Appeal No. UKEAT/0206/18/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 30 January 2020
Judgment handed down on 03 June 2020

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MRS G SMITH

MR M WORTHINGTON

GWYNEDD COUNCIL — APPELLANT

SHELLEY BARRATT
& OTHER — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Owain Rhys James (of Counsel) Instructed by: Gwynedd Council Legal Services Council Offices Shirehall Street Caernarfon Gwynedd LL55 1SH
For the Respondents	Ms Claire Darwin (of Counsel) Instructed by: Mark Underhill – Principal Official (Legal & Casework) NASUWT Hillscourt Education Centre Rose Hill Rednal Birmingham B45 8RS

SUMMARY

REDUNDANCY

The Claimants were dismissed for redundancy following the closure of the school where they worked. They were unsuccessful in applying for positions at a new school that opened at the same location. The Tribunal held that the dismissals were unfair because of the failure to provide the Claimants with a right of appeal, the absence of consultation and because of the manner in which they were required to "apply for their own jobs". The Respondent local authority appealed on the grounds that the Tribunal had erred in its approach to the assessment of fairness under s.98(4) of the 1996 Act in that it had treated guidelines as to what an employer should do in a redundancy dismissal as inflexible legal requirements; and had failed to take account of the particular limitations on the Respondent's role in relation to recruitment at a maintained school.

Held, dismissing the appeal, that the Tribunal had not erred in its approach to fairness. Whilst some parts of the Tribunal's judgment might be indicative of a rigid approach, a fair reading of the whole judgment reveals that it did not treat guideline cases as laying down mandatory requirements that had to be applied in every case. Whether or not the Respondent acted fairly in applying that process in the circumstances of this case was to be judged by an application of s98(4) of the 1996 Act and that is what the Tribunal did. In doing so, it did not err in its understanding of the relationship between the Respondent and the Governing Bodies of the schools as set out in the relevant regulations.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. We shall refer to the parties as "the Claimants" and "the Respondent" as they were below. The issue in this appeal is whether the Employment Tribunal sitting in Wrexham ("**the Tribunal**"), Employment Judge Tobin ("**the Judge**") presiding, erred in law in concluding that the Claimants, who were both teachers employed by the Respondent local authority at a community school, were unfairly dismissed by reason of redundancy following the closure of that school.

Factual Background

2. The hearing before the Tribunal proceeded on the basis of agreed facts, from which the following summary is derived.

3. The Claimants were teachers employed by the Respondent to work at Ysgol y Gader School, a community secondary school ("**School 1**"). The Respondent was the Claimants' sole employer at all material times.

4. On 19 May 2015, the Respondent's cabinet resolved to implement a reorganisation of the primary and secondary education provision within part of its area. That reorganisation involved the permanent closure of School 1 and nine primary schools within its catchment area, and the replacement of these from 1 September 2017 with a new community school, named Ysgol Bro Idris ("**School 2**"), for pupils aged 3 to 16. The Respondent also approved the establishment of a temporary governing body ("**TGB**") at School 2, which would determine the staffing structure of the new school pending the formal opening in September 2017.

5. Between 19 May 2015 and 1 September 2017, the Respondent kept affected schools informed on the progress of the reorganisation process. This included telling affected staff that

all existing contracts of employment would be terminated as of 31 August 2017; that the staffing of School 2 would be determined by an application/interview process; and that unsuccessful candidates would be made redundant as of 31 August 2017 unless they were successfully redeployed at a suitable alternative post within the Respondent authority.

6. The Claimants applied for positions at School 2. They were interviewed but were unsuccessful. By letters dated 9 May 2017 and 24 May 2017, the Respondent gave written notice of termination on the grounds of redundancy to take effect on 31 August 2017.

7. The Claimants, through their trade union representative, queried the fact that they had not been given the opportunity to make representations or appeal in respect of the decision to dismiss. They sought to rely upon the right of appeal conferred by Regulation 17 of the **Staffing of Maintained Schools (Wales) Regulations 2006** ("**the 2006 Regulations**").

8. On 18 August 2017, the chairperson of the Governing Body of School 1, Mr Siencyn, wrote to the Claimants' representative apologising for the fact that no opportunity to make representations or appeal had been given. However, Mr Siencyn went on to say that the failure to allow an appeal did not cause any disadvantage to the Claimants and that the appeal would have made no difference as the dismissals were caused by the closure of School 1, which was something that no appeal panel would have been able to reverse so as to avoid dismissals.

9. School 2 opened in September 2017 as planned. School 2 operates from six sites, all of which were previously occupied by schools that were closed as a result of the reorganisation. Secondary education in the area is provided from a single site, namely that which was formerly occupied by School 1.

10. In October 2017, the Respondent paid the Claimants their redundancy payments. On 3 October 2017, the Respondent, in an email to Claimants' union representative, stated that the Claimants were not disadvantaged in any way by not being allowed to submit an appeal under Regulation 17 of the 2006 Regulations as such an appeal would not have led to a reversal of

the decision to close the school. The Respondent also stated that it believed staff were properly compensated by the redundancy payments made.

11. On 23 October 2017, the TGB of School 2 ceased to exist and the Governing Body of School 2 was formally incorporated. The employment liabilities of the former were transferred to the latter.

12. The agreed facts before the Tribunal expressly stated that the parties acknowledged that:

a. prior to dismissal, the Claimants were entitled to make representation and appeal to the Governing Body of School 2[1] in respect of the decision to dismiss, pursuant to Regulation 17 of the 2006 Regulations;

b. the Claimants were not given an opportunity to make such representations or lodge an appeal;

c. without prejudice to the question of whether the dismissals were fair, the Claimants were dismissed on the grounds of redundancy;

d. exercising the statutory right of appeal under Regulation 17 would not have made any difference to the outcome. Had the Claimants been given such an opportunity, they would still have been dismissed on the grounds of redundancy.

The Tribunal's Judgment

13. It was common ground before the Tribunal that although the notice of dismissal was *ultra vires*, having been given by the Respondent without there first being a determination by the Governing Body of School 1, as is required by the 2006 Regulations, there was still an

[1] The agreed facts refer to an entitlement to make representation and appeal to the Governing Body of Ysgol Bro Idris, i.e. School 2. However, that appears to us to be a typographical error as it is clear that the parties' cases were put on the basis the Regulation 17 right of appeal existed as against School 1.

effective dismissal: see **Pinnington v Governing Body Ysgol Crug Glas School & City and County of Swansea** UKEAT/1500/00.

