EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr Dennis McNulty		(1) The London Borough of Camden (2) The Governing Body of New End Primary School

Heard at: London Central

On: 16, 17 September 2020 and 7, 8, 9 December 2020

Before: Employment Judge Stout
Ms C Brayson
Ms C James

Representations
For the claimant: Mr Harris (counsel)
For the respondent: Ms Robertson (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claim for unfair dismissal is not well-founded and is dismissed.

REASONS

1. Mr McNulty (the Claimant) was employed by the London Borough of Camden (the First Respondent or "LA") to work at New End Primary School (the Governing Body of which is the Second Respondent and we will refer to it as "the School"). The Claimant commenced employment on or about 21 December 1987. Since October 1992 he has lived in the school house on site as the school's residential caretaker (although the job has had a number of different titles over the years). Since April 2015 the Claimant has been seconded full-time as Branch Secretary to the GMB Union. The Claimant was dismissed with effect from 31 August 2019, with pay in lieu of 12 weeks' notice. The Respondents maintain the reason for dismissal was redundancy/business reorganisation as it no longer required a residential caretaker. The Claimant disputes this, maintaining that the real reason for his dismissal was his trade union activities.

Preliminary matters

2. This has been a hybrid hearing under Rule 46 which has been consented to by the parties. The form of hearing was Partly Video (by Cloud Video Platform)/partly in person. The first two days were conducted with the Tribunal panel in person and the parties by CVP. The hearing was then adjourned because of connection difficulties and resumed in person, but with one panel member (Ms James) and one witness (Ms Ray) joining by CVP.

3. After the hearing had commenced and the parties had been introduced on CVP the Judge recollected that she had seen the Claimant previously and, on checking the name, realised that he had been a witness in a case she had heard in March 2020. On the hearing resuming at 2.30pm following reading, the Judge said: "Out of courtesy to all present, and in the spirit of transparency, I should say that after I saw the Claimant this morning I recognised his face and have checked my files and see that he was a witness in another case on which I presided in March 2020. That case has nothing to do with this one, I have told my members nothing about it, and I do not consider that our previous encounter could possibly give rise to any cause for concern, or any appearance of bias, but I felt it better to mention it at the outset lest it arise in the course of the hearing or afterwards. If either party wishes to say anything about this, then of course we will hear what you have to say."

4. The parties muted themselves to take instructions, after which Mr Harris indicated that Mr McNulty was not happy for Judge Stout to chair this hearing. Although he had not mentioned it before, he now recalled I found against the party for whom he was a witness and did not consider it appropriate. Ms Robertson indicated the Respondents had no objection.

5. The Tribunal then referred the parties to two cases: *Ansar v Lloyds TSB Bank Plc and ors* [2006] EWCA Civ 1462 and *Papajak v Intellego Group Ltd and*

ors (UKEAT/0124/12/JOJ) and adjourned the hearing for 20 minutes for them to consider those authorities before deciding whether or not to pursue a recusal application. On resuming the hearing, Mr Harris indicated that Mr McNulty withdrew his objection and was content for Judge Stout to preside over the hearing. Ms Robertson indicated that the Respondents likewise did not object.

The issues

6. The parties agreed that the issues to be determined by us at this stage are:

   (1) What was the reason, or if more than one, the principal reason, for dismissal?

      a. Was it, as R contends, redundancy? Or, some other substantial reason of a kind such as to justify the dismissal of an employee holding the position held by C?
      b. Or was the reason, or if more than one, the principal reason for dismissal that, as C contends,
         i. He was …. a member of an independent trade union, or
         ii. Had taken part, or proposed to take part in the activities of an independent union at an appropriate time?
      c. If the reason is redundancy, is S.139(1)(b)(i) ERA satisfied? Had the requirements of R's business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish?

   (2) If so, was the dismissal of C caused wholly or mainly by that state of affairs?

   (3) Alternatively, given the identification that a residential premises manager was no longer required, the educational and safeguarding needs of the children, the location of the school and schoolhouse in a conservation area with no room to expand, the continuing need to make savings, and C's refusal to accept the post of non-residential premises manager or pursue rehousing with R1, did that set of facts amount to SOSR of a kind such as to justify the dismissal of an employee holding the post of residential premises manager?

   (4) If dismissal was by reason of redundancy or SOSR, was it fair or unfair in all the circumstances within s 98(4) ERA 1996?
      a. Consultation
      b. Selection
      c. Search for alternative employment

The Evidence and Hearing

7. We heard evidence from the Claimant and from the following witnesses for the Respondents:

a. Ms Karyn Ray (Headteacher, New End School);
b. Mrs Helen Andrews (Governor, New End School);
c. Ms Hafsa Mohammad-Hameed (HR Business Advisor for the LA).

8. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

9. We explained our reasons for various case management decisions carefully as we went along.

The facts

10. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

11. The Claimant commenced employment with the Inner London Education Authority (ILEA) on 21 December 1987 as a casual part-time assistant at New End Primary School, and part-time cleaner, working a total of 37 hours per week.

12. In 1990 he took up the post of Residential School Keeper and moved in October 1992 into the New End School House. The Claimant had previously been a Council tenant. Between 1990 and October 1992 whilst a Council tenant and before moving into the School House, the Council paid his rent and he presented his household utility bills to the school for payment. There is a job description and terms and conditions of employment for the Schoolkeeper job in the bundle dating from 1992, which the Claimant accepts applied to him (pp 71-82). They provided that the School Keeper would be required to reside in the property provided for the better performance of his duties, and that utility bills would be paid by the school. The terms provided that on retirement the School Keeper would need to take on responsibility for utilities.

