Was dismissal within the range of reasonable responses? This seems to me unarguable. I was puzzled by the amount of submission which Mr Wilson devoted to it.

72. Mr Wilson submitted that the proper outcome of a disciplinary, after adjournment, and after hearing Dr Evans in self-defence, might have been a warning. One of the many reasons why that is improbable is the difficulty which it would have caused for the employer. The tribunal has experience of the weight attached to consistency as an element of fairness, and of the concern, especially of large employers, not to set a precedent in one case which may prove troublesome in another case.

73. This employer is a local authority, employing many staff in jobs which though modest in status and pay, require personal trust and financial integrity. In the school setting, cleaners, dinner staff and teaching assistants might be the most obvious examples. A properly advised disciplinary panel which was contemplating warning Dr Evans would have had to consider the wider implications. It could not fail to be advised that if a senior figure were warned for unlawful, unauthorised self-payments from school funds of sums running into six figures, it would be difficult to set standards of conduct, or a disciplinary structure, for any other every day disciplinary case, such as say the cleaner or caretaker who picked up a lost wallet and kept it.

74. It is not for the tribunal to decide what was the appropriate penalty for gross misconduct, only to decide if the actual penalty was outside the range of reasonable responses. I am utterly confident in finding that there is no prospect whatsoever of that happening in this case.

Procedural fairness and Polkey

75. Had there been a fair enquiry? My task is of course not to find if Dr Evans was unfairly dismissed. It is to ask if he has no reasonable prospect of success in a claim to that effect. If the matter stopped at this point in this judgment, I would reach that conclusion. For the reason which now follows, and <u>for this reason alone</u>, I am unable to make that finding.

76. I cannot accept in principle that an employee faced with an allegation which could lead to termination of his career is required to master 800 pages of paperwork, and proceed in the absence of his chosen representative, on less than two weeks' notice. Even if that time frame were sanctioned by Brent's own procedures (which I was told to be the case), it does not meet the basic standard of fairness.

77. Dr Evans' request to be accompanied by a chosen representative was entirely reasonable. Implicit in Brent's letter was that a new representative could equally master the case in the few days available. Even if such a person could be found, the claimant was entitled to seek his first choice of representative, who was both his sister and the person who had accompanied him at the audit interview of July 2009. If those who refused the adjournment had in mind the strength of the evidence against Dr Evans, and refused the adjournment because they thought it would make no difference, (a suspicion which I have not had the opportunity to test), they misunderstood their role.

78. The dismissive language with which Brent's dismissal letter refused the claimant's request for postponement was wholly out of keeping with the careful analysis in the rest of it. Brent could not, in the context of this case, argue that it was prejudiced by granting a limited delay as a matter of fairness. The analogy between panel members reading a mass of papers in order to have a broad understanding of their function versus that of the accused person mastering the papers in order to save his job and his career, is not well made.

79. I accept that the claimant made a common error of judgment in failing to attend on 2 November and to put his case in person for postponement; there was nothing to stop him from doing that, on the basis that he would withdraw if postponement was refused.

80. On that one basis, I cannot say that this claim of unfair dismissal has no reasonable prospect of success. For complete avoidance of doubt, my finding is that but for this one procedural point I would find that the claim for unfair dismissal has no reasonable prospect of success.

81. I accept Ms Thelen's submission that the Polkey question is in substance answered by the High Court. I accept that the Court judgment demonstrates that an adjournment of the disciplinary case would have led to the outcome of dismissal, albeit after a delay. I accept the submission that that is shown by the overlap between the points which failed in Dr Evans' defence in the High Court, and the arguments which he has advanced by in this case. In the absence of evidence, it is speculation as to how long an adjournment of the disciplinary hearing would have been required to meet the standard of fairness. Tentatively, I suggest a minimum of two weeks.

Remedy in the tribunal

82. In my judgment, the claimant, if successful, has no prospect whatsoever of recovering any compensation, whether as basic award or as compensatory award.

83. The first reason is straightforward. The High Court has found that it has no power to order Dr Evans to repay Brent some £200,000 of its funds which he is not entitled to have. He cannot be ordered to repay because of limitation, and for no other reason.

84. The over-arching principle on which a basic award or compensatory award is ordered is that which is just and equitable. That formula is found in each of sub-sections 122(2), 123(1) and 123(6).

85. I do not think that there is any prospect of an Employment Tribunal calculating the basic and / or compensatory awards and awarding those sums or any proportion of them to be paid in the knowledge that Dr Evans has been found to hold over £200,000 of funds which belong to Brent. I simply cannot think of any argument which might convince the tribunal that that would be just and equitable.

86. If I am wrong about that, in the alternative I can secondly see little prospect of contribution reductions of less than 100% for both awards, having regard to the distinction in the wording of sections 122(2) and 123(6).

87. In either event, and thirdly, I consider the tribunal to be bound by Nicolson above. In the absence of a declaratory remedy, the claimant has in my judgment no prospect of recovering any sum by way of compensation.

88. It follows that I find that Dr Evans has no reasonable prospect of recovering any financial remedy. I, following the reasoning of Nicolson in finding that he therefore has no reasonable prospect of success in this claim.

89. In the exercise of discretion, I can see no interest of justice in this case proceeding further. These matters have been the subject of litigation for many weeks, in which Dr Evans, through counsel, has had the opportunity to put his case on the substance of these events, albeit not within the framework of unfair dismissal. It is apparent that many of his submissions to the Court were successful. I can see no interest of justice in devoting further substantial judicial resource, or the public funds of Brent, to litigate these events any further.

Deposit orders

90. Although not strictly necessary, I add that if I had not struck out the claim, I would have ordered the payment of three deposits. In light of the limited information given about Dr Evans' means, which I do not record in this public judgment, I would have given further thought to the amount of the deposits. I would have ordered the same amount for each deposit, and would not have ordered a merely nominal sum.

91. I would have attached deposits to three separate points, which would have been:

    91.1 Little reasonable prospect of a finding of unfair dismissal on any ground other than the failure to adjourn the disciplinary hearing;

    91.2 Little reasonable prospect of receiving any basic award;

    91.3 Little reasonable prospect of receiving any compensatory award.

____
Employment Judge R Lewis

Date: ……16 May 2019………………..

Sent to the parties on: ....

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For the Tribunal Office