14. The Tribunal then went on to consider whether or not there was a redundancy situation. The Tribunal appears to consider this issue more by way of background, as the parties were agreed that the Claimants had been dismissed for redundancy. At paragraph 27, the Tribunal said as follows:

> **"27. It is clear from the pleadings and from the statement of agreed facts that the parties rely upon the claimants' redundancy situation as being activated by the closure of [School 1]. i.e closure or cessation of the employer's business (i.e. the school). I am not convinced that this was, in fact, a closure of the employer's business or organisation because the day after [School 1] closed [School 2]. Liabilities and assets transferred from the "old" school to the "new" school and there was a need for teachers of physical education in the secondary part of the new school at least (irrespective of whether they were described as Head of Health and Well-being and Physical Education Teachers). So whilst I accept that a redundancy situation arose because of the closure of [School 1], I do not accept that dismissal were (sic) inevitable. The vast bulk of the school staff were not dismissed because of disclosure of [School 1]. Rather than deal with the redundancy situation in the established way of consultation, pools of affected staff, selection criteria and suitable alternative employment, with consultation on each of these matters the respondent chose to circumvent this establish (sic) process. The respondent chose to warn staff of dismissal and to get staff to apply for their jobs or equivalent jobs at the new school. The respondent has conflated two issues. The claimants were not dismissed because a redundancy situation arose, they were dismissed because of the method (and an atypical method) that the respondent chose to deal with the redundancy situation."**

15. The Tribunal then went on to comment that the Respondent's approach was an unusual one as it provided no opportunity for meaningful or effective consultation in that there was little more than the communication of decisions made throughout the period leading up to the Claimants' dismissals. Notwithstanding some concerns about whether there was in fact a redundancy situation, the Tribunal concluded as follows:

> **"Although this situation may not fit in easily to the definition of redundancy, it probably fits better into that category that a dismissal for some other substantial reason (i.e. a reorganisation of the educational resources of the Dolgellau area) under s.98(1)(b) ERA. The parties accept that this is a redundancy dismissal, so other than note my points above, I accept that it is appropriate to categorise this as redundancy dismissals."**

16. The Tribunal then considered the Claimants' contention that the dismissals were unfair because of the absence of any right of appeal. The Tribunal found that the assertion by the chair of the Governing Body of School 1 that denying the Claimants their right of appeal did not

cause any disadvantage was "*extraordinary*", "*ill-conceived*", and "*emphatically wrong*". It is appropriate to set out the Tribunal's subsequent conclusions in full:

> **"35. … At the very least he denied the claimants their statutory and contractual entitlements on a fundamentally important issue at a crucial time. The injury was significant as an appeal is a fundamental part of a dismissal process. It affords the employer another opportunity to look at the dismissal and, as articulated in *Tipton*, it offers the employees the opportunity to show that the employer's reason for dismissing them could not be treated as reasonable.**
> **36. An appeal is ingrained in principles of natural justice and, although I do not say that the absence of an appeal would render every dismissal unfair, I do determine that it requires truly exceptional circumstances to refuse an employee the right to appeal against their dismissal. Such exceptional circumstances do not exist in this case, particularly where the Claimants have a statutory and contractual right of appeal. It was substantively and procedurally unfair to deny the Claimants in the case the right of appeal. Furthermore, no reasonable employer would refuse to consider an appeal in circumstances where an employee had a clear right of appeal.**
> **37. Mr Siencyn was also wrong in his contention that the claimants' appeals would have challenged the closure of the school. Both he and the Respondents conflate the closure of [School 1] with the inevitable dismissal of the claimants. The claimants were merely 2 teachers of many. They had never complained about the reorganisation of educational provision in general nor the decision to close [School 1]. There is no factual basis to support the contention that the Claimants were opposed to the reorganisation affecting their school. Indeed they cooperated with the Governing Bodies by applying for their jobs/substantially similar jobs in the new school. It is a fiction (and indeed disingenuous) for Mr Siencyn to say what the claimants appeal would have been about without asking them. The vast bulk of teachers were not dismissed and were able to continue their employment with the respondent as (sic) the new school. It is very clear that the claimants sought similar treatment. The Particulars of Claim contends that the claimants' appeals would have been in respect of the decision not to appoint them to the staff of the new school and Mr Adkins confirmed this in his oral submissions to me at the hearing.**
> **38. The respondent ignored the established method of dealing with redundancy, as set out in paragraph 11 above. I have not been provided with a copy of the claimants' contracts of employment, therefore, I cannot discern any contractual obligation for the claimants to apply for their own jobs or broadly similar jobs, either on a periodic basis or in the event of a reorganisation by the Respondent.**
> **39. Threatening to dismiss staff and compelling them to apply for their own jobs or similar jobs ignores years of jurisprudence on dealing with potential redundancy situations. It abrogates the employer's responsibilities and seeks to circumvent employment rights. Mr Adkins submitted that the appeals would have challenged the Respondent's approach to this reorganisation/redundancy and this was something that Mr Siencyn should have allowed. No reason (sic) the employer of the size of the respondent with similar administrative resources available to it would have rejected the claimant's attempt to exercise their contractual and statutory rights of appeal with these issues in contention.**
> **40. In accordance with the case of *Tipton*, the claimants were denied the opportunity of demonstrating that the reason for their dismissal were not sufficient for the purposes of S98(4). The reason given for the dismissal was redundancy. The claimants were invited to apply for their own jobs. There is no contractual requirement that they apply for their own jobs, either periodically or at all. Furthermore, the very act of applying for their jobs demonstrates that either an identical job or substantially similar job existed or, at least, such was the similarities between the roles that they amounted to suitable alternative employment. The lack of any appeal or review of this process is both substantively and procedurally unfair. I determine that this is also outside the band of reasonable responses available to a reasonable employer."**

17. Finally, the Tribunal dealt with the Respondent's assertion that, had the Claimants been given the opportunity to appeal, this would have made no difference and that they would have been dismissed in any event. The Respondent thereby sought a 100% **Polkey** deduction. The Tribunal rejected that contention. It concluded:

> **"41. … Some processes adopted by the employer are so unfair and so fundamentally flawed that it is impossible to formulate the hypothetical question of what would be the percentage chance the employee had still been dismissed even if the correct process had been followed: see Davidson v Industrial Marine Engineering Services Ltd EAT/0071/2003. This is an instance where the breach of a proper process was fundament (sic) and profound. I am not prepared to make a Polkey deduction in such circumstances.**

The Legal Framework

18. Community schools are established by Part 3 of the **Education Act 2002** ("**the 2002 Act**"). They are maintained by funds provided by local authorities such as the Respondent. Section 19(1) of the 2002 Act provides that every maintained school shall have a Governing Body, which is a body corporate constituted in accordance with regulations. The conduct of a maintained school is under the direction of the Governing Body: s.21, 2002 Act.

19. The Governing Body of a community school in Wales must consist of prescribed categories of governors (for example staff governors and parent governors); and must include five local authority governors: s.19(2), 2002 Act and Regulation 13 of the **Government of Maintained Schools (Wales) Regulations 2005** ("**the 2005 Regulations**").