13. The Claimant accepted in oral evidence that, notwithstanding the various other changes to his terms and conditions of employment that occurred over subsequent years, and the changes in his job title, he had always occupied the School House for the better performance of his duties.

14. Once the Claimant had moved into the School House he lived there rent-free and the School paid his utility bills. The accommodation was not classed as a benefit-in-kind for tax purposes because he was required to reside there for

the better performance of his duties and accordingly he did not pay tax on that benefit as he would have done if it had been a 'perk' or 'benefit' or simply part of his remuneration for doing the job. The Claimant described how, given he was on site, he would often respond to things happening on the premises out of hours and at weekends and during holidays. Indeed, he does so now as people coming into the school by climbing over the fence (for example) are, he says, potentially a threat to his property.

15. In 1996 new terms and conditions of service were introduced. The Claimant did not agree to these, but signed a slip to indicate that, in order to mitigate his losses, he accepted the dismissal and re-engagement with continuity of employment entirely without prejudice to any other legal action he may wish to take in relation to his dismissal. He did not take any other legal action, however, and we find that whatever happened in 1996 made no material change to his terms and conditions of employment.

16. In January 1999 it is apparent from a letter dated 19 January that Camden had realised that in general the contractual position in respect of Service Tenancies was unsatisfactory because *"There is insufficient reference to the fact that their occupation of the accommodation provided is for the better performance of their duties."* However, this did not apply to the Claimant because his own agreement was clear in that respect.

17. On 1 November 2000 Camden's Personnel Manager wrote to the Claimant referring to a Service Tenancy Agreement said to have been sent in February 1999 which the Claimant had not signed and returned. This letter refers to *"previous agreements"* being *"clear that you occupied these premises for the better performance of your duties",* but added that Camden wished to make clear that he would be eligible for rehousing by Camden on his retirement and that this could be made clear in the Service Tenancy Agreement. The letter states that the Claimant's predecessor GMB Branch Secretary (Mr Sinclair-Pilch) would advise him to sign this revised Service Tenancy Agreement, and there was certainly no reason for him not to agree to this as it was in his interests to do so.

18. There is no copy of a Service Tenancy Agreement from that date in the bundle.

19. The Claimant has long been involved with his local Trade Union. With effect from 7 June 2004 the School released him from his duties for one day per week for paid time off to undertake trade union duties as the joint Convenor.

20. In November 2006 the Claimant's then position as Site Services Officer was regraded to Premises Manager, increasing his pay to SCP 31. The Claimant agreed to this.

21. From 9 May 2007 the Claimant's trade union duties increased and he was permitted two days' per week paid leave to undertake them. The Claimant accepted that the headteacher at that time was supportive of his trade union duties. Ms Karen Ray commenced as Headteacher at the School in 2007 and

the Claimant suggested in oral evidence that she was not so supportive of his trade union duties, although he gave no specific examples other than the matters that he relies on in these proceedings, which we consider below.

22. Ms Ray gave evidence that at the point she joined the School the Claimant's responsibilities included locking up the school premises in the evening, but from June 2008 responsibility for locking up moved to contractors. Ms Ray gave evidence, which we accept, that the School used the Caretaker (Level 3, Scale 6) job description at p 93 for monitoring purposes for the Claimant. The Claimant did not accept that this was his job description, however, or that he had ever seen it and we accept his evidence too. Nothing turns on this. We have considered the scope of the Claimant's role by reference to the facts the parties have given us as to what was and was not done by the Claimant rather than by reference to any particular document.

23. During 2010 the LA was implementing the national Single Status agreement intended to harmonise terms and conditions across the LA.

24. The Claimant was presented with new terms and conditions of employment by letter of 25 February 2010 and asked to agree to them under a COT3 agreement, for which the Claimant was to be paid £450 for signing. The new terms and conditions state that he was employed as a Site Services Officer at Grade Scale 6. The terms and conditions include that *"As a condition of your contract of employment you may be required to occupy premises at the School. In this case, you will be required to enter into a formal service tenancy with the Council. The service tenancy will exist as long as the council requires you to occupy the premises and in any event will automatically terminate if you move from your current role or if your contract of employment with the Council terminates for any reason, whatsoever including retirement."* The main changes for site officers at this time were that working hours would be harmonised at 35 hours per week so that they would work fewer hours for the same pay, and his job was assigned to a new pay grade. Neither change was detrimental to the Claimant.

25. The Claimant in evidence said that he refused to sign up to these new national terms and conditions for caretakers that the Respondent sought to introduce because there was no tenancy agreement attached. However, there is evidence in the bundle of the correspondence about a Service Tenancy Agreement in 2010. There is an undated letter in the bundle in which the Claimant sets out various objections to a new Service Tenancy Agreement, which was acknowledged by the School on 2 July 2010. The Agreement was discussed at a meeting of the School's Finance Committee on 13 July 2010 at which it appears that various amendments to the Service Tenancy Agreement sought by the Claimant were agreed by the Governors and that it is the revised version of the Service Tenancy Agreement that is then in our bundle (pp 87-90).

26. The Claimant, however, maintains that he has never had a Service Tenancy Agreement and was not privy to the minutes of the Governor's meeting. This is not, ultimately, material to our decision given that he accepts that his

residence in the School House was for the better performance of his duties and that it makes no difference whether or not there was a written agreement given the provisions of the Housing Act 1985, sch 1, paragraph 2, the effect of which is that service occupancies such as the Claimant's do not create secure tenancies, and agreements in relation to them do not have to be in writing.

27. In 2013 the Claimant was attacked and was out of work for a year while he recovered. Sickness absence procedures were commenced by Ms Ray in relation to the Claimant's absence, but not until some time past the School's normal trigger point for implementing such procedures.

