THE FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 62/18FET
722/17IT

CLAIMANT: **Gavin Bell**

RESPONDENT: **Department for Communities**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims of unauthorised deductions of wages and unlawful discrimination on the ground of political opinion are dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Orr**

Members: **Ms C Stewart**
Mr B Heaney

APPEARANCES:

The claimant appeared in person and represented himself.

The respondent was represented by Ms T Maguire, Barrister-at-Law, instructed by the Departmental Solicitor's Office.

BACKGROUND

1. The claimant is employed by the respondent as an Administrative Officer and is currently based in the Belfast Benefits Centre. He transferred to this department in November 2015. Prior to this he had been in Employment Support Allowance, (ESA) located at Castle Court, Belfast.

2. The claimant was elected to serve as a Sinn Féin Councillor in Mid-Ulster District Council in May 2014 and re-elected in May 2019. The respondent has a Special Leave policy, the terms of which permit 'Special Leave' both paid and unpaid, to enable employees to carry out public duties.

3. The claimant presented a claim to the tribunal on 31 January 2017 claiming unauthorised deduction of wages in relation to an alleged failure to be paid for 'Special Leave' to enable him to carry out his public duties as an elected Councillor.

4. At a Pre-Hearing Review which was heard on 20 April 2018 and 18 May 2018, the claimant was permitted to amend his claim to include a claim of unlawful discrimination on the ground of political opinion pursuant to the Fair Employment and Treatment (Northern Ireland) Order 1998 in relation to the alleged failure to be paid for 'Special Leave'.

5. The respondent denies the claimant's claims on the basis that there is no contractual entitlement for employees to be paid under the Special Leave Policy in circumstances where they are in receipt of a payment for the performance of their public duties from the relevant public body – in the claimant's case Mid-Ulster District Council. The respondent disputes that the claimant's political opinion played any part in its decision not to grant the claimant paid Special Leave and relies entirely on the provisions of its Special Leave Policy as the reason for its decision.

ISSUES

6. The issues to be determined by the tribunal are as follows:

   (1) Did the claimant suffer an unauthorised deduction of wages?

   (2) Was the decision not to grant the claimant paid Special Leave less favourable treatment on the ground of political opinion?

SOURCES OF EVIDENCE

7. The tribunal received written statements and heard oral evidence from the claimant on his own behalf.

8. The tribunal received written witness statements and heard oral evidence on behalf of the respondent from Ms Sharon Green (Staff Officer) and Ms Anne Hanna (Assistant Director).

9. The tribunal also had regard to the agreed bundle in making its determination of the issues.

THE LAW

Unauthorised Deduction of Wages

10. Article 45(1) of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") provides as follows:

   "An employer shall not make a deduction from wages of a worker employed by him unless –

   (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

   (b) the worker has previously signified in writing his agreement or consent to the making of the deduction".

11. Article 45 (2) defines "relevant provision", in relation to a worker's contract as meaning a provision of the contract comprised:-

> *"(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
>
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion."*

12. Article 45(3) of the 1996 Order provides as follows:

> *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".*

13. Article 59 of the 1996 Order provides that "wages", in relation to a worker, means:

> *"... any sums payable to the worker in connection with his employment, including - (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise ..."*,

subject to certain statutory exceptions which do not apply to the facts of this case.

<u>*Time-limits*</u>

14. Article 55(2) of the 1996 Order provides that;

> *"An Industrial Tribunal shall not consider a complaint under this Article unless it is presented before the end of the period of three months beginning with –*
>
> *(a) in the case of the complaint relating to a deduction made by the employer, the date of payment of the wages from which the deduction was made".*

15. Article 55(3) provides:

> *"Where a complaint is brought in respect of –*
>
> *(a) a series of deductions or payments, or*
>
> *(b) a number of payments falling within paragraph (1)(d) and made in pursuance of demands for payment subject to the same limit under Article 53(1) but received by the employer on different dates,*

The references in paragraph 2 to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."

16. Article 55(4) provides that a tribunal may consider a complaint if it is presented -

> *"within such further period as it considers reasonable in a case where it is satisfied that it was* not reasonably practicable *(tribunal emphasis) for the complaint to be lodged before the end of the period of three months*".

17. In relation to an application for an extension of time under the '*not reasonably practicable test*' the onus of proof is on the claimant to establish that it had not been reasonably practicable or '*reasonably feasible*' for the complaint to have been presented before the end of the three month period or before the end of such further period as the tribunal considers reasonable.