20. Whilst for some types of school, for example voluntary aided and foundation schools, teachers are directly employed by the Governing Bodies of those schools, in community schools the teachers are employed by the relevant local authority. Section 35(2) of the 2002 Act provides that:

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

21. The 2006 Regulations govern the appointment of staff at maintained schools. Regulations 10 and 11 deal with the appoint of head teachers and deputy head teachers. Regulation 12 deals with the appointment of other teachers. So far as is relevant, Regulation 12 provides:

> **"(1) Subject to paragraph (2) [which is not relevant here], paragraphs (6) to (14) apply in relation to the filling of a vacancy in any teaching post (whether full-time or part-time) at the school, other than the post of head teacher or deputy head teacher.**
> **…**
> **(6) before taking any of the steps mentioned in paragraphs (7) to (14), the governing body must –**
> **(a) determine a specification for the post in consultation with the head teacher, and**
> **(b) send a copy of specification to the local authority.**
> **(7) The local education authority may nominate for consideration for appointment to the post any person who appears to the authority to be qualified to fill it and who at the time of his or her nomination either:**
> **(a) is an employee of the authority's or has been appointed to take up employment with the authority at a future date, or**
> **(b) is employed by the governing body of the foundation, voluntary aided or foundation special school maintained by the authority."**
> **(8) no person who is employed at any school maintained by the authority is to be nominated by the authority under paragraph (7) without the consent of the governing body of that school.**
> **(9) the governing body may advertise the vacancy at any time after it has sent a copy of the specification for the post to the local authority in accordance with paragraph (6), and must do so unless either –**
> **(a) it accepts for appointment to the post a person nominated by the local authority under paragraphs (7) and (8), or**
> **(b) it decides to recommend to the authority for appointment to the post a person who is already employed to work at the school.**
> **(10) Where the governing body advertises the vacancy, it must do so in a manner likely in its opinion to bring it to the notice of persons (including employees of the authority) who are qualified to fill it.**
> **(11) Where the governing body advertises the vacancy, it must –**
> **(a) interview such applicants for the post and such of the persons (if any) nominated by the local authority under paragraphs (7) and (8) as it thinks fit, and**
> **(b) where it considers it appropriate to do so, either recommend to the authority for appointment one of the applicants interviewed by it or notify the authority that it accepts for appointment any person nominated by the authority under paragraphs (7) and (8).**
> **(12) If the governing body is unable to agree on a person to recommend or accept for appointment, it must repeat the steps mentioned in paragraph (11), but it may do so without first re-advertising the vacancy in accordance with paragraph (10).**
> **(13) Where a person is recommended or accepted for appointment by the governing body and the person meets all relevant staff qualification requirements, the local authority must appoint the person.**
> **…"**

22. It is apparent from these provisions that the local authority does have a limited role in relation to the appointment of teachers, other than head teachers and deputy head teachers, at maintained schools in that it may nominate for consideration for appointment to a post any

person, being an employee or future employee of the authority, who appears to the authority to be qualified to fill it. The Governing Body may accept a person so nominated, but is not obliged to do so. If it does not do so, then it must advertise the vacancy. In those circumstances, the local authority's nominated candidates may be interviewed by the Governing Body, along with other candidates, but only if the Governing Body thinks it fits to do so. Once the Governing Body is in a position to recommend a candidate for appointment and that candidate meets all relevant staff qualification requirements, the local authority *must* appoint that person: Regulation 13.

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

> **"17.—**
> **(1) Subject to regulation 18, where the governing body determines that any person employed or engaged by the authority to work at the school should cease to work there, it must notify the authority in writing of its determination and the reasons for it.**
> **(2) If the person concerned is employed or engaged to work solely at the school (and does not resign), the authority must, before the end of the period of fourteen days beginning with the date on which the notification under paragraph (1) is given, either—**
> **(a) give him or her such notice terminating his or her contract with the authority as is required under that contract, or**
> **(b) terminate that contract without notice if the circumstances are such that it is entitled to do so by reason of his or her conduct.**
> **(3) If the person concerned is not employed or engaged by the authority to work solely at the school, the authority must require him or her to cease to work at the school with immediate effect.**
> **(4) Where paragraph (3) applies, no part of the costs incurred by the [local authority][1] in respect of the emoluments of the person concerned, so far as they relate to any period falling after the expiration of his or her contractual notice period, is to be met from the school's budget share.**
> **(5) The reference in paragraph (4) to the person's contractual notice period is to the period of notice that would have been required under his or her contract of employment with the authority for termination of that contract if such notice had been given on the date on which the notification under paragraph (1) was given.**
> **(6) <u>The governing body must—</u>**
> **<u>(a) make arrangements for giving any person in respect of whom it proposes to make a determination under paragraph (1) an opportunity of making representations as to the action it proposes to take</u> (including, if he or she so wishes, oral representations to such person or persons as the governing body may appoint for the purpose), and**
> **(b) <u>have regard to any representations made by him or her</u>.**
> **(7) <u>The governing body must also make arrangements for giving any person in respect of whom it has made a determination under paragraph (1) an opportunity of appealing against it before it notifies the [local authority][1] of the determination</u>.**
> **(8) Nothing in paragraphs (6) and (7) is to apply to a person who—**
> **(a) is due to cease to work at the school by reason of the termination of his or her contract of employment by effluxion of time; and**

(b) has not been continuously employed at the school, within the meaning of the Employment Rights Act 1996, for a period at least as long as the period for the time being specified in section 108(1) of that Act[2].

(9) The chief education officer of the [local authority][1] , or his or her representative, and the head teacher (except where he or she is the person concerned) are entitled to attend, for the purpose of giving advice, all hearings of the staff disciplinary committee and the disciplinary appeal committee [3].

(10) The staff disciplinary committee and the disciplinary appeal committee must consider any advice given by a person who is entitled to attend such hearings under paragraph (9) before making a determination under paragraph (1).

(11) The [local authority][1] must not dismiss a person employed by it to work solely at the school except as provided by paragraphs (1) and (2).

(12) Paragraph (11) does not apply in a case where—

(a) the dismissal of the person in question is required by virtue of a direction made under section 142 of the 2002 Act or regulations made under section 19 of the Teaching and Higher Education Act 1998[4], or

(b) the person in question is a teacher who is subject to a conditional registration, suspension or prohibition order made under Schedule 2 to the Teaching and Higher Education Act 1998" (Emphasis added)

24. These provisions make it clear that it is for the Governing Body to determine whether any person employed by the authority to work at the school should cease to work there. If it does so determine, it must notify the authority of its determination and reasons for it. The authority must then either give notice of termination, if the person is employed to work solely at the school, or in other cases, require him or her to cease work immediately. The Governing Body must make arrangements for giving any person in respect of whom it proposes to make a determination an opportunity of making representations and the Governing Body must have regard to such representations. The Governing Body must also make arrangements for giving any person in respect of whom it has made a determination, an opportunity of appealing against it before it notifies the local education authority thereof.

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

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

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

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

> **"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –**
>
> **(a) the fact that his employer has ceased or intends to cease –**
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
> **(ii) to carry on that business in the place where the employee was so employed, or**
> **(b) the fact that the requirements of that business –**
> **(i) for employees to carry out work of a particular kind, or**
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**
> **have ceased or diminished or are expected to cease or diminish.**
> **(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one parental unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).**
> **(3) For the purposes of subsection (1) the activities carried on by a local authority with respect to the schools maintained by it, and the activities carried on by the governing bodies of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them)."**

27. Before leaving the legal framework, it is also relevant to mention the **Education (Modification of Enactments Relating to Employment) Wales Order 2006** ("**the 2006 Order**"). Although, as set out above, it is the local authority that employs staff at maintained schools, the 2006 Order has the effect that the employer is, for certain purposes, deemed to be the Governing Body. In particular, references in specified legislation, such as the 1996 Act, include references to dismissal by the authority following notification of a determination by a Governing Body under Regulation 17(1) of the 2006 Regulations: see Article 3(1)(d) of the 2006 Order. In other words, the Governing Body is treated as the employer wherever the local authority dismisses a member of staff following a determination by the Governing Body.