28. In 2014 the Claimant was also suspended for a period while he was investigated by the police for a potential offence. He returned to work in July 2014.

29. During the period that the Claimant was absent the School arranged cover through an agency with temporary staff.

30. In December 2014 the Claimant was elected to a full-time union position as Branch Secretary of the GMB, but the School was not informed until later in 2015 and he actually started in post in April 2015.

31. In 2015 the School was facing a large budget deficit and the Governors went through all the School's expenses to see where cuts could be made. It was noted that there was about £200pcm going out to pay for the Claimant's utilities and questions were asked by the Governors as to whether the LA or TU should have been paying for this. Although this is a small sum relative to the whole school budget, it is not insignificant, and we accept Mrs Andrews' evidence that the School could not run with a deficit and Governors were reasonably looking at all expenditure lines with an eye to reducing expenditure where they could.

32. Following the Governing Body raising questions on 10 June 2015 the School Bursar enquired as to whether the school remained liable for the costs of the School House while the Claimant was undertaking his secondment to the trade union role. There was a long delay before any response and in February 2016 the School was informed that they would only be reimbursed for the Claimant's salary costs not utilities etc. That remained the position up until the Claimant's dismissal.

33. After the Claimant commenced full-time union duties, the School returned to employing agency staff. It did this, rather than appointing a permanent replacement, because Ms Ray understood that the Claimant could return to his role at any time and did not want the School to be liable for redundancy costs for the Claimant's replacement if he did. The agency workers were not residential. In terms of the work that the Claimant had done, there were some minor changes. There had since 2008 been no requirement for the Claimant to lock up the school as that responsibility had been given to the contracted cleaners. Responsibility for unlocking the school moved to the Head and

Deputy Head. The monitoring of the School's alarm systems was outsourced. The Claimant had been the first person on the list to be called by the alarm company if it went off out of school hours and we accept his evidence that remained the case for a short period after he became full-time union, but this then stopped and the School moved to an arrangement with the alarm company whereby they were also a keyholder for the premises and thus there is no requirement for any employee of the School to attend if the alarm is activated out of school hours.

The 2017 reorganisation

34. In 2017 the school identified a number of changes that it wished to make to its administration and premises structure. These included the replacement of its Bursar with a School Business Manager, who would take on responsibility for monitoring cleaning and kitchen staff (previously part of the Claimant's duties), and also that the School required additional space and wished to use the school house as the administration hub, and no longer had a requirement for a residential caretaker. Redundancy discussions commenced with the Claimant, as part of that wider restructure. It was made clear to the Claimant and his TU representative by Ms Ray in an email of 3 May 2017 that the School was happy for the Claimant to move into the non-residential role. However, the Claimant had argued that what was proposed was an eviction, not a genuine redundancy and that he was entitled to the house as a term of his contract with the LA so that it could only be removed by agreement. As a result the LA advised the School to leave the Claimant's role out of the 2017 reorganisation, and the School agreed. The school had also managed to make the necessary financial savings without making the Claimant's post redundant.

35. In December 2018 the Claimant was re-elected for a further four-year term as GMB Branch Secretary. The School was not informed about this and we accept that Ms Ray did not know about his re-election.

The 2019 consultation

36. In early 2019 the school recommenced the redundancy consultation for the Claimant's role. Miss Mohammed-Hameed prepared a consultation proposal for consideration by the Governors and on 12 February 2019 (p 195) the Claimant was notified that this process had commenced and that the proposal was to make the Residential Premises Manager into a Non-Residential Premises Manager (p 196). He was sent a consultation report (p 200a). This explained that the School considered there was a safeguarding risk both from the fact that the SchoolHouse has direct access to the school playground, and because of the school entry system, which was affected by the location of the schoolhouse. The document anticipated that the change would result in a saving of £3576 or thereabouts per year because the School would not have to meet the utility bills. It explained that the School also hoped to move the admin team out of the main school building into the house to

open up space within the school where the admin team sits. It also mentions the possibility of redeveloping the school entrance.

37. The Claimant was invited to a meeting on 4 March 2019 to discuss this. A formal letter followed on 2 February 2019 informing him that the consultation period would run from 7 March to 8 April 2019. A consultation proposal document was shared with the Claimant. In outline, this set out the school's plans to use the Caretaker's House as the new school entrance, save on the utility bills for the property and have only a non-residential caretaker going forward.

38. On 27 February 2019 the Claimant was suspended from duty pending investigation into allegations as follows:-

- In August 2018 you were involved in an incident and that you have subsequently been charged with the following:
  - Racially and religious aggravated fear and provocation of violence by words/writing;
  - A wound inflicted by grievous bodily harm without intent.
- You failed to inform either the Headteacher at New End Primary School or an officer at Camden of the incident and the fact that you had been interviewed by the Police in August 2018.

39. On 15 March 2019 the Respondent confirmed that it was commencing a disciplinary investigation into those matters. That matter was also the subject of a police investigation/criminal case which is still ongoing. The Claimant has already been through two trials, one was abandoned, and on the second he was acquitted, but he is still facing charges of causing GBH or inflicting GBH with intent. The Claimant maintains his innocence of those and hopes the CPS will drop the charges, but at the moment he is still due to face trial next year.

40. The Claimant attended a consultation meeting on 7 March 2019 with his GMB representative, Helen Purcell. This was chaired by Ms Ray. The Claimant made clear that he not believe the consultation was genuine as (among other things) he considered that the School would need planning permission to change the use of the school house and would have to pay utilities if the administration moved into it so that there would be no cost-saving.