18. The Employment Appeal Tribunal in ***Bodha v Hampshire Area Health Authority [1982] ICR 200*** confirmed that the '*reasonably practicable*' test for an extension of time did not permit an employee to plead that it had not been '*reasonable*' for him to present his claim for unfair dismissal before an internal appeal procedure had been completed. It concluded that the correct test was a strict test of practicability, namely where the act of presenting the complaint in time was reasonably capable of being done. It held:-

> *"The statutory words still require the industrial tribunal to have regard to what* could *be done albeit approaching what is practicable in a common sense way. The statutory test is not satisfied just because it was reasonable not to do what could be done."*

Political Discrimination

19. Article 3 of the Fair Employment and Treatment Order (Northern Ireland) Order 1998, Article 3(2)(a) provides, so far as relevant to these proceedings:-

> *"(2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of this Order if –*
>
> *(a) On either of those grounds he treats that other person less favourably than he treats or would treat other persons.*
>
> *…*
>
> *(3) A comparison of the cases of persons with different religious belief or political opinion under paragraph (2) or (2A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."*

20. There are two elements in a direct discrimination claim, firstly, the less favourable treatment and secondly, the reason for that treatment as per ***Glasgow City Council v Zafar 1998 IRLR 36.*** In the case of ***Shamoon v Chief Constable of the RUC 2003 UKHL 11*** at paras 7 & 8 - Lord Nicholls said that

"*sometimes the less favourable treatment issue cannot be resolved without, at the same time deciding the reason why issue".*

Further, in his judgment in the case of ***Nagarajan v London Regional Transport 1999 IRLR 572*** he observed that 'the reason why' is the crucial question.

<u>*Burden of proof*</u>

21. Regulation 38(a) of the Fair Employment and Treatment (Northern Ireland) Order 1998 (as amended) provides:-

    "… (2) Where, on the hearing of the complaint under Article 38, the complainant proves facts from which the Tribunal could, apart from this article, conclude in the absence of an adequate explanation that the respondent –

    (a) has committed an act of unlawful discrimination or unlawful harassment against the complainant, or

    (b) is by virtue of Articles 35 and 36 to be treated as having committed such an act of discrimination or harassment against the complainant, the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed that act."

22. The burden is on the claimant to prove facts from which the tribunal could conclude that an act of discrimination on the ground of political opinion occurred and if he does so then the burden shifts to the respondent to show that any adverse treatment was in no sense influenced by the claimant's political opinion.

23. The proper approach for a tribunal to take when assessing whether discrimination has occurred and in applying the provisions relating to the shifting of the burden of proof in relation to discrimination has been discussed numerous times in case law. The Northern Ireland Court of Appeal re-visited the issue in the case of ***Nelson v Newry & Mourne District Council [2009] NICA -3 April 2009***. The court held as follows:-

    "22 This provision and its English analogue have been considered in a number of authorities. The difficulties which Tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in ***Igen v Wong [2005] 3 ALL ER 812*** *considered the equivalent English provision and pointed to the need for a Tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the Tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in* ***Barton v Investec Henderson Crosthwaite***

***Securities Ltd [2003] IRLR 333**. It stated that in considering what inferences and conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In **McDonagh v Royal Hotel Dungannon [2007] NICA 3** the Court of Appeal in Northern Ireland commended adherence to the **Igen** guidance.*

*23 In the post-**Igen** decision in **Madarassy v Nomura International PLC [2007] IRLR 247** the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the **Igen** approach, the **Madarassy** decision is in fact an important gloss on **Igen**. The court stated:-*

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; 'could conclude' in Section 63A(2) must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the Tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.'*

That decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the

wording of the Directive which refers to facts from which discrimination can be 'presumed'.

24 This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. In ***Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8****, Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."*

24. In ***S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279***, the Court of Appeal in England considered the shifting burden of proof in a discrimination case. It referred to ***Madarassy*** and the statement in that decision that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. At Paragraph 19, Lord Justice Sedley stated:-

"We agree with both counsel that the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be forwarded by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."

25. In ***Laing v Manchester City Council [2006] IRLR 748***, the EAT stated at Paragraphs 71 - 76:-

"(71) There still seems to be much confusion created by the decision in ***Igen v Wong****. What must be borne in mind by a Tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race.*

...