28. Article 4 of the 2006 Order provides:

> **"Without prejudice to the generality of article 3, where an employee employed at a school having a delegated budget is dismissed by the authority following notification of such a determination as is mentioned in article 3(1)(d) –**
> **(a) section 92 of the 1996 act has effect as if the governing body had dismissed him and as if references to the employer's reasons for dismissing the employee were references to the reasons for which the governing body made its determination; and**

> **(b) part X of the 1996 Act has effect in relation to the dismissal as if the governing body had dismissed him, and the reason or principal reason for which the governing body did so had been the reason or principal reason for which it made its determination."**

29. Thus, not only is the Governing Body deemed to be the employer where there is a dismissal following a determination, its reason for making the determination is deemed to be the reason for dismissal.

30. Although the 2006 Order is mentioned by the Tribunal, it seems that no argument was presented to it that the Governing Body of either School 1 or School 2 should be treated as the employer for any purpose. That may be because there was no determination by the Governing Body of School 1 within the meaning of Article 3(1)(d) of the 2006 Order. It is common ground that the decision to dismiss the Claimants was that of the Respondent local authority alone. In those circumstances, the deeming provisions under the 2006 Order would not apply.

The Grounds of Appeal

31. At a preliminary hearing before HHJ Eady QC (as she then was), consideration was given to which, if any, of the Respondent's eight proposed grounds of appeal should proceed. Ground 1 was dependent on the effect of the 2006 Order. HHJ Eady QC held that it would not be appropriate to grant permission in respect of that ground when the effect of the 2006 Order was not argued below. Permission was however, granted in respect of Grounds 3, 4, 5, 6 and 8 of its Grounds of Appeal. The principal contention under each of these grounds is as follows:

a. Ground 3: The Tribunal erred in concluding that there was no redundancy situation and reached an irrational conclusion in finding that dismissal was not the inevitable consequence of the closure of School 1;

b. Ground 4: The Tribunal erred in finding that the Claimants had a right of appeal against the decision of the TGB of School 2 not to appoint them;

c. Ground 5: The Tribunal erred in concluding that any unfairness arose from the procedure used in order to determine which candidates should be appointed to the available positions in School 2;

d. Ground 6: The Tribunal erred in concluding that the dismissal was rendered unfair by the absence of any right of appeal; and

e. Ground 8: The Tribunal erred in failing to make a **Polkey** deduction.

32. Grounds 4, 5 and 6 challenge different aspects of the Tribunal's approach to the question of fairness and are considered together.

Ground 3 - Error in concluding that there was no genuine redundancy situation and that dismissal was not inevitable

33. The first aspect of this ground appears, at least in part, to be against the Tribunal's statement at paragraph 27 of the Reasons, that it was "*not convinced that this was a closure of the employer's business (i.e. the school)*" and that the "*claimants were not dismissed because a redundancy situation arose, they were dismissed because of the method (and an atypical method) that the respondent chose to deal with the redundancy situation*". The argument on appeal is that this amounted to a conclusion on the part of the Tribunal that there was no genuine redundancy situation at all. Mr James, who appeared before us on behalf of the Respondent, submits that the Tribunal was wrong to so conclude and that its remarks in this regard should be seen as addressing the question of fairness rather than the prior question of whether there was a redundancy situation at all. Given that the Tribunal did go on to accept the agreed position as between the parties that the dismissals were by reason of redundancy, it must have accepted that there was a redundancy situation in any event.

34. Ms Darwin, for the Claimants, submits that upon a reading of the whole judgment, it is clear that the Tribunal's conclusion was that there was no genuine redundancy situation and that that was a conclusion that the Tribunal was entitled to reach, notwithstanding the parties' agreed position below that these were redundancy dismissals. Although the Tribunal ought to proceed on the basis of the agreed facts, it should not, submits Ms Darwin, regard itself as bound by the parties' agreed position on the question of redundancy which remained a matter for the Tribunal.

35. We can deal with this aspect of this ground of appeal briefly, as it appears to us to be based on a misreading (by either side to some extent) of paragraphs 27 and 30 of the Judgment. In our view, on a fair reading of the Judgment, the Tribunal did not conclude that there was no genuine redundancy situation; indeed, the Judge expressly stated the opposite in paragraph 27:

> **"So whilst I accept that a redundancy situation arose because of the closure of [School 1], I do not accept that dismissal were (sic) inevitable"**

36. Where the Tribunal goes on to state (at the end of paragraph 27) that the "*claimants were not dismissed because a redundancy situation arose…*", it was not thereby resiling from or being inconsistent with its earlier stated position that there was a redundancy situation. It was, it seems to us, doing no more than dealing with the question whether the accepted reason for dismissal, namely redundancy, was a sufficient reason for dismissal in all the circumstances. That issue, i.e. the fairness of the dismissal, was a matter that it was required to consider. That conclusion is confirmed by the Tribunal's reference in the final words of paragraph 27 to how the respondent "*chose to deal with the redundancy situation*". Once again, there is no suggestion there that the Tribunal rejected the redundancy as genuine.

37. We accept that there are aspects of the Tribunal's remarks in paragraph 27 that might tend to suggest that it was questioning whether there was a redundancy situation at all. Mr James places particular reliance on the following passage in paragraph 27:

> "**I am not convinced that this was, in fact, a closure of the employer's business because the day after [School 1] closed [School 2] opened. Liabilities and assets transferred from the "old" school to the "new" school and there was a need for teachers of physical education in the secondary part of the new school at least…"**

38. It is submitted, with some justification, that the Tribunal was simply wrong to refer to the liabilities and assets transferring from the old to the new school. That was not one of the agreed facts, which merely state that the transfer of assets and liabilities was as from the TGB of School 2 to the Governing Body of that school. However, we do not consider that that erroneous reference to the transfer of assets and liabilities undermines the principal conclusion that there was a redundancy situation. The Judge was, in this paragraph, identifying some matters that gave him pause, but, as he states at paragraph 30, "*other than note my points above, I accept that it is appropriate to categorise this as redundancy dismissals*." In other words, notwithstanding the matters giving the Judge some pause (including the erroneous reference to the transfer of assets), he was prepared to proceed on the agreed basis that these were redundancy dismissals.