41. By letter of 18 March 2019 the Claimant's TU representative objected to the proposals, contending that it was not a redundancy but a variation to the contract for which the Claimant should be compensated. The Claimant also criticised the Respondent's rationale for the redundancy and suggested that the school entrance could be located elsewhere, or further space freed up by doing things other than reclaiming the School House. Ms Ray responded to these points explaining why the Claimant's proposals would not work. She also provided evidence of the school having previously identified safeguarding concerns around the school entrance in a 2017 Safeguarding Report from the School to the LA. This particular extract does not actually deal with any risk posed by the location of the Claimant's house, or the occupants of it. We find that this is understandable because what the Safeguarding Report records are the steps that the School has taken to

mitigate the risk around the entrance set-up. At that point, the School also believed that everyone living in the house who needed to be DBS-checked had been. We find that this also provides a likely explanation for why Ofsted did not mention it in their report, but only discussed it off the record with Ms Ray. There is no reason for us to reject Ms Ray's evidence in this respect. It is not implausible. However, despite the lack of documentary support, we accept that the School's concerns about safeguarding were genuine and legitimate. As Mr Harris accepted in his submissions, it is difficult not to acknowledge that as a matter of fact having a house with direct access to a school playground in which individuals live who are not DBS checked (or to which non-DBS-checked visitors may come) is an obvious risk. The nature of that risk became even more apparent later in this process when it was realised that the Claimant actually had a partner and two adult children living in the house with him who had not been DBS-checked. It is understandable that the risk was not articulated in writing because the School was mitigating the risk, and it would have been difficult to articulate the risk in writing without stating in terms that the only way to remove the risk altogether was to evict the Claimant.

42. On 28 March 2019 there was a meeting between the Claimant, Helen and Hafsa Mohammad-Hameed (HR Business Advisor). At this meeting the Claimant suggested that he had lost the right to buy his former Council house as a result of having been moved to the schoolhouse. He indicated that he should have compensation for that. He said that he was being intimidated and bullied because of his TU role. As a result of the Claimant's concerns about housing Miss Mohammad-Hameed arranged for the Claimant to meet with the LA's Senior Housing Lawyer and extended the consultation deadline to 12 April to allow this meeting to take place.

43. On 8 April 2019 the Claimant met with Mark Reihill, Senior Housing Lawyer for the LA who said that he thought the Claimant's situation was *"not a housing issue, but a contractual one"*, and that the Council would not be able to assist until he was made homeless. In this hearing this has become an assertion by the Claimant that there was no assurance that he would get alternative accommodation and that he would have to be made homeless first, but he did not raise this with the Respondent in these terms at any point. What he did complain about at the appeal stage was that he had not had an offer of suitable alternative accommodation from the LA for him and his family. This was in the context of his argument that he was entitled to occupy the house separately to his job and that it was not for the School to evict him from his Council house.

44. On 29 May 2019 at 14:43 Miss Mohammad-Hameed wrote to Shaun Flook (Head of Housing Needs). The email follows on from a discussion they had had. In it, Miss Mohammad-Hameed sets out two scenarios relating to residential caretakers at schools in the area, one was at Netley Primary School (where the caretaker was to take ill-health retirement) and the other was the Claimant. Miss Mohammad-Hameed's email does not mention that the Claimant may be made redundant. It only says that the school is deleting the residential post and creating a non-residential post. It then says that the

Claimant has two adult sons living with him who will also need to be re-housed. She finished her email by asking for a link for them to make an application for housing.

45. Before she had had a reply to her email, Miss Mohammad-Hameed wrote to the Claimant and his TU rep at 16:12 stating that she has *"spoken with housing and they have said Dennis will be entitled to a direct offer"* (p 221). Miss Mohammad-Hameed therefore in this email gave the Claimant a very specific assurance that he would be re-housed if made redundant. It is thus not surprising that he did not in the course of the process thereafter assert that he was going to be made homeless.

46. On 11 June 2019 Miss Mohammad-Hameed chased Mr Flook for an update and he replied late that night (p 222). Regarding the Netley caretaker, he said that they could not proceed until the employee's employment was terminated and he was service notice of dismissal and that, presuming the dismissal was not disciplinary, *"he can apply and be entitled to direct offers as we discussed"*. Regarding the Claimant he wrote:

> Can you please confirm/remind me whether the caretaker is being made redundant or that the school want to make him non-residential. This situation not reflected in the allocations scheme, but it would seem reasonable to rehouse him. If it is confirmed that the sons have been living with him for a reasonable period of time and this is verified, we could offer the Premises Manager a one-bed and each of his sons **studio** properties.

47. Miss Mohammad-Hameed then responded (p 225) clarifying that there was an option of redundancy and saying that the Claimant's sons had lived with him for some time. Mr Flook then asked for the ages of the sons and confirmation of whether the Claimant was being offered the non-residential role and also whether he owns or has an interest in another property. Miss Mohammad-Hameed did not write again for a month until 16 July 2019 when she was able to make clear that the Claimant had chosen not to apply for non-residential role and was therefore being made redundant. By this time Miss Mohammad-Hameed was aware that the Claimant also had a partner living in the property with her child under 18. She asked as to what the next steps were for the Claimant to be rehoused.

48. The Claimant did not know about Mr Flook's email at the time, but in these proceedings he has argued that Mr Flook's email of 11 June is significant because: (a) it shows that Miss Mohammad-Hameed (and, later, Ms Ray) was lying to him about the availability of housing; (b) it shows that his situation was not regarded as falling within the Respondent's Allocations Policy; and (c) it backs up what he says about his meeting with Mark Reihill on 8 April 2019 that he was told he could not be assisted until he was made homeless.