(73) No doubt in most cases it would be sensible for a Tribunal to formally analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in ***Network Road Infrastructure v Griffiths-Henry****, it may be legitimate to infer he may have been discriminated against on grounds of race if he is equally qualified for a post which is given to a white person and*

there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single answer and Tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.

...

(75) The focus of the Tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a real question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he believed or he did and it has nothing to do with race'.

*(76) Whilst, as we have emphasised, it will usually be desirable for a Tribunal to go through the two stages suggested in **Igen**, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage."*

RELEVANT FINDINGS OF FACT

26. The tribunal found the following findings of fact based on the written, oral and documentary evidence before it. This judgment does not record all the competing evidence but only the tribunal's findings of fact which were necessary for the determination of the legal issues.

The Respondent's Special Leave Policy

27. The respondent has a Special Leave policy in relation to voluntary service which permits Special Leave for public duties. The relevant extract provides as follows:-

"15.2 Line managers have discretion on the appropriate amount of paid leave to award and suggested limits are set out in Annex 3. Where a member of staff is a member of more than one body, line managers may allow an aggregate of the leave that applies to each. Special leave without pay may also be granted although the combination of leave with and without pay should, normally, not be more than 36 days in a leave year.

15.2 Special leave without pay for attendance at meetings of the bodies listed in Annex 3 may be counted as reckonable service for pension purposes.

… …

15.4 If payment other than for reimbursement of expenses, is offered by any of the bodies listed in Annex 3, staff should choose to either accept the

payment and apply for special leave without pay to enable them to carry out the required duties or decline the payment and apply for special leave with pay.

15.5 Payment in this circumstance covers any payment made by the body whether as a daily attendance fee, a retainer or any other form of compensation".

…

28. It is common case that Annex 3 of the policy provides for a suggested upper limit of Special Leave with pay for an elected member of a District Council of 18 days.

The alleged unauthorised deduction of wages

29. The claimant had, prior to his transfer to the Belfast Benefits Centre been located within ESA Appeals at Castle Court and during that time had received paid Special Leave when carrying out his duties as a Councillor. In November 2015 the claimant moved to the Belfast Benefits Centre. He was refused Special Leave with pay on the following dates:-

    30 November 2015
    8 January 2016
    1 February 2016
    9 February 2016
    1 March 2016
    14 March 2016

30. It is common case that the claimant made further applications for time off to carry out his civic duties as a Councillor from March 2016 ongoing but did so under the unpaid Special Leave provisions.

31. By email dated 27 May 2016 the claimant submitted a 'Uniform Appeal' as follows:-

    "I was denied Paid Special Leave in respect of a total of 6 working days. The application for Paid Special Leave was in (sic) to enable me to carry out my duties as a District Councillor, which I believe falls within the parameters of the NICS Special Leave Policy, for Paid Special Leave – Voluntary, Public and Civic Duties. Furthermore, whilst working in ESA Appeals Team in Castle Court, my previous applications for Paid Special Leave for my Civic Duties were authorised. Following a number of Freedom of Information Requests (Reply received 13 May 2016), to the various NICS Departments, including my parent Department, DSD, I am aware of other members of staff who have been authorised Paid Special Leave to help them carry out their Civic Duties".

32. A Uniform Appeal Meeting took place on 20 July 2016 and was conducted by Ms Sharon Green, as Appeal Officer. The claimant attended and was accompanied by his Trade Union representative, Mr Mark Gibson.

33. Ms Green's minutes of the Uniform Appeal Meeting record as follows:-

"Gavin pointed out the allowance was used for various different duties he carried out in his role of Councillor, and it was impossible to quantify what specifically this covered. Mark pointed out this was not a Payment for work done on a given day as a salary would be, it was an allowance which is accepted to cover out-of-pocket expenses and is definitely not intended to cover loss of earnings.

I pointed out that a paragraph in the letter did refer to the option of renouncing the allowance, however we discussed that it was not clear how this would work in practice …

…

I asked Gavin whilst he was applying for special leave to his previous Line Manager in ESA Appeals, Castle Court, whether he made them aware he was receiving an allowance payment. He referred me to Special Leave Policy Annex 3, paragraphs 15.1 to 15.5 and, when I asked the question again, he replied that no one had asked him, but that it was public knowledge that Councillors received allowances. That may be the case but I confirmed I personally had not been aware of this fact so perhaps his previous Line Manager was unaware also.