39. The manner in which this case was presented to the Tribunal was unusual. The parties, who were not represented at that stage by Counsel, sought to assist the Tribunal by agreeing a statement of agreed facts, and expressed agreed positions on the reason for dismissal (redundancy) and the likely outcome if there had been a Regulation 17 right of appeal (it would have made no difference). These are both issues of fact and it would have been open to the Claimants, should they have so wished, not to have accepted that these were redundancy dismissals. Having chosen not to do so, and having not cross-appealed, they cannot now complain that the Judge proceeded on the basis of that agreed position (albeit with some

reservations). Indeed, that is the appropriate course for the Judge to take when presented with agreed facts. We were referred to the judgment of the Court of Appeal in **Secretary of State for Industry v Rogers** [1996] 1 WLR 1569, in which the parties in directors disqualification proceedings had presented agreed facts which did not refer to the director being dishonest. Notwithstanding that, the court at first instance made a finding of dishonesty. The Court of Appeal held that the Judge had not been entitled to make that finding:

> **"It is for the Secretary of State (or the official receiver) and those advising him to decide what evidence to place before the court in support of an application under section 6 and in respect of the matters to which, under section 9, the court is required to have particular regard. If, having done so, the Secretary of State decides that certain allegations made in the affidavits filed in support of the application need not be pursued, it is not, in my opinion, the proper function of the court to insist that they be pursued. The function of the court, in directors disqualification proceedings as in civil litigation generally, is adversarial. It is for the applicant to decide what case to present to the court, what allegations to make and what allegations, once made, should be persevered with. It is for the respondent director to decide what allegations to dispute and what allegations to accept. If the Secretary of State and the respondent director place before the court an agreed statement of the facts that are agreed and of the facts that the respondent does not propose to dispute and invite the court to deal with the case on the basis of that agreed statement, it is not for the court, in my judgment, to insist that other allegations be pursued (whether or not the allegations relate to section 9 matters) or that cross-examination of any deponent or of the director should take place. If the judge feels strongly enough that the course being taken by the Secretary of State is ill advised, he or she can, I would think, adjourn the case for a short period and invite the Secretary of State to reconsider. But, thereapart, the function of the judge is to deal with the case that is put before the court by the parties. There is no impropriety in directors disqualification cases or in any other civil proceedings in placing before the court an agreed statement of facts and inviting the court to deal with the case on the basis of that statement." (Per Sir Richard Scott VC at 1573 F to H) (Emphasis added)**

40. That approach applies as much to the Employment Tribunal as to other civil proceedings. What the parties cannot do, however, is to bind the Judge in respect of a matter of judicial judgment. As also stated by Sir Richard Scott in the **Rogers** case (at 1574 E-G):

> **"The parties cannot, however, by their agreement require a judge to find that the director's conduct as described in an agreed statement of facts warrants a disqualification order. I find it almost inconceivable that, in a case where the director agrees that his conduct warrants a disqualification order, the judge would not so find. But a judicial finding must remain a matter for the judge's judgment reached on the facts agreed or proved before him. Similarly, the parties cannot by their agreement require the judge to conclude that a disqualification order of a specified period or falling within a specified bracket should be made. That, too, must remain a matter of judicial judgment formed, of course, on the basis of the agreed statement of facts. It would, naturally, be unusual for a judge to disagree with a period of disqualification thought both by the Secretary of State and by the respondent director to be suitable. But the principle remains that the judge would not be bound by their agreement in that regard." (Emphasis added)**

41. In our view, the statement of agreed facts did not seek to bind the Judge on any matter of judicial judgment. Questions such as whether the dismissal was fair and whether there should be a **Polkey** reduction, which are matters of judgment for the Tribunal, were expressly left for it to decide. The parties' agreed position that the reason for dismissal was redundancy did not usurp the judicial function either; the reason for dismissal being a set of facts known to the dismissing employer at the time of dismissal. Of course, as Ms Darwin rightly points out, the fact that the reason for dismissal was redundancy does imply that it was accepted that there was a prior redundancy situation within the meaning of s.139(1) of the **1996 Act**, to which the dismissal was wholly or mainly attributable. However, the parties had not put that issue before the Tribunal to decide. In those circumstances, whilst the Judge expressed some concerns about whether there was a redundancy situation, he was correct, in our view, to put those to one side and proceed to determine the matter on the basis that this was a redundancy dismissal.

42. The conclusion that there was a genuine redundancy situation is one that, in our view, inevitably flows from a proper application of s.139 of the 1996 Act in any case. As that section provides, an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the employer has ceased to carry on the business in the place where the employee was so employed. In the present case, the closure of School 1 amounted to the cessation of the relevant business (namely the activities of School 1) in that place. The fact that a different business (namely the activities of School 2) commenced immediately after that cessation did not mean that there was no redundancy situation within the meaning of s.139.

43. Before us, there was much argument about the provisions of s.139(3) of the **1996 Act** and whether or not the Tribunal did or ought to have taken account of the Respondent's other schools in determining whether there was a redundancy situation. The Tribunal did not refer to

s.139(3), although ss.139(1) and (6) were set out: see paragraph 5, and we are told that there was no evidence on the Respondent's other schools. It seems to us that it was open to the Tribunal to reach the conclusion that there was a redundancy situation based on the closure of School 1 alone (and its replacement by School 2), and that it was not therefore necessary for it to consider the Respondent's business more widely. As provided in s.139(3) of the 1996 Act, the Respondent's activities and those of the Governing Bodies of maintained schools are to be treated as one business unless the cessation or diminution requirements under s.139(1)(a) and (b) would be satisfied without so treating them.

44. The second line of attack under this ground is directed at the Tribunal's conclusion that dismissal was not inevitable. Mr James submits that once School 1 closed, and effective notice of termination had been provided by the Respondent, (as the Judge accepted was the case), that was the end of the matter. The fact that there was a need for teachers in the new school did not change the position.

45. Ms Darwin submits that the Tribunal's conclusion that dismissal was not inevitable was a finding of fact involving no misdirection of law. In other words, this is a perversity challenge.

46. We do not find that the Tribunal erred in law in stating that dismissal as a result of the redundancy situation was not inevitable. The Tribunal noted that there was still a need for teachers of physical education in the new school and that the vast bulk of staff were not dismissed because of the closure of School 1. In our judgment, these points were made, not in order to support a conclusion that there was no redundancy situation (which as we set out above was not what the Tribunal concluded), but to support the Tribunal's concerns about the fairness of the process resulting in dismissal. The Tribunal was clearly of the view that the "*atypical*" approach taken by the Respondent to this redundancy situation need not necessarily have resulted in dismissal. This was not a case where the Governing Body had made a determination

that employment should cease thereby leaving the Respondent with no option, in accordance with the terms of Regulation 17 of the 2006 Regulations, but to terminate the employment. Here, the decision to close the school was taken by the Respondent, and it was not bound to follow through with a dismissal. In these circumstances, we find that it was open to the Tribunal to conclude that dismissal was not inevitable upon the closure of School 1.

Grounds 4, 5 and 6 – The Tribunal's approach to fairness

47. These grounds relate to the Tribunal's approach to the question of fairness and, in particular, to the Tribunal's approach to the right of appeal and suitable alternative employment. We shall consider first the Tribunal's approach to the right of appeal.

Right of Appeal

48. Mr James challenges the Tribunal's approach to the right of appeal on several fronts. First, he submits that the Tribunal erred in that it applied a rigid approach to the need for an appeal, effectively concluding that the absence of an appeal would automatically render a dismissal unfair save in "*truly exceptional circumstances*". Second, he submits that the Tribunal was wrong to consider that any failure to confer on the Claimants their statutory right of appeal under Regulation 17 could have any bearing on fairness. That was particularly so as any such right would apply against the Governing Body of School 1, whereas the appeal right being sought was as against the decision of the Governing Body of School 2 not to appoint. Third, Mr James submits that the Tribunal failed to take the correct approach which was to consider fairness under s.98(4) of the 1996 Act generally. Finally, it is said that the Tribunal erred in failing to recognise that this was a case where the decision to dismiss was not one for the Respondent to take but lay with the Governing Body of School 1, and that in those

circumstances the action or inaction of the Respondent was largely irrelevant to the question of fairness.