49. However, we find:

    a. We find that Miss Mohammad-Hameed in her email to the Claimant of 29 May 2019 in which she assured him he was entitled to a direct offer of housing set out her genuine understanding of her

conversation with Mr Flook in that respect. That this was her understanding is reflected in her email to Mr Flook in which she has evidently understood that housing will be offered as she asks to be provided links for making applications that she can provide to the caretakers. She was not lying in her email to the Claimant, or seeking to manipulate the situation, or deliberately giving the Claimant wrong information. She had absolutely no reason to do so.

b. Insofar as Mr Flook's email at p 222 appears to say that the Claimant's situation was not in the Allocations Policy it is partly right and partly wrong. It is correct that the particular situation of conversion of a residential into a non-residential post is not expressly dealt with in the Allocations Policy. It also correct that what should happen to adult children living in the property is not in the Allocations Policy. It is not correct that the situation where a residential caretaker is made redundant is not in the Allocations Policy, because it is at paras 7.5.1-7.5.5. The policy provides that a residential caretaker who is made redundant may be offered alternative accommodation by the Council. We find that, given that Miss Mohammad-Hameed had missed the word redundancy out of her email to Mr Flook, Mr Flook was simply (and correctly) saying that the scenario as described in her email was not covered in the Allocations Policy.

c. We do not find these emails have any bearing on what was said by Mr Reihill to the Claimant on 8 April, which sounds to us like a simple statement of the point made in Mr Flook's emails to Miss Mohammad-Hameed about the Netley school position, i.e. that the Council's housing department will only swing into action once someone has actually been given notice and thus will be homeless if not provided with accommodation by the Council.

50. We have seen no evidence (in these emails or elsewhere) to suggest that if the Claimant was made redundant from the residential caretaker post (as in fact happened) he would not (or will not now, if not reinstated as a result of these proceedings) be offered suitable alternative accommodation by the Council as envisaged by the Allocations Policy. We do not consider that the use of the word *"may"* in this Policy bears the weight that Mr Harris seeks to put on it, but whether it does or not would be a matter for a Court on judicial review in the event that the Council did not offer the Claimant alternative housing and the Claimant sought to challenge that decision. It is not a matter for us.

51. Around this time the school queried with the LA whether, in the event that the Claimant moved out, the Council would seek to claim the house as general Council housing. An email from Mark Reihill dated 24 April 2019 indicates that it is highly unlikely that the Council would seek to claim the school house for additional Council housing provision, given the school's need for the building and the safeguarding risk.

52. The consultation period was extended again from 12 April to 3 May. There was a further meeting on 30 April 2019. At this the Claimant asked Miss Mohammad-Hameed for confirmation that the process they were following was correct and on 15 May Miss Mohammad-Hameed sent the Claimant an email from the legal department confirming this. In this email she made clear that the Claimant was offered the Non-Residential Premises Manager role of voluntary redundancy and asked again for him to confirm what he wished to do. The Claimant did not respond.

53. Miss Mohammad-Hameed put together a Post-Consultation Implementation Report which identifies the business drivers for the change as being the safeguarding risk arising from the location of the school house, the fact that there is no longer a need for out of hours work by the premises manager and that the school is currently meeting the premises costs for school house (totalling slightly over £3,576 per year). The report refers to the School having to make a total cost saving from their budget of £120,000 and not being able to afford building work at present. There is reference in this regard also to planning restrictions resulting from the School being in a conservation area. We have also heard in these proceedings that the School is a listed building. This report wrongly said that the Claimant had sought voluntary redundancy.

54. On 17 July 2019 the Claimant had still not responded regarding the non-residential role or voluntary redundancy and on Ms Ray served formal notice of redundancy, again offering voluntary redundancy as an option, or the role of Non Residential Premises Manager.

55. The non-residential premises manager role was (it is accepted by Ms Ray) almost identical to the Claimant's role save that it is non-residential and he is not required to open or lock up the school. In addition, there were other minor differences that had evolved as noted above, i.e. there was no requirement for monitoring or responding to the alarm system and responsibility for cleaners and kitchen staff had moved to the Business Manager.

56. Shortly after being given notice of dismissal the Claimant was contacted by the LA's redeployment team and also given information Miss Mohammad-Hameed about applying for housing.

57. In his appeal email of 26 July 2019 the Claimant made clear that he had not requested voluntary redundancy. He argued, contrary to the position he has taken in these proceedings, that the house was nothing to do with his performance of his duties, but was a Council house in which he was entitled to remain and not be evicted by the School.

58. On 6 August 2019, Ms Ray emailed the governors asking for volunteers available on the appropriate dates to hear the appeal. The governors had not seen all the restructuring proposals from 2017, but they had been aware of discussions. Ms Ray considered that governors should sit on the appeal because that is the normal procedure and the LA did not advise that the governors should not sit on the appeal. Neither the Claimant or his TU representative objected to the composition of the panel at the time. The

appeal hearing minutes indicated (p 250) that the Claimant's union representative asked about prior involvement of the governing body in the decision-making process, but was clearly satisfied with the answer and did not object to the appeal hearing going ahead or complain afterwards about the composition of the panel either in his subsequent letters, his claim in these proceedings or his witness statement.

59. On 22 August 2019 the Claimant was reissued with notice (the letter previously having been incorrectly dated 24 June rather than 17 July) with the Claimant being paid 12 weeks in lieu of notice (£6857.15) and £16,571.47 redundancy. His last day of employment was stated to be 31 August 2019.