…

I refer to the HR Guidance Special Leave and Remuneration which states that staff should choose to either accept the payment and apply for Special Leave Without Pay, or decline the payment and apply for Special Leave with Pay.

…

Mark then explained that the allowance was primarily to facilitate Gavin in carrying out his duties as a Councillor, to recognise the time spent on this role and it was not just to attend meetings, but to prepare for meetings and do associated work such as writing letters, responding to emails, dealing with public bodies. While working full-time during the day for NICS he does a lot of these duties outside working hours, however when contacting public bodies etc, he can only do so during working hours. When this type of work builds up, Gavin needs to take time off to deal with it. Gavin feels he is entitled to have this allowance disregarded.

In his opinion, the whole decision seems to be based around the amount of allowance Gavin is paid, and he does not feel this is 'remuneration'. Remuneration is a specific payment for specific salaried hours and this is treated differently, which is why the Special Leave guidance allows Elected Members of District Councils to have up to 18 days' special leave with pay'.

34. The tribunal was presented with an email dated 10 December 2015 from the claimant's Line Manager to the claimant which specifically asked:-

"Can you clarify if any payments are made for your duties as a Councillor?"

35. The claimant responded to this email the same day stating:-

> *"Absolutely not, there is no financial gain. This is purely for the benefit of the wider public. It states clearly in the policy and guidance that there is 18 days' paid leave entitlement for – it is also in statute law …"*

36. The outcome of the Uniform Appeal was issued on 11 August 2016. There is no dispute that the claimant's appeal was not upheld. It concluded as follows:-

> *"I have noted that when applying for Paid Special Leave in BBC (Belfast Benefits Centre), you did not disclose that you were receiving an allowance or any payments were being made to yourself from the council until you were specifically asked about it. Initially when asked on 10 December 2015 if any payments were made for your duties as a councillor, your response was 'absolutely not, there is no financial gain. This is purely for the benefit of the wider public'. You did not at this point disclose any further details. The existence of a potential allowance being paid to you was raised by your Line Manager and to date, despite requests, you personally have not provided full disclosure of the amounts you are paid.*
>
> *As a result, on 22 March 2016, the decision-maker based his decision on the knowledge that substantial payments were being made to you which he felt exceeded solely the reimbursement of expenses. The evidence of payments made to Councillors was published on the Mid-Ulster Council website and showed a reimbursement of expenses payments of £585.00 in 2014/2015 made to yourself, with an added Allowance payment of £8,251.00.*
>
> *…*
>
> *The details of your role, basic allowance and special responsibility allowance was later provided and confirmed by the Director of Finance for Mid-Ulster council in his letter to Anne Hanna dated 25 March 2016. The letter also confirms "Local Government Finance Act 2011. Allowances for councillors". 31(1) Regulations may provide for the payment by councils or such allowances or other payments as may be prescribed to councillors for, or in relation to anything done in connection with, services councillors. This does refer specifically to the allowance as being for reimbursement of expenses, but is paid in relation to anything done in connection with the service as a Councillor".*

37. As referred to in paragraph 27 above, the claimant had made a number of Freedom of Information requests, requesting a list of all those Northern Ireland Civil Servants within the Department for Communities and its predecessor, the Department of Social Development who had been granted 'Paid Special Leave' to carry out duties as a Councillor and/or any other duties of a specific nature. There was no dispute that at the Uniform Appeal meeting, the claimant agreed that the information he received under the Freedom of Information request illustrated that the majority of civic duties performed by the numerous NICS employees related to roles which would not attract a payment of any nature from the relevant public body. Accordingly these individuals are clearly not in the same position as the claimant as he did receive payments from Mid-Ulster District Council.

38. Mid-Ulster Council by letter dated 25 March 2018 to the respondent, confirmed that the basic allowance paid to the claimant was not officially classed as remuneration, it clarified that:

> *"To recognise the time commitment of all Councillors and the incidental expenses incurred, each Council must make provision in its scheme of allowances for a basic allowance, payable at the same rate to all of its councillors".*
>
> …
>
> *"There is no doubt that the basic allowance, in particular, is intended to recognise a time commitment of councillors. However, it is clear that the allowance is intended to also cover various costs which are neither expressly defined nor quantified. Members are entitled to incur such costs as they deem necessary in the performance of their duties as councillor. It is inevitable, therefore that some will incur significantly higher costs than others. However all Members will receive the same amount of basic allowance regardless of the amount of expenditure on such costs".*