49. We deal with the last of those points first. In our judgment, it is not open to the Respondent, in the circumstances of this case, to contend that the Respondent was not the relevant decision-maker for the purposes of considering fairness. The agreed facts made it clear that the decision to close School 1 was that of the Respondent and that that is what resulted in the dismissal. Regulation 17 of the 2006 Regulations confers on the Governing Body the power to determine whether a teacher should continue to be employed at a school, and requires the local education authority to act upon such determination by effecting the dismissal. However, the absence of such a determination does not render dismissal by the local education authority a nullity: see **Governing Body of Abergwynfi Infants School v Jones** [2011] ICR 1415 at [27] (referring to **Pinnington**). The Respondent accepted before the Tribunal that "*irrespective of the lawfulness of the dismissal, if the … notice of dismissal is clear and acted upon it is, in law, an effective dismissal which be to (sic) the subject of an unfair dismissal challenge*.": see paragraph 24 of the Reasons. There was nothing in the agreed facts to suggest that the Governing Body of School 1 had adopted the Respondent's decision so as to render it potentially liable for a claim of unfair dismissal. Indeed, Mr Siencyn, in his letter to the Claimants' representative dated 18 August 2017 (to which the Tribunal refers at paragraph 35 of the Reasons) expressly sought to distance the Governing Body of School 1 from the Respondent's decision, stating that the Claimants were not being dismissed by either Governing Body but that, *"… the Council is the Employer and the Employer dismisses them*."

50. We acknowledge that Elias LJ, in his dissenting judgment in **Abergwynfi Infants School,** stated that in considering fairness in this context the focus was on the actions (or inaction) of the Governing Body alone and not on the independent failings of the local education authority:

> **"49. It follows that, in my judgment, there is no purpose in naming the local education authority as a respondent to the unfair dismissal claim on the basis that it has failed properly to assist an employee to secure alternative employment. Any local education authority failing cannot of itself have any bearing on the fairness of the dismissal, which is deemed to have been carried out by the governing body. That is not to say that the failure to assist a redundant teacher to obtain alternative employment in another school is necessarily irrelevant to the fairness of the dismissal. It may be that on the facts of a particular case a governing body might not be acting reasonably in all the circumstances if it fails to assist a teacher to obtain employment in another school, by analogy with *Vokes Ltd v Bear [1974] ICR 1*. This was the view of the Employment Appeal Tribunal (Judge McMullen QC presiding) in Northamptonshire County Council v Gilkes (unreported) 15 February 2006. We heard no argument on that particular point and I prefer to express no opinion about it. But, even if that approach is correct, it is the action or inaction of the governing body alone which is the focus of attention."**
>
> **50. I accept that it may be thought that this is not altogether a satisfactory state of affairs, but it seems to me that it is what Parliament has sought to achieve by treating schools with a delegated budget as single employers distinct from the local education authority where they are exercising employment functions conferred upon them. (Emphasis added)**

51. The majority (Carnwath and Pitchford LJJ), whilst acknowledging there were "*formidable obstacles*" (per Pitchford LJ at [60]) in the way of the claimant in that case in establishing that the local education authority owed a separate duty to redeploy her, did not feel able to say that the 2006 Regulations were abundantly clear that any direct liability of the local education authority was excluded:

> **"67. ... One of the hallmarks of the tribunal system is supposed to be its accessibility and freedom from legal technicality. In the present case the key consideration should surely have been the merit or otherwise of the claimant's case that she had been unfairly dismissed. Whatever the precise effect of the regulations, the substance of the matter was that the local education authority was responsible (perfectly properly) for the school closure which led to her dismissal. One might have expected the authority to be confident enough of its position to wish to defend the case on the merits, and, if the process were to be shown to have been legally unfair, to accept responsibility for the consequences.**
>
> **68. If it were abundantly clear from the regulations that any direct liability of the local education authority was excluded, I agree that there would be advantage in us saying so without more ado. However, with respect to Elias LJ's careful analysis, I am not in that position. The tenor of the regulations is to provide that the governing body is to be "treated as if it were an employer" for the purposes of the Employment Tribunals Act 1996 (see eg article 6(1) of the 2006 Order referred to by Elias LJ at para 8) but not necessarily to exclude concurrent liability of the authority itself. Reliance is placed on regulation 17 of the 2006 Regulations, which requires the governing body, not the local education authority, to determine when a person should cease to work at its school. It is unclear to me, however, how that is to apply in circumstances where dismissal follows necessarily from a closure decision made by the authority. As a matter of practicality, it is not surprising that in this case the dismissal letter came from the authority. I would need some persuasion that it was acting unlawfully in sending it. The high point of the authority's argument appears to be regulation 17(11) , which provides that "it must not dismiss" a person employed at the school, except as provided by the earlier parts of that regulation, which involve a decision by the governing**

> **body. However, it seems wholly unrealistic to fix the governing body with notional responsibility by its own inaction, in circumstances where there was nothing in practice that it could do."**

52. In the present case, the Respondent has conceded that it can be the subject of an unfair dismissal challenge (although it maintained that there was no unfairness). In our judgment, based on the majority judgment in **Abergwynfi**, that concession was correctly made. The 2006 Regulations do not expressly address the situation where the local education authority purports to dismiss a teacher in the absence of a determination by the Governing Body (as was the case here). Although Regulation 17(11) provides that the local authority "*must not*" dismiss a person employed by it to work solely at the school except as provided by Regulation 17(1) and (2), in the present case, there does not appear to have been any clear evidence as to whether (and no clear finding that) the Claimants were employed to work solely at School 1. The Tribunal was not taken to the Claimants' contracts of employment: see paragraph 38, and neither were we. If they were not so employed, then Regulation 17(11) would not apply in any case. However, even if they were so employed, the structure of the 2006 Regulations does not, as held in **Abergwynfi**, necessarily preclude liability attaching to a local authority making a decision to dismiss in the absence of any determination by the Governing Body.

53. We deal next with Mr James's contention that the Tribunal erred in stating that it requires "*truly exceptional circumstances*" to refuse an employee the right to appeal against a dismissal, and that it was wrong not to follow the decision of the Scottish EAT (Lady Smith presiding) in **Taskforce (Finishing & Handling) Ltd v Love** [2005] All ER (D) 269 (Jun). Mr James submits that the Tribunal treated the absence of an appeal as determinative instead of making an assessment of fairness overall, of which the absence of an appeal would be just one relevant factor.

54. Ms Darwin submits that on a fair reading of the whole judgment, the Tribunal did not err in its approach.

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

any unduly narrow approach that treated the absence of appeals or means of review as determinative.

56. In coming to this conclusion, we make it clear that we do not endorse any test of exceptionality when it comes to appeals, or indeed any of the various steps that one might usually expect to see in a fair and reasonable dismissal procedure. The test remains that of fairness overall under s.98(4) of the 1996 Act, and not whether there were "*truly exceptional circumstances*" that justified the omission of any of those steps. We also do not endorse the Tribunal's apparent criticisms of the judgment of Lady Smith in **Taskforce**. In that case, Lady Smith stated that:

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

57. The Tribunal did not seek to distinguish that case, presumably on the basis that nothing in it was considered to be contrary to the approach it was taking. As such, it is all the more surprising that the Tribunal chose to comment on that judgment in the following terms:

> **"The EAT [in Taskforce] did not consider the circumstances where an employee had a contractual and/or statutory entitlement to an appeal against dismissal as Ms Barratt and Mr Hughes did, and which had been denied. Furthermore, in my judgment, much in employment practices has changed and the case law has moved on since 2005. The right to appeal any dismissal is now so ingrained in employment practices that it is rare that an employee would be dismissed without being given the right of appeal. Such a right has virtually become second nature for all but the most cavalier employer. Although I do not need to distinguish the task force case, with the greatest of respect to the (sic) Lady Smith, I would have difficulties in following her rather brief reasoning in extending the applicability of the Taskforce case to**

> **this determination. Had the Taskforce case being (sic) decided more recently then I am sure that the outcome would have been different, or Lady Smith's reasoning would have been more elaborate."**

58. Mr James submits that the **Taskforce** decision was binding on the Tribunal and that the mere effluxion of time was not a proper basis for not following the decision. We have considerable sympathy with that submission. The Tribunal used trenchant terms to cast this decision aside as obsolete. The question, however, is whether the Tribunal fell into error by apparently not following the decision in **Taskforce**. The difficulty, ultimately, with Mr James's submissions is that there is little or nothing in the judgment of the Tribunal to suggest that it was in fact departing from the principles set out in **Taskforce**. We should make it clear that we consider Lady Smith to have been correct in her judgment that there is no rule that a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure. We were not taken to any authority to suggest that the position has changed significantly in the 15 years since Lady Smith's judgment, and neither does the Tribunal refer to such authority. The Tribunal did not refer specifically to the passage in **Taskforce** to which it took objection. Instead, it sets out that the EAT in that case had "*determined that, in a redundancy dismissal, the employee was not conferred with a free-standing entitlement to have an appeal hearing*". That may have been the factual position in that case, but it would be incorrect if the Tribunal had interpreted that as meaning that the EAT was saying that the absence of an appeal hearing could never be unfair. Furthermore, as we have already set out above, the Tribunal expressly stated that it did not consider that the absence of an appeal would render every dismissal unfair. It seems to us that there is considerable overlap between that statement of the Tribunal and Lady Smith's judgment that there is no rule that the absence of an appeal would automatically render a redundancy dismissal unfair. In other words, the approach taken by the Tribunal was, if anything, consistent with the judgment in **Taskforce**. In these circumstances, whilst the Tribunal's criticisms of the judgment in **Taskforce** were, in

our view, misplaced, they do not, on a full reading of the judgment, disclose any actual error of law in the Tribunal's approach.

59. Mr James's next point under this ground was that the Tribunal was wrong to consider that any failure to confer on the Claimants their statutory right of appeal under Regulation 17 could have any bearing on fairness. As we understood the point, it was that as the Regulation 17 appeal was the only right of appeal in play, and as it was one that clearly could not apply to the Respondent, the Tribunal erred in having regard to it.

60. In our judgment, there was no error in the Tribunal's approach. The Respondent accepted, both before the Tribunal and before us, that the Claimants had a right of appeal under Regulation 17. Of course, that right could only have been invoked in the event of a determination by the Governing Body of School 1 within the meaning of Regulation 17(1). As we have seen already, there was no such determination here; merely a decision by the Respondent to close School 1 and to effect dismissals of its own motion. The Tribunal was entitled to take account of the fact that, ordinarily, the Claimants would have had a right of appeal in considering whether a fair procedure had been adopted by the Respondent. It was relevant to note that the Claimants were not employed within a setting where there could be no reasonable expectation of an appeal; there was a statutory (and as the Tribunal found, contractual) entitlement to one. That was not to say that the Regulation 17 right of appeal could be directly invoked against the Respondent; it could not, and the Tribunal did not say otherwise. However, the Tribunal did find that that there was an absence of any opportunity for the Claimants to appeal or grieve against the decisions to dismiss. That was a reference to the absence of any such procedures vis-à-vis the Respondent. The Tribunal was entitled to conclude that, in the circumstances of this case, where ordinarily the Claimants had an expectation of an appeal (albeit against the Governing Body), the absence of any appeal gave

rise to unfairness. Such conclusion was not perverse or one with which this EAT would readily interfere.

Recruitment Procedure

61. We turn now to the second aspect of Mr James' challenge on fairness, namely the Tribunal's approach to the procedure used to determine which candidates should be appointed to the available positions in School 2.

62. Mr James's principal submission here is that the Tribunal erred in treating the guidance in **Williams v Compair Maxam** [1982] IRLR 83 as requirements to be applied in all redundancy cases. He submits that not only is there no such requirement, but that that guidance is inapt where employees are not selected for redundancy from a pool, but are required to apply for different jobs (in this case, at School 2). Reliance is placed on the judgment of HHJ Richardson in **Morgan v Welsh Rugby Union** [2011] IRLR 376, where it was held:

> **"29. There are some redundancy cases, of which this is one, where redundancy arises in consequence of a re-organisation and there are new, different, roles to be filled. The criteria set out in Williams did not seek to address the process by which such roles were to be filled.**
> **30. We shall turn in a moment to the authorities which support this proposition. But it is, we think, an obvious proposition. Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas Williams type selection will involve consultation and meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion.**
> **31. In Akzo Coatings v Thompson (EAT/117/94) His Honour Judge Peter Clark said:**
>
> > **"There is, in our judgment, a world of difference between the way in which an employer approaches selection for dismissal in a redundancy pool where some will be retained and others dismissed. It is to that exercise which points 2–4 in the Williams guidelines are directed. These observations have no application when considering whether the employer has taken reasonable steps to look for alternative employment. The Tribunal's approach was wholly erroneous in law.""**

63. Mr James further submits that, as it was a matter for the Governing Body of School 2 which employees should be recruited there, there was no warrant for finding that the Respondent had acted unfairly. The regulatory scheme was such that the Respondent could not make recruitment decisions for School 2.

64. Ms Darwin submits that the Tribunal was entitled to conclude that the Respondent's approach fell outside the band of reasonable responses. The Respondent was a large employer and had the power, under Regulation 12 of the **2006 Regulations** to nominate teachers for appointment at any of the 100 schools (including School 2) which it maintains. There was no evidence before the Tribunal that the Respondent had no vacancies or that the number of potentially redundant employees exceeded the number of vacancies across its schools such that a competitive interview process was appropriate.

65. The guidance set out in the well-known case of **Williams v Compair Maxam** (said to be the generally accepted principles where employees are represented by an independent union) was as follows:

> **"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.**
> **2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.**
> **3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.**
> **4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.**
> **5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."**

66. The EAT in that case stressed that these were "*not principles of law, but standards of behaviour*": at [35]. As seen from the analysis in the **Morgan** case above, the guidance (or at

least certain aspects of it) may not, in any event, be appropriate in a case where the exercise does not involve selection from a pool but a process whereby candidates are interviewed for new and/or different roles: **Morgan** at [29] to [30].

67. In the present case, the Tribunal did not refer expressly to the **Williams** case, but instead referred to the "*case law*" generally in the following terms:

> **"11 The case law has identified a number of steps that employers are required to take to fairly dismiss staff by reason of redundancy. These include the following:**
>
> **a. Examining alternatives to redundancy**
> **b. Consulting with employee representatives…**
> **c. Notifying the Secretary of State for business innovation and skills…**
> **d. Defining the staff affected by the redundancy situation.**
> **e. Selecting those to be dismissed for redundancy.**
> **f. Individual consultation.**
> **g. Looking for alternative work." (Emphasis added)**

68. Some of these steps may be said to derive from the **Williams** case: for example, b, d, e, and g, but there was not, in our view, any slavish application of that case. Although the Tribunal referred to these steps as ones that "*employers are <u>required</u> to take to fairly dismiss staff by reason of redundancy*" (our emphasis), a fair reading of the whole judgment reveals that these were not steps that were elevated to any principle of law such that a failure to comply with any one of them would render the dismissal automatically unfair. At paragraph 28, the Tribunal stated that, "*It would be normal in a redundancy case, when considering fairness, to look not only at the nature of the proposed redundancy, but at the consultation process carried out, the pool of employees involved, and the selection criteria*." That is very different from stating that a redundancy dismissal would be automatically or necessarily unfair if one of these steps – such as consultation or the application of selection criteria – was missing.

69. The Tribunal reiterates its view at paragraph 38, where it states that "*The respondent ignored the established method of dealing with redundancy, as set out in paragraph 11 above*." To refer to something as the "*established method*" is not to suggest that the dismissal was necessarily unfair if that method were not applied. Furthermore, the Tribunal does, at other points in its judgment, refer expressly to the more general test of fairness under s.98 (4) of the

1996 Act, which is the proper test to be applied: see, for example, paragraphs 6 to 9, 12, 28, 36 and 40. .

70. It is clear from the judgment as a whole that the Tribunal was concerned by the absence of any opportunity given to the Claimant to challenge their dismissals or be consulted about the manner in which the redundancy exercise would be carried out. Given the size and administrative resources of the Respondent (to which the Tribunal expressly refers: paragraph 39), it was permissible for the Tribunal to conclude that the Respondent's approach was, in the circumstances, outside the band of reasonable responses and unfair.

71. The fact that the redeployment decisions were to be taken by way of a recruitment exercise conducted by the Governing Body of School 2, rather than the Respondent, does not necessarily mean that consultation is rendered irrelevant. We do not think that the decision in **Morgan** established any principle of law suggesting otherwise. The claimant in that case had contended that there was a failure to apply the third and fourth factors in **Williams**, namely, the establishment of objective criteria for selection and the application of those criteria. The EAT held that the **Williams** factors did not address the situation in **Morgan**, where there was a reorganisation of two roles down to one new role and an interview process to determine the successful candidate. The "*forward-looking*" nature of the recruitment exercise led the EAT to conclude that, "*whereas Williams-type selection will involve consultation and a meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process" (emphasis added):* per HHJ Richardson at [30]. The EAT did not thereby suggest that consultation can never be relevant in such an exercise. In our judgment, consultation may remain relevant. Whether or not that is so in any particular case is a matter for the Tribunal, as the arbiter of compliance with s.98(4) of the 1996 Act, to determine. In the present case, there was, as the Tribunal found, no consultation at all, merely the communication of decisions made. Clearly, the Tribunal considered that there were matters about which the

Claimants could have been consulted, including the adoption of a procedure involving the dismissal of staff at affected schools and the process of recruitment to the new schools.

72. Furthermore, it was not even clear that the appointments were to be made to "*new roles*" (as was the case in **Morgan**). Indeed, the Tribunal found that the Claimants were required to apply for "*either an identical job or a substantially similar job*" (at paragraph 40). Where recruitment is to the same or substantially the same role as one which the employee was doing, then the exercise may not involve "*forward-looking*" criteria at all, but something closer to selection from within a pool.

73. Mr James' further submission here was that, as the recruitment decisions were solely those of the Governing Body of School 2, there was nothing that the Respondent could do, and any criticism of its actions (or inaction) was misplaced. Whilst it is right to say that the recruitment decision was ultimately one for that Governing Body, we do not agree that the Respondent had no role to play at all. The terms of Regulation 12 of the 2006 Regulations are such that the Respondent can nominate a person who appears to it to be qualified for appointment to a role at a maintained school. The Governing Body may accept for appointment a person so nominated; but it is not obliged to do so. If it does not, then it must advertise the vacancy. We do not agree with Mr James that this process of nomination confers no advantage on an employee; it clearly confers *an* advantage, in that he or she will be considered for appointment *before* the position is advertised. We are told that the two vacancies for PE teacher roles at School 2 were eventually filled by external candidates, suggesting that the roles were advertised. There is nothing to indicate that the Respondent put forward a formal nomination of the Claimants pursuant to Regulation 12 beforehand. Whilst the possibility of nomination is not expressly considered by the Tribunal, the agreed facts do state that it was the TGB of School 2 that determined the staffing structure of the new school "*pursuant to powers under regulations 12 and 36 of [the 2006 Regulations]*".

74. In these circumstances, it cannot be said that it was perverse for the Tribunal to conclude that the Respondent's approach to alternative employment (of simply requiring the Claimants to apply for their own jobs) was unfair.

75. Ms Darwin also submitted that the Respondent's influence over the recruitment decisions of the Governing Body of School 2 extended beyond a simple Regulation 12 nomination. She reminded us that that the Governing Body would have included a number of local authority governors and submitted that they would have been in a position to exercise influence over the Governing Body's decision. We reject that submission. We cannot accept that such governors would be entitled to promote the interests or aims of the local authority over and above that of School 2 when acting in the capacity of a member of the Governing Body of that school.

76. For these reasons, we consider that the Tribunal did not err in law in its approach to the question of alternative employment.

Ground 8 – Polkey reduction

77. Mr James relies on two principal matters in support of the argument that the Tribunal erred in not making a 100% Polkey reduction. The first is that, as the agreed factual position was that exercising the statutory right of appeal would "*not have made any difference to the outcome*", the Tribunal was bound to make a Polkey deduction. However, the agreed facts related to the exercise of the Regulation 17 right of appeal against a determination by the Governing Body of School 1, not as against the decision of the Respondent absent such determination. The Claimants' claim that their dismissals were unfair was clearly advanced on the basis that the usual procedural safeguards, had they been in place, were likely to have affected the outcome. The second matter is that the only conclusion open to the Tribunal was that dismissal was inevitable following the closure of School 1, and that, therefore, a 100%

Polkey reduction was inevitable. We have already found above that the Tribunal did not err in concluding that dismissal was *not* inevitable. Accordingly, this argument falls away. In any event, as Ms Darwin submits, this ground of appeal is a perversity challenge. The Tribunal found that this case was "*an instance where the breach of a proper process was fundament (sic) and profound*". That was a conclusion that the Tribunal was entitled to reach and it cannot be said to have reached a perverse conclusion in deciding that this was a case where it was "*impossible to formulate the hypothetical question of what would be the percentage chance the employee had of still being dismissed even if a correct process had been followed*" (at paragraph 41).

Conclusion

78. For the reasons set out above, the appeal fails and is dismissed.