60. A letter from Warren Kenny GMB Regional Secretary of 5 September 2019 stated:

> This letter is to certify that Mr Dennis McNulty, who was an employee of the London Borough of Camden and/or the Governing Body of New End Primary School until his dismissal on 31 August 2019, was a member, and Branch Secretary, of the GMB Trade Union on the date of the dismissal and there appears to be reasonable grounds for supposing that the reason for his dismissal was that alleged in his ET1 and Grounds of Complaint accompanying this certificate.

61. The Claimant's appeal hearing took place on 11 September 2019. It was chaired by Mrs Andrews. She had been involved throughout but considered that she could approach the matter objectively. She was concerned about the Claimant saying that it was a contract variation process that should have been followed rather than redundancy, so Mrs Andrews asked the Headteacher for legal advice and the headteacher checked and confirmed (backed up by an email from legal) that the correct process was being followed.

62. The appeal was not upheld and this was confirmed by writing by letter dated 20 September 2019 (pp 255-257). He was given a further 14 days to consider whether to take up the non-residential position.

63. On 25 September 2019 the Claimant sought further information on the non-residential role so that he could make an informed decision and the documents and information were supplied shortly thereafter by letter of 27 September 2019.

64. On 5 October 2019 the Claimant turned down the offer of non-residential position.

65. The Claimant and his two grown-up children currently still live in New End School House. Between 2017 and 2019 his partner also lived there too.

66. The Claimant commenced these proceedings 6 September 2019. He made an application for interim relief, but that application was dismissed by Employment Judge E Burns on 30 October 2019.

Conclusions

The law

67. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is normally for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), eg conduct, redundancy, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

68. In this case, however, the burden lies first on the Claimant since he contends that the reason or principal reason for his dismissal was that he had taken part in the activities of an independent trade union at an appropriate time and that his dismissal was therefore automatically unfair under s 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992). Although there are no statutory provisions dealing with burden of proof in such cases, we assume that (as in whistle-blowing cases), we see no reason why the same principles should not apply, so that the Claimant must raise a *prima facie* case that the sole or principal reason for his dismissal was his trade union activities. If he does, then it is for the Respondents to prove that trade union activities were not the sole or principal reason for the dismissal: for the position in whistle-blowing cases see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81. As such, there is a shifting burden of proof that is similar to that which applies in discrimination claims under s 136 of the Equality Act 2010 (EA 2010). Unlike in discrimination claims, though, if the employer fails to show a satisfactory reason for the treatment, we do not consider the Tribunal is bound to uphold the claim. As with whistle-blowing claims, if the employer fails to establish a satisfactory reason for the treatment then the Tribunal may, but is not required to, draw an adverse inference that the was the reason for the treatment: see *International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16/DA at paras 115-116 and *Dahou* ibid at para 40.

69. There is another important distinction between this case and a discrimination case, which is that we are not to apply the discrimination approach to the reason for the treatment. The Claimant's dismissal is not automatically unfair if his trade union activities played some small part in the Respondents' reasons for dismissing him. It must be established that those activities were the sole or principal reason for his dismissal.

70. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss, or alternatively what motivates them to do so: *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at para 60. In certain limited circumstances, identified in that case, it is permissible to look beyond the mind of the individual decision-maker in order to identify the reasons for dismissal that should in law be attributed to the corporate 'mind' of the employer. *Jhuti* was

a whistle-blowing case, but there is no reason why the principle should not apply equally to a case under s 152 TULRCA 1992 such as this.

71. The ratio of *Jhuti* is that where an individual in the hierarchy above the employee dishonestly presents facts to the decision-maker so that the ostensible reason for the decision-maker's action is an 'invention', the tribunal may take the dishonest employee's reason for acting as the reason for dismissal: ibid, at para 60. The Supreme Court in *Jhuti* at paras 51-53 further approved (*obiter*) the (also *obiter*) view expressed by Underhill LJ in *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704 that *"the motivation of [a] manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation"*. The EAT in *Uddin v London Borough of Ealing* [2020] IRLR 332 (Auerbach J) accepted this latter principle (at para 78) and held that it applies equally to the question of the fairness of the dismissal under s 98(4). In that case, Auerbach J accordingly held that the knowledge of the investigating officer should be attributed to the employer and taken into account in determining whether dismissal was fair.

72. Mr Harris suggested that the *Jhuti* principle might be relevant to the actions of Miss Mohammad-Hameed with regard to the information she provided to the Claimant and the School regarding the availability of housing for the Claimant. We have therefore considered this but found the factual basis of it not to be made out for the reasons set out above.

73. If the Claimant fails in his primary argument, then we have to consider, first, whether the Respondent has proved that the definition of 'redundancy' in s 139(1)(b)(i) ERA 1996 is satisfied, i.e. whether the requirements of the School *"for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish"* and whether the dismissal is *"wholly or mainly attributable"* to that state of affairs. The House of Lords in *Murray and ors v Foyle Meats Ltd* [2000] 1 AC 51 made clear that these are questions of fact for us as a Tribunal. That case concerned employees employed by a slaughter house as "meat plant operatives". The employer selected for redundancy those who generally worked in the slaughter hall, because they were reducing the number of 'killing lines' from two to one. They did not select from those who worked elsewhere, such as the boning hall or the loading bay (even though all employees could be, and were occasionally, required to work anywhere in the factory). This raised the question of whether 'the contract test' or 'the function test' applied. The House of Lords decided 'neither'. Lord Irvine observed that the language of the statute *"is in my view simplicity itself"* and was to be applied without gloss. He nonetheless went on to say a little more because of *"the earlier cases which may have encouraged a belief that the statute had a different meaning"*. Lord Clyde added the further point that care must be taken since the statute does not refer to *"employees of a particular kind"* or to *"work specified in their contracts of employment"* but to *"the requirements of the business for employees to carry out <u>work</u> of a particular kind"* (emphasis added).

74. The Claimant relies on the case of *Amos v Max-Arc Ltd* [1973] IRLR 285, a decision of the Northern Ireland equivalent of what is now the EAT. In that case court held that *"work of a particular kind"* means *"work which is distinguished from other work of the same general kind by requiring special aptitudes, skills or knowledge"*. However, we do not consider that, post *Murray v Foyle Meats* we should apply that particular gloss to the words of the statute. This is particularly so given that what was said in that case about what *"particular kind"* meant was evidently coloured by the particular question before the court, which was whether sheet metal work in stainless steel was a different kind of work to other sheet metal work. In that context, it is plain that the relevant distinguishing features (if any) are to be found in a consideration of the aptitudes, skills or knowledge required for the work. That may also provide an appropriate means for distinguishing different kinds of work in many other contexts, but it would be wrong for us to regard the *Amos* decision as limiting the meaning of the statute because the House of Lords in *Murray* held that we must apply the words of the statute itself and that earlier cases that may have suggested otherwise were wrong.

75. The Respondent has referred to *Shawkat v Nottingham City Hospital NHS Trust (no 2)* [2001] IRLR 555 and *Murphy v Epson College* [1985] IRLR 271, both of which turned on the findings of fact by the Tribunal at first instance. In *Shawkat* the Tribunal had concluded that Dr Shawkat (a thoracic surgeon) had been unfairly dismissed when he refused, following a reorganisation, to carry out cardiac as well as thoracic surgery. The Tribunal found, however, that he was not redundant as the Trust required two surgeons to carry out thoracic surgery before the reorganisation and two surgeons after, it was just that after the reorganisation they were required to carry out some additional duties. In *Murphy*, in contrast, a school that dismissed one of its plumbers because it required someone to carry out both plumbing and heating engineer work was held by the Tribunal to have made the plumber redundant because the replacement employee was to carry out work of a different kind (plumbing and heating). In each case these were findings of fact by the Tribunal, upheld on appeal. They are helpful examples, but provide little in the way of principled guidance.

76. In deciding what the requirements of the business are for the purposes of s 139, the parties are agreed that Tribunals are not to investigate the commercial and economic reasons behind an employer's actions: *James W Cook and Co (Wivenhoe) Ltd v Tipper* [1990] ICR 716. However, in this case, we accept that investigation of the reasons is relevant to the first issue we have to decide, which is what was the sole or principal reason for the dismissal.

77. If we are not satisfied that the Claimant was dismissed for redundancy, then we must consider whether he was dismissed for some other substantial reason. On this, we have been referred to *Catamaran Cruisers Ltd v Williams* [1994] IRLR 386, EAT, *Hollister v National Farmers' Union* [1979] IRLR 238 and *Banerjee v City and East London Area Health Authority* [1979] IRLR 147. What we take from those cases is that we must be satisfied that there is a 'good business reason' for the dismissal. The employer must adduce

evidence to demonstrate this as *Banerjee* illustrates: it is not enough for the employer to introduce, on a whim, a new policy (for example, in that case, a new policy of amalgamating part-time posts into full-time posts). The employer must show that there are clear advantages to the business from the reorganisation. However, we must not substitute our view for that of the employer: we apply an objective test of whether the employer has, on reasonable grounds, a good business reason for the dismissal. See Lord Denning MR in *Hollister* at 551, approving the dictum of Arnold J at first instance in that case.

78. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all 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 (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at para 48. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. Unfairness at the appeal stage is always relevant and may render a dismissal unfair even if dismissal was fair in all other respects, but not necessarily: it is a matter for assessment by the Tribunal on the facts of each case: *Mirab v Mentor Graphics (UK) Limited* (UKEAT/0172/17) at para 54 *per* HHJ Eady QC.

<u>The issues</u>

The reason for dismissal

79. The Claimant argued, with reference to paragraph 19 of Ms Ray's statement, that Ms Ray had accepted that the reason for recommencing the redundancy consultation at this point was because he had been seconded to a full-time position working as a representative with the GMB Union. This is also a fact which is recounted at the beginning of the consultation proposal that Miss Mohammad-Hameed (of the LA) prepared for consideration by governors at this point and in other consultation documents. However, we do not consider that what Ms Ray said in her statement, or what is said in the consultation

documents, shows that the School proposed changing the residential role into a non-residential one because the Claimant was seconded to the Union. That was entirely incidental. The point was that the Claimant had not been working in the school since April 2015 (and was previously off work between 2013 and July 2014). Whatever the reasons for his absence, it had by 2017 and even more so by 2019 become very clear as a result of his absence that the School did not need a residential caretaker role. That was the material factor in the School's (and Ms Ray's) reasons for acting, not that he was a TU member or undertaking TU activities. That the School held no malice toward the Claimant for his TU activities is further underscored by the facts that they were very slow to take action regarding his sickness absence in 2013/14, had not appointed a permanent replacement in case he returned to his role and that they offered him, many times without caveat of any sort, the non-residential role.

Was it redundancy?

80. We find that the residential premises manager role was a different kind of work to that of non-residential premises manager. In this regard, we accept that there was little change in the specific tasks required to be done within each role, but we nonetheless consider that being residential or non-residential fundamentally changes the character of the job.

81. As the Claimant told us in evidence, being on site means that, to an extent, there is a need or expectation for the premises manager to respond to situations arising out of school hours. This may not have been a contractual requirement, but *Murray* tells us that the contract is not the test. We have to look at the reality. The reality is that a caretaker in residence will respond out of hours to intruders on the premises or if there are any other emergencies obvious from the schoolhouse, such as a fire or water leak. The residential role also formally included some out-of-hours requirements in terms of responding to the alarm system.

82. If one asks whether someone looking for a job would consider a residential role to be the same kind of work as a non-residential role, we consider the answer is clear: they would not. The character and nature of a residential role is quite different to that of a non-residential post. If we turned the point on its head and ask what if the School had simply given the Claimant notice of eviction, as he effectively contends they should rather than 'dressing it up' as a redundancy, we consider his response would have been that the residence was fundamental to the role. As he accepted, he at all times occupied the house for the better performance of his duties.

83. We are therefore satisfied that the change from residential to non-residential, taken together with the minor (but significant) changes in duties (in particular out of hours duties) means that this was a different kind of work for the purposes of s 139 of the ERA 1996.

84. Further, the Respondent's requirements for a residential caretaker had diminished because they now required none rather than one.

85. The reasons for the change in requirements were because of finances, space and safeguarding.

86. Although we acknowledge the force of the Claimant's point that the School would not be saving very much money by removing the residential role, and may not have saved any at all if it had gone ahead with potentially expensive plans for converting the School House or even just using it (which would have entailed utility costs), we accept that the School's concern about the financial saving was genuine. In the face of a significant budget deficit, it is reasonable (indeed, is to be expected) that the Governors should seek to ensure that no public money was spent unnecessarily, and their view (also reasonable) was that there was no need for a residential caretaker and therefore no need to spend any money on that role.

87. Further, we accept that the School had a genuine need for additional space and that the School House could reasonably have been regarded by the School as a potential source of space.

88. Yet further, we accept that the safeguarding concerns were genuine for the reasons we have set out in our findings of fact above, notwithstanding the lack of contemporaneous documentation of the same.

89. These are all sound business reasons for wanting to remove the residential role and require the Claimant to leave the property. They were genuinely the reasons for the Respondents decision to delete the residential role and they were based on objectively reasonable grounds.

90. There was therefore a redundancy situation, which was genuinely the Respondent's reason for wanting to remove the residential role, and the Claimant's dismissal was mainly attributable to that.

Some other substantial reason

91. Even if we are wrong about s 139, we are satisfied that the Respondents had 'some other substantial reason' for dismissing the Claimant. The reasons for wanting to change the role were sound business reasons which were in our judgment objectively reasonable for the reasons we have set out.

Fairness in all the circumstances

92. We find the dismissal was fair in all the circumstances. There was an extensive consultation process with the Claimant, running over four or five months, during which he had ample opportunity, which he took, to make his points and criticise the Respondent's proposals. The Claimant was fairly selected because he was the only person in the role and he was freely offered the non-residential role, multiple times, even after he had been dismissed, but he refused it.

93. As to the fairness of the constitution of the appeal panel, we are satisfied that there was nothing about the constitution of the appeal panel that rendered the dismissal unfair. This was a point raised for the first time at this hearing, there was no objection raised by the Claimant or his union representative at the time, or in his ET1 or in his witness statement. As noted above, although the point was raised by the Claimant's TU representative in the appeal hearing, he was clearly satisfied with the answer and did not object to the appeal hearing going ahead or raise the point again until it was picked up by Mr Harris in these proceedings.

94. The fact that the point was not raised previously does not of course necessarily mean that it is not a good one. It is of course important that an appeal panel should be in a position to approach an employee's appeal with an open mind. This does not require them to have an empty mind. Nor does it require them to have the independence that is required of a court or tribunal. In some cases, it may be necessary for an organisation to appoint someone completely independent to hear an appeal, but in most cases it is possible for an appeal in relation to redundancy or reorganisation to be fairly heard by people who are part of the organisation itself. The fact that they may have been privy to discussions about the business need for redundancies or reorganisations does not mean that they are not able to stand back and judge whether the process has been fairly followed or whether the employee's arguments about the genuineness of the redundancy situation have merit.

95. In this case, we are sastisfied that the governors' prior involvement was not such as to make it inappropriate for them to hear the appeal. Their prior involvement was high-level. Further, we are satisfied that Mrs Andrews at least had given consideration to whether she could approach the matter objectively and had reasonably concluded that she could. We further find as a matter of fact that Mrs Andrews (leading her fellow governors on the panel) approached her role conscientiously and gave proper consideration to the arguments raised by the Claimant, particularly about the procedure that was being followed. There was no appearance of bias here.

96. We further find that appropriate consideration was given to the Claimant's housing situation. The position was explored by Miss Mohammed-Hameed and she gave reassurances to the Claimant (which she genuinely believed to be true) and provided the Claimant with information about how to apply for housing. In any event, whether or not the Claimant would in the end be entitled to an alternative Council house, and whether or not it would be like-for-like, is not actually material to the fairness of the dismissal. Many people occupying tied accommodation for the purposes of their employment have no entitlement to be rehoused on dismissal from their employment. In the Claimant's case, the evidence before those involved in the dismissal process was that, in line with the 2018 Allocations Policy, the LA would provide the Claimant (unless he had other property or personal resources) at least with alternative accommodation (although there was some doubt about the position of his adult sons). That was all that the Respondents in their capacity of employer could be expected to do. Any further dispute about housing is a

matter between the Claimant and the LA *qua* local housing authority and is a public law issue, not a matter for us.

Overall conclusion

97. We therefore conclude that in all the circumstances the Claimant was fairly dismissed and that the sole or principal reason for his dismissal was that he was redundant.

98. The claim is therefore dismissed.

_____

Employment Judge Stout

Date : 09/12/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

10/12/2020.

FOR THE TRIBUNAL OFFICE