39. The trial bundle contained a copy of *"a Guidance on Councillors' Allowances*" – dated March 2012 which set out the following:

> *"5.2 A Basic Allowance is intended to recognise the time commitment of all Councillors, including such inevitable calls on their time as meetings with officers and constituents, including approved duties. …*
>
> *5.3 The Basic Allowance is also intended to cover incidental costs incurred by Councillors in their official capacity, such as the use of their homes and the cost of any telephone calls, including mobile telephone calls."*
>
> *"Approved Duty" is defined in the Local Government (Payments to Councillors) Regulations (Northern Ireland) 2012 –*
>
> *(a) attendance at a meeting of:*
>
> - *the council;*
> - *a committee or sub-committee of the council;*
> - *a joint committee of which the council is a member, or any sub-committee of a joint member;*
> - *a group committee established under the provisions of the Local Government Order …*
>
> *or*
>
> *(b) the doing of anything approved by a council or, as the case may be, by a joint committee, or anything of a class so*

approved, for the purpose of, or in connection with, the discharge of the functions of the council, or any of its committees or sub-committees, or as the case may be, of the joint committee of any of its sub-committees."

40. The respondent's witnesses were consistent in their evidence that the respondent throughout applied its Special Leave policy. The respondent's clear position was that the previous line manager in ESA was unaware of the fact that the claimant received a basic allowance from Mid-Ulster Council. On the claimant's own evidence, he informed his previous line manager that he received only expenses. The tribunal is satisfied that the payment of Special Leave when the claimant was in ESA was granted on the understanding that the claimant was not in receipt of any payment or allowance other than expenses from Mid-Ulster Council.

41. The claimant accepted in cross-examination that the basic allowance he receives from Mid-Ulster Council as a Councillor includes incidental expenses, for example use of his home and telephone and also includes his time spent at meetings and other time carrying out councillor duties. He accepted that mileage expenses are paid separate to this basic allowance.

Political Discrimination

42. In his claim of political opinion discrimination, the claimant initially identified three comparators, Councillor Nigel Kells (DUP), Councillor Ian Byrnes (UUP) and Councillor Sean McAteer (SDLP). At hearing the claimant only relied on Mr Nigel Kells as a comparator for the purposes of his discrimination claim.

43. The tribunal was provided with a spreadsheet of each occasion when Special Leave was paid to the claimant and Mr Kells for the period January 2014-August 2019. It contained the same information for Mr Ian Byrnes and Mr Sean McAteer. From this document it is clear that all four councillors received pay for Special Leave up to November 2015 but from that date onwards none of them received paid Special Leave except Mr Kells. There is no dispute that the last occasion that the claimant received paid Special Leave was on 9 November 2015. Mr Nigel Kells was paid Special Leave on eight occasions after this date namely four occasions in December 2015 and four occasions in January 2016. There was no evidence before the tribunal of the particular circumstances under which Mr Kells received payment for these dates, nor was there evidence on whether Mr Kells received or declined a payment from the relevant public body. Accordingly, the tribunal determines, based on the evidence presented to it, that Mr Kells is not an appropriate comparator because there was no evidence that he was in materially the same circumstances as the claimant.

44. Nowhere in the claimant's Uniform Appeal document or at any time during the appeal meeting did either the claimant or his Trade Union representative raise any complaint of discrimination or discriminatory treatment on any grounds whatsoever.

The contentions of the parties

45. The claimant contends he is entitled to be paid under the terms of the respondent's Special Leave policy for the following reasons:-

(1) He was paid for Special Leave when working in ESA from 2014 until 2016 and there is therefore a precedent for making such payments.

(2) There is ambiguity in the wording of the respondent's Special Leave Policy specifically in paragraphs 15.4 and 15.5. The basic allowance paid by the Council includes expenses and time commitments and there is no way of quantifying either within the basic allowance; therefore the basic allowance relates to expenses only, which are specifically excluded under the policy at 15.4.

(3) That the basic allowance cannot be quantified in terms of the time commitment and expenses rendering it impossible for him to *"decline"* the allowance under paragraph 15.4 for specific days of Special Leave.

(4) Clauses 15.4 and 15.5 in the Special Leave policy are contradictory as per (2) above.

(5) That the entire Department of Communities and/or its HR Department discriminated against him because he was a Sinn Fein Councillor as opposed to being a Councillor for any other political party.

46. The respondent contends that the wording in its Special Leave Policy is clear and unambiguous – if any payment in the carrying out of public duties (other than for reimbursement of expenses) is offered, staff should chose to either accept the payment (in this case the basic allowance) and apply for Special Leave without pay to enable them to carry out the required public duties or decline the payment (the basic allowance) and apply for Special Leave with pay.

47. The respondent's position is that the claimant cannot receive pay from the respondent for days spent carrying out public duties in addition to receiving the basic allowance from Mid-Ulster; the basic allowance from the Council is a payment under paragraph 15.5 of the Special Leave policy.

CONCLUSION

Unauthorised Deduction of Wages

48. At the commencement of the hearing, the claimant confirmed that his claim of unauthorised deduction of wages related to only six days, as set out at paragraph 29 above. The claimant's claim form was lodged in the tribunal on 31 January 2017. Accordingly this claim has clearly been presented outside the statutory time limit as the last deduction in the series claimed by the claimant is 14 March 2016. The claimant adduced no evidence and made no submissions in relation to whether it was not reasonably practicable for him to bring his claim within the three month statutory time limit or within such further period. Accordingly the tribunal unanimously determines that it has no jurisdiction to hear the claimant's claim of unauthorised deduction of wages. Nonetheless, had the tribunal jurisdiction it unanimously determined that the claimant has not suffered an unauthorised deduction of wages for the reasons set out below.

49. The tribunal is satisfied, contrary to the claimant's argument, that the terms of the Special Leave Policy and in particular, the circumstances in which paragraph 15.4

apply, are clear and unambiguous. The tribunal finds, without hesitation, that the basic allowance received by the claimant from Mid-Ulster Council was, recognition, both of his time commitment in the carrying out of his public duties as a Councillor and included an element of incidental expenses. The tribunal accepts that the basic allowance is not remuneration in the sense of an hourly rate for work carried out and is patently not intended to be, nonetheless the tribunal accepts that it amounts to a payment as defined in paragraph 15.5 of the respondent's Special Leave policy:-

> *"any payment made by the body whether as a daily fee, a retainer or any other form of compensation"*.

50. Accordingly the claimant has no contractual entitlement to paid Special Leave in circumstances where he receives and has not declined a payment from Mid-Ulster District Council.

51. The claimant's argument that the payment of the basic allowance cannot be quantified in terms of the time commitment and expenses rendering it impossible for him to *"decline"* the payment is rejected by the tribunal. This may be a practical issue for the Council however this does not, in any way, alter the contractual terms of the respondent's Special Leave policy. This is a matter between the claimant and the Council.

52. The tribunal does not accept the claimant's interpretation of paragraphs 15.4 and 15.5. As per the findings of fact, the tribunal determines that the payment of the basic allowance includes both incidental expenses and the time commitment of Councillors in carrying out their duties. For the avoidance of doubt the tribunal is satisfied from the evidence presented that the basic allowance does not, contrary to the claimant's contention, relate only to expenses.

53. Furthermore the tribunal does not accept that there was any precedent established by the making of payments for paid Special Leave during the claimant's time with Employment Support Allowance (ESA). As per the findings of fact, the claimant had not made his previous line manager aware that he received a basic allowance and therefore any payment was made on the understanding that the claimant was not in receipt of a payment under 15.5 of the respondent's Special Lave Policy.

Political Discrimination

54. As per the tribunal's findings of fact set out above, the respondent's decision not to make a payment for Special Leave was based entirely on the application of its Special Leave policy. There was no evidence before the tribunal of any less favourable treatment of the claimant and the claimant candidly accepted in submissions that he had no evidence of discrimination on the ground of political opinion. The tribunal finds there is no prima facie case of discrimination, the claimant has not proved facts, in the absence of which, the tribunal could conclude that an act of political discrimination has occurred. The burden of proof has not been discharged. Even if the burden of proof had been discharged the tribunal finds that the reason for the treatment was the application of the respondent's Special Leave Policy. There was no evidence before the tribunal nor was it suggested by the claimant that the policy itself was discriminatory or anyway tainted by discrimination.

55. Accordingly the claimant's claims are dismissed in their entirety.

Employment Judge:

Date and place of hearing: 11-12 February 2020, Belfast.

This judgment was entered in the register and issued to the parties on: