THE INDUSTRIAL TRIBUNALS

CASE REF: 195/14

CLAIMANT: **AB**

RESPONDENTS: **1. DC**
2. XY
3. ZW

DECISION

The unanimous decision of the tribunal is that the claimant was unfairly dismissed by the first respondent and that his employment transferred to the second/third respondents. The tribunal will reconvene as agreed on 31 July and 1 August 2014 to consider remedy.

Constitution of Tribunal:

Vice President: **Mr Noel Kelly**

Members: **Mr James Law**
Mr John Boyd

Appearances:

The claimant was represented by Mr Neil Philips, Barrister-at-Law, instructed by Worthingtons Solicitors.

The first named respondent was represented by Dr Barr.

The second and third named respondents were represented by Mr Martin Wolfe, Barrister-at-Law, instructed by the in-house solicitors.

Background

1. The claimant was a teacher. He had been employed by a Voluntary Grammar School (VGS) since 1 March 2004. He was suspended on 22 August 2011 following allegations of misconduct.

2. Those allegations led to a criminal prosecution. The claimant was acquitted on 18 January 2013. He had at that point been suspended on full pay from employment for some 16 months.

3. The first named respondent was the Board of Governors of the relevant school. It dismissed the claimant on 30 August 2013 with effect from 2 December 2013. On that latter date he had been suspended on full pay from employment for some two years and three months.

4. That dismissal was confirmed by the first named respondent on 19 September 2013 following representations by the claimant and by the staffing sub-committee of the Board of Governors.

5. The claimant appealed to the Independent Appeals Committee of the Labour Relations Agency in accordance with Departmental guidance numbered TNC 2007/5.

6. The Labour Relations Agency upheld that appeal on 5 December 2013.

7. On 12 December 2013, the first named respondent refused to accept or to implement that decision.

8. The VGS became a controlled school on 1 April 2014.

9. The name of the school remained the same through this process although its legal status obviously changed from a VGS to a controlled school. The name of the Board of Governors remained the same, although it was now the Board of Governors of a school with a changed legal status. It was reconstituted at that point.

10. The second and third named respondents, i.e. the relevant Education & Library Board and the controlled school's new Board of Governors since 1 April 2014, did not accept that the claimant transferred to the new controlled school and therefore did not accept that he became an employee of the second or third named respondent.

11. Almost three years after his original suspension from employment, and some seven months after his successful appeal to the Labour Relations Agency, the claimant claims unfair dismissal contrary to the Employment Rights (Northern Ireland) Order 1996.

Issues

12. This case threw up a number of factual and legal issues which require determination. Those include:-

    (i) Had the claimant been procedurally or substantively fairly or unfairly dismissed for the purposes of the Employment Rights (Northern Ireland) Order 1996 (the 1996 Order)?

    (ii) Had the claimant been automatically unfairly dismissed because of a failure to comply with the statutory dismissal procedure contrary to the Employment (NI) Order 2003 (the 2003 Order)?

(iii) Who had been the claimant's employer at the time of the initial dismissal and at the time of the appeal decision of the Labour Relations Agency?

(iv) Had the transfer of the school to the ELB on 1 April 2014, been a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the TUPE Regulations)?

(v) Had the claimant been automatically unfairly dismissed because the sole or principal reason for the dismissal had been a TUPE transfer?

(vi) What was the claimant's employment status immediately before 1 April 2014, the date of the transfer to controlled status?

(vii) If the claimant's employment had been in existence immediately before 1 April 2014 did his employment transfer on that date and, if so, to whom?

(viii) If the claimant's employment had been in existence immediately before 1 April 2014 but did not transfer from the first named respondent, did any relevant civil liability transfer under the TUPE Regulations?

(ix) If the claimant had been unfairly dismissed, and if his employment had not transferred to either the second or third respondents, was the claimant in those circumstances left without a remedy because of a transfer? How should the Acquired Rights Directive and the TUPE Regulations be interpreted and applied in such circumstances?

(x) What was the legal effect of the decision of the LRA appeal on 5 December 2013? Was the claimant's employment reinstated at that point? Did the first named respondent have the power in the circumstances of this case to refuse to comply with the LRA decision?

(xi) If the claimant had been unfairly dismissed and if his employment did transfer to either the second or the third respondents, what is the appropriate remedy? The claimant seeks a reinstatement order under the 1996 Order.

(xii) If the claimant had been unfairly dismissed and if his employment had not transferred to either the second or the third named respondents, what was the appropriate remedy? Where would the liability fall for any such remedy?

Procedure

13. Nothing about this case, either factually or procedurally, has been straightforward. This decision has already referred to the transfer of the relevant school to controlled status with effect from 1 April 2014. That transfer to controlled status had been planned and had been pending for some time. It was so pending at all relevant dates in this case.

14. The claim was originally lodged on 23 January 2014, as it had to be, against only the first named respondent which was the Board of Governors of the relevant VGS. No other respondent was in existence at that point in time. No transfer to controlled status had yet taken place. The first named respondent lodged a response on 28 February 2014. The first named respondent was at that time represented by a firm of solicitors. The first named respondent believed that it was a limited company incorporated under companies legislation in or about 1952. This belief was incorrect. That limited company was due to be dissolved.

15. As indicated above, the status of the school changed on 1 April 2014 and the second named respondent was added to the claim shortly thereafter. The second named respondent was, as indicated above, the relevant Education & Library Board. A response was filed on behalf of that second named respondent on 6 May 2014.

16. The second named respondent is the employer of staff, including teaching staff, in controlled schools within its geographical area. The response filed in this tribunal on behalf of the Education & Library Board did not, as would have been expected and which has happened in at least one other case, refer the claimant and the tribunal to the particular provisions of the Education (Modification of Statutory Provisions in relation to Employment) Order 1991 which provide that relevant tribunal proceedings should be brought against the Board of Governors of the relevant school although it does provide that the Education & Library Board can be added as an additional respondent on application. The claimant's representatives and indeed the tribunal could not reasonably have been expected to have been aware of this relatively obscure statutory provision which would be known in this context to only a relatively small number of educational officials.

17. The 1991 Order was raised by Mr Wolfe on behalf the second named respondent on the first day of the hearing. Following discussion, it appeared to the tribunal that the tribunal claim as originally drafted referred to the Board of Governors of the named school. The title of that Board of Governors remained unchanged after 1 April 2014. Although it was clear that the legal status of the school had changed, it was therefore at least arguable that the claim as originally drafted already covered the newly constituted Board of Governors in 2014. The words "as constituted from time to time" would have to be necessarily implied after "the Board of Governors for X school". Any Board of Governors would be reconstituted from time to time. There would, in any event, have been regular reconstitutions every four years and reconstitutions every time somebody died or resigned or failed to turn up to sufficient meetings. The membership of any Board of Governors would therefore be constantly changing and would be a moving target. The appropriate corporate body would however remain. It seems therefore somewhat pedantic to insist that a clear reference to the Board of Governors for a named school does not cover a situation where the school doesn't change its name, doesn't move its premises, doesn't change its pupils, doesn't change its staff and simply changes a technical legal status for the purposes of the Education Orders.

18. The tribunal pointed out to the parties that there already had been a substantial series of delays in this matter which had been outstanding in one form or another since 2011. The tribunal did not want to create further delays, particularly in circumstances where it had been made plain in the Case Management Discussions

that it was in the interests of the claimant in particular, but in reality in the interests of all concerned, to reach a determination on this matter before the start of the new school term in September 2014. The late reference to this rather obscure statutory provision put all of this in jeopardy and raised the possibility of a substantial postponement and in all probability, raised the possibility of a costs application. Mr Wolfe helpfully agreed to seek instructions from the newly reconstituted Board of Governors overnight. The next day, Mr Wolfe advised that the newly reconstituted Board of Governors had agreed, for the avoidance of doubt, to be added by consent. The tribunal therefore, for the purposes of the Restricted Reporting Order, refers to the new Board of Governors, to the extent that it is necessary to separate it, as an identified respondent, from the first named respondent, as "ZW". Mr Wolfe confirmed that ZW was represented by him instructed by the ELB solicitors. This would have been the situation in any event, had this technical issue been raised earlier.

19. The tribunal therefore directed that it would deal in this hearing with liability and transfer only. This was a matter in which the third named respondent i.e. the newly constituted reincarnation of the Board of Governors would have no evidential input. The fairness of the dismissal was a matter for the first-named respondent. The transfer to controlled status and the potential transfer of staff under the TUPE Regulations concerned the first and second-named respondents. Mr Wolfe properly made it plain that he would object at any point if the interests of the third named respondent were adversely affected. No such objection was raised at any point. The tribunal at this hearing i.e. the present hearing stated that it would address solely whether the claimant had been unfairly dismissed for the purposes of the 1996 Order and if so, whether his employment had transferred to either the second or to the third respondents.

Pre Hearing Review

20. There was a Pre Hearing Review (PHR) on the preceding Friday to determine the correct legal title of the claimant's employer at the date of the initial dismissal and at the date of the LRA appeal. The first named respondent believed that it was a limited company incorporated under companies legislation in or around 1952. The claimant did not accept that position. The limited company was in the process of dissolution. Clearly, if the limited company were the correct respondent, that would have serious implications for the progress of this case. Leave of the Bankruptcy Master would have had to be sought on the following Monday (the first day of the present hearing) before any tribunal case could commence.

21. An oral decision was given at the end of that PHR. That oral decision was along the following lines:-

> *"1. This is a situation where it is clear that the school was incorporated as a company limited by guarantee in or around 1952. It is equally clear that the memorandum of association was amended in 1984 to provide that the governors of the school appointed in accordance with the education legislation in 1972 and 1984 would act as directors of the limited company. No further amendment was made to the memorandum of association or to the articles to incorporate either the 1986 or the 1989 changes in educational law. However, I am prepared to accept that the Governors qua directors of the limited*

company were appointed in accordance with those Orders from time to time.

2. *There is no evidence that the Board of Governors, rather than the school, was ever incorporated for the purposes of the Companies Acts, or in any educational endowment, Royal Charter, or in any other legislative instrument other than the 1996 Education Order.*

3. *In Article 40 of the 1996 Education Order, provision was made for the incorporation of Boards of Governors for the purposes of their role under the Education Orders. Article 40 incorporated those Boards of Governors except, and only except, where those Boards of Governors had already been incorporated. As indicated above, no such earlier incorporation of the particular Board of Governors of this school had taken place on the evidence before me. Therefore the clear interpretation of Article 40 is that, from that point on i.e. from 1996, the Board of Governors acted as an incorporated body but not as an incorporated body for the purposes of the Companies Acts. It was a statutory incorporation in the same way as the incorporation of Health Trusts or Education & Library Boards or indeed Government Departments.*

4. *It is therefore clear that from 1996, the members of the Board of Governors wore two hats:-*

   (i) as effectively directors for the purposes of a company limited by guarantee under the Companies Acts;

   (ii) as part of an incorporated body under the 1996 Education Order and for the purposes of Section 19 of the Interpretation Act (Northern Ireland) 1954.

5. *I accept fully that the Board of Governors and indeed individual governors were not particularly aware of this dual role. They simply acted in good faith in their public service duties.*

6. *This lack of full appreciation was not restricted to the individual governors. It seems to have affected everyone; including everyone involved in the PHR today and those in the Department and in the Education & Library Board.*

7. *It is clear that the claimant had been employed by the Board of Governors (however it was acting and however it was titled) – see TNC 2007/5, TNC 2014/6 and TNC 2009/5.*

8. *The Scheme of Management produced by the school in accordance with the 1989 Order correctly notes the incorporated status of the school and goes on to refer to the appointment of governors under the Education Orders. Incorrectly, or rather incompletely, it does not refer to the separate incorporation of the Board of Governors, rather than of the school, under the 1996 Education Order.*

It however makes it plain that it, as the Board of Governors, employs teachers – see paragraph 12.5 at page 54 of the bundle.

9. *It is correct to say that the Article 17 Agreement to deal with the transfer of the school and of the staff refers to staff employed by the school. However that is an incorrect statement. The staff, (including the teachers) were clearly employed by the Board of Governors which had been separately incorporated (whether the individual members realised it or not) by Article 40 of the 1996 Education Order.*

10. *Therefore the claim is correctly constituted as it reads currently. The respondents are correctly named and correctly titled. The matter will proceed to a hearing on Monday."*

Rules 49, 50 and 16 of the Industrial Tribunal Rules of Procedure

22. On 28 March 2014, the tribunal issued a Restricted Reporting Order (RRO) under Rule 50 in respect of the name of the claimant, the name of the respondents and the name of any pupil involved in any way with the circumstances leading up to the claimant's dismissal.

The tribunal concluded that such an Order was appropriate in the circumstances of this case and that it represented an appropriate balance between Article 6 and Article 8 rights. The identification of any of the above names could unnecessarily and harmfully identify vulnerable young people. The RRO would not interfere with the freedom of the media to any meaningful extent.

23. On the same day, the tribunal made an Order under Rule 49 designating this as a case involving an allegation of a sexual offence. This Order required the removal of certain identifying references from the Register.

24. On 23 June 2014, the claimant applied for an Order under Rule 16 for a private hearing. That application was refused. The tribunal concluded that the circumstances of the case did not fit neatly within any of the limited statutory exceptions to the general rule requiring a public hearing. The existing RRO and the Rule 49 Order represented an appropriate balance between, on the one hand, protection of privacy and the protection of potentially vulnerable persons and, on the other hand, the provision of a public hearing and the legitimate interests of the media. Private hearings are clearly provided for in the tribunal rules but are very much the exception. Such a private hearing was not required in the circumstances of this case.

Relevant Law

Unfair dismissal

25. The proper approach for an Employment Tribunal to take when considering the fairness of a misconduct dismissal is well settled and was recently considered by the Court of Appeal in ***Rogan –v- South Eastern Health & Social Care Trust [2009] NICA 47***.

26. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides:-

"130-(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal and

(b) that is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) a reason falls within this paragraph if it –

(b) relates to the conduct of the employee,

(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

27. The Court of Appeal in ***Rogan*** approved the earlier decision of Court in ***Dobbin –v- Citybus Ltd [2008] NICA 42*** where the Court held:-

*"(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores –v- Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd –v- Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley –v- Post Office** and **HSBC Bank PLc (formerly Midland Bank) –v- Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury –v- Hitt [2003] ICR 111**.*

*(50) In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-*

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to

adopt in answering the question posed by [equivalent GB legislation] is as follows:-

> *(1) the starting point should always be the words of [equivalent GB legislation] themselves;*
>
> *(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another;*
>
> *(5) the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."*

(51) To that may be added the remarks of Arnold J in ***British Home Stores*** *where in the context of a misconduct case he stated:-*

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to*

examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

28. In ***Bowater –v- North West London Hospitals NHS Trust [2011] EWCA Civ 63***, the Court of Appeal considered a decision of the Employment Appeal Tribunal which had set aside a decision of an employment tribunal. The employment tribunal had determined that a remark made by a nurse in an Accident & Emergency Department was not a sufficient basis for a fair dismissal. Lord Justice Longmore stated at Paragraph 18 of the decision that:-

> *"I agree with Stanley Burnton LJ that dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The EAT decided that the ET had substituted its own judgment for that of the judgment to which the employer had come. But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."*

He continued at Paragraph 19:-

> *"It is important that, in cases of this kind, the EAT pays proper respect to the decision of the ET. It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt, sometimes, difficult and borderline decisions in relation to the fairness of dismissal."*

29. In ***Fuller –v- London Borough at Brent [2011] EWCA Civ 267***, the Court of Appeal again considered a decision of the Employment Appeal Tribunal which had set aside the decision of an employment tribunal on the basis that the employment tribunal had substituted its view for the decision of an objective reasonable employer. Lord Justice Mummery stated at Paragraph 7 of the decision that:-

> *"In brief the council's case on appeal is that the ET erred in law. It did not apply to the circumstances existing at the time of Mrs Fuller's dismissal the objective standard encapsulated in the concept of the 'range or band of reasonable responses'. That favourite form of words is not statutory or mandatory. Its appearance in most ET judgments in unfair dismissal is a reassurance of objectivity."*

At Paragraph 38 of the decision, he continued:-

"On a proper self-direction of law I accept that a reasonable ET could properly conclude that the council's dismissal was outside the band or range of reasonable responses and that it was unfair. If, as I hold, the ET applied the objective test, it did not err in law and there was no ground on which the EAT was entitled to set it aside or to dismiss Mrs Fuller's claim."

30. In ***Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721***, the Court of Appeal again considered a decision of an Employment Appeal Tribunal which set aside the decision of an employment tribunal on the ground that that Tribunal had substituted their judgment of what was a fair dismissal for that of a reasonable employer. At Paragraph 13 of the judgment, Lord Justice Elias stated:-

*"Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In **A –v- B [2003] IRLR 405**, the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite"*

*"In **A –v- B** the EAT said this:- Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course even in the most serious cases it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiry should focus no less on any potential evidence that may exculpate or least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."*

Hearing

31. The parties had been directed to exchange witness statements which were to take the place of oral evidence in chief. The intention was that each such witness would move immediately, once they had sworn or affirmed to tell the truth and had adopted their statement, to cross-examination and re-examination.

32. In the event, the legal representatives for the first named respondent came off record. On 12th June 2014, the tribunal directed that witnesses on behalf of the first named respondent could give their evidence in chief orally.

33. The tribunal heard evidence under the witness statement procedure from the claimant and from his trade union representative, Mr Alastair Donaghy. Under the same procedure, it heard from Dr Barr, the school principal, and from Mrs L McGowan, the Human Resources officer of the second-named respondent (the relevant ELB). Dr Barr gave oral evidence in chief separately on behalf of the first respondent, together with Mrs J Kerry who had latterly been the Chair of the Board of Governors in the period leading up to the transfer to controlled status on 1 April 2014.

34. The evidence in chief, cross-examination and re-examination of each witness was heard over three days; Monday to Wednesday, 23 to 25 June 2014. The tribunal heard submissions on Friday 27 June 2014. Those submissions were received in writing and were briefly supplemented orally. The written submissions are attached to this decision.

On consideration of these written submissions and on our initial consideration of the evidence the tribunal concluded it was a possibility, in the sense that it could not be definitely ruled out or in at that stage, that the tribunal might conclude that:-

(i) the claimant had been unfairly dismissed;

(ii) the claimant had been reinstated by the LRA appeal;

(iii) the claimant had been unfairly dismissed for the second time by the first respondent when it failed to accept the LRA appeal;

(iv) the tribunal might in such circumstances rule that employment had not transferred to either the second or third respondents;

(v) a remedies hearing might be held;

(vi) a reinstatement order could be made against the first respondent.

In such a scenario, an unfairly dismissed employee would be left without the primary remedy of re-employment and indeed without any remedy because the first named respondent as a body incorporated under the 1996 Education Order ceased to exist in that form on 1 April 2014. A wronged employee could therefore be deprived of any remedy by what was arguably a relevant transfer for the purposes of the Acquired Rights Directive and the TUPE Regulations. That was potentially a separate issue to the issue whether or not the sole or principal reason for the initial dismissal or for the affirmation of the dismissal was the transfer. This was rather whether an individual could be deprived of a <u>remedy</u> because of a relevant transfer. Given the second and possibly the third respondent's status as a public authority and the need to interpret the ARD teleologically, the tribunal required further arguments. The parties were given until 10.00am on 8 July to provide further written submissions on this or any other point. They were directed to exchange such submissions. They are also attached.

The tribunal panel met on 8 and 9 July 2014 to consider the evidence, the submissions and to reach this decision.

35. The parties agreed the dates of 31 July and 1 August 2014 for any remedies hearing, should one be required after the tribunal had had time to consider the evidence and the submissions and had time to reach a decision on the liability issue and the transfer issue.

<u>Relevant Findings of Fact</u>

36. Dr Barr, the school principal, stated that on or about 19 or 20 August 2011, pupil 1 and her mother made a complaint to the PSNI against the claimant. They also reported another matter allegedly concerning pupil 2. However, Dr Barr's

contemporaneous note of a conversation with the Education & Library Board stated that the complaint had been made by the mother of pupil 1 and not initially by both together. The tribunal concludes that this contemporaneous note was accurate and that the initial complaint concerning pupil 1 and pupil 2 was brought to the PSNI by the mother of pupil 1..

37. On 22 August 2011, the Education & Library Board Child Protection Officer (CPO) telephoned Dr Barr to say that the PSNI had contacted her to report allegations against a teacher. Dr Barr was advised by the CPO to follow the child protection policy of the Department entitled "Pastoral Care in Schools" published in 1996. Dr Barr made the handwritten note of this telephone conversation referred to in the preceding paragraph. This was clearly a potentially serious matter for any school and for any school principal. The tribunal therefore concludes that any handwritten note would have been careful and accurate and that it would not have been approached casually. That handwritten note records the allegation as reported by the CPO as:-

> "13 May 2011. Teacher and pupil were in a photocopy room – he leaves and comes back and she says how much will this cost? He puts his arms around her and tries to kiss her. She pushes him away."

38. Later that same day, 22 August 2011, the CPO of the ELB met Dr Barr, a PSNI inspector and the then chair of the Board of Governors, Dr Proudfoot. The claimant was suspended by letter while the PSNI investigated an allegation on behalf of pupil 1 of a sexual assault in May 2011.

39. Dr Barr again made a contemporaneous handwritten note of the allegation which was the subject of that meeting. The note stated:-

> "13/5/11 – Print artwork in tech – [the claimant] told her to go with (pupil 3) – away one hour – blinds closed in room – asked him price per sheet – no price just a smile and a hug – grabbed her around the waist and tried to kiss her – texted (pupil 3). Told (pupil 2) and she said that a similar thing happened the previous year."

40. From 22 August 2011 to 18 January 2013 (the date of the claimant's acquittal on the criminal charge), Dr Barr stated that the PSNI investigated the matter and that the school stood back and did nothing. It would appear that no investigation took place by the school during this period. However it would also appear that Dr Barr, in discussions with the PSNI on 19 September 2011 and 20 September 2011 raised the possibility of a parallel investigation by the school.

41. The claimant was prosecuted in the criminal courts on one charge of sexual assault. That related to the allegation concerning pupil 1. He was acquitted by the District Judge, Judge Copeland. No written decision is available. However, the Belfast Telegraph report referred to by the LRA at a later stage in the proceedings (but not referred to at any stage by anyone on behalf of the school) stated:-

> "But yesterday District Judge Paul Copeland said the Public Prosecution Service had failed to prove the case.

He said he had significant doubts, including that the pupil had turned up unannounced to get assistance with coursework from the teacher, and the teacher had not arranged a time or encouraged her to return alone to collect the printout.

Judge Copeland also expressed concerns about the number of pupils and staff who were in the vicinity when the alleged incident occurred, with no less than two people having entered the store room when the pupil was in there with a teacher.

He also said that no one had seen her running from the room in distress and pointed out that the complainant had not reported the sexual assault to anyone including her parents, sister or school until three months later, following an overdose."

42. It was apparent from the evidence of, in particular, Mrs Kerry that the individuals involved in investigating this matter and in dealing with the discipline process were not inclined to place any credence on press reports. Mrs Kerry stated in cross-examination that "I personally wouldn't rely too much on a journalist from the Belfast Telegraph". However, they do not appear to have investigated this matter further and there is certainly no evidence to suggest that the press report, as supported by the claimant and by his solicitor, was in any way inaccurate. The tribunal therefore accepts that this press report is an accurate representation of what occurred. In the absence of any written judgment, a reasonable employer would at least have obtained contemporaneous press reports and have put them to the claimant and to the other witnesses for comment.

43. The claimant's then solicitor in the course of the criminal proceedings, Mr Martin C Hart LLB of Hart & Company Solicitors, wrote to the school in the course of the disciplinary hearing. Again it is obvious, in particular from the evidence of Mrs Kerry, that the school paid no attention to this letter and did not regard it as either truthful or impartial. Both Dr Barr and Mrs Kerry refused to comment on this in cross-examination. Mrs Kerry said 'the appellant's solicitor – not prepared to comment on that'. It was clear that the chair of the SSC, the disciplinary authority, had told the LRA that this was a letter from the claimant's solicitor and that they didn't place much weight upon it. The tribunal will return to this point in due course. However, it is simply extraordinary that a letter from a solicitor, who is an officer of the court, should be dismissed in such a cavalier fashion and should be so patently and disparagingly mistrusted.

That letter stated that Mr Hart provided the following information from the trial when Judge Copeland gave his verdict of not guilty and when he (Judge Copeland) made the following points:-

"It was common case that the complainant (pupil 1) arrived unannounced at the technology department. There was a discussion regarding work to be done and it was agreed between (the claimant) and (pupil 1) that she come back later. The Judge noted that there was no particular time given for the return. It was also common case that (pupil 1) regarded her teacher (the claimant) very highly. The Judge further found that she was regarding her re-attending relating to a piece of work and was in no way a situation contrived by (the claimant). It was certainly not a ruse to get her back to the class. He

was of the view that it was quite the contrary and that her further attendance was actually holding (the claimant) back from his other business of the day.

The Judge felt the time of (pupil 1's) return was highly significant with the number of people that were present or would have been coming or going from the room including another staff member. It was never suggested to her that she should return alone and it may well have been it could have been the case that she came back with her friend (pupil 3). The Judge noted the assertion made by the complainant that (the claimant) was fidgety and that the blinds were closed and that there had allegedly been a discussion regarding the cost of the printing and further the suggestion from (the claimant) that "a smile and a hug" would suffice. Again the Judge had difficulty believing this, as (the claimant) would have been aware that there would have been other pupils coming in to the room. In any case this conversation was denied and the Judge accepted this.

He stated that the allegation if accurate would have constituted an offence but he had to place the allegation in the context of subsequent defence. He found that there was absolutely no attempt to stop the complainant from leaving the room. It is common case that there was some form of exchange of words as it was the complainants last day. She made her way from the technology room showing no signs of being as she had put in her evidence "terrified" or with her "heart beating fast".

The Judge was keen to point out that having made references to text and phone calls, no supporting evidence had been produced by the prosecution by way of corroboration from the phone or at all and that the evidence which was before the court was solely from the complainant.

He then moved on to the fact that the first sign of a complaint was following (pupil 1's) admission to the Ulster Hospital on 18 August 2011.

The Judge went on to confirm that (the claimant) had been willing to give evidence to diminish (pupil 1's) evidence. Much of the events as set out by the prosecution are common case with the exception of the alleged "touching". (The claimant) makes a complete denial in interview and in court and elected to give evidence to be cross examined. This is significant.

In a criminal case obviously the burden of proof is on the prosecution to make their case with the relevant and admissible evidence, not for the defendant to prove his innocence. Judge Copeland made the point that as a Judge sitting without a jury there would have to be an exacting standard of proof and that any doubt should firmly favour the defendant. He again noted the late complaint made three months after the event at a time during which the complainant had spent a considerable personal time with her family including a holiday with her sister. He noted that (the claimant) gave a detailed account of the day in question and that his evidence was not contradicted. He was able to detail the environment in which he was working. It was obvious that other members of staff or pupils could have appeared in to the room at any time. There was the potential of an entire class to be only feet away. The complainant herself accepted that other people had visited the room during her time alone with (the claimant). The

fact that (pupil 1) was accompanied by a friend earlier would suggest therefore that she may also return with a friend again. It was noted again that (the claimant) had also sent for another pupil to attend and this pupil could have appeared at any time without notice and did in fact eventually appear. All of this was uncontested and undisputed by the complainant. It was also uncontested that another pupil (named) could well have just been outside the door having been requested to attend. A picture was therefore painted of a busy buzzing environment. At this stage the Judge paused to ask himself would he really have taken such a reckless risk. This alone the Judge stated created significant doubt.

The Judge went further on to note (the claimant) also saw (pupil 1) in class and on occasion thereafter and again helped her with work. She engaged with him again and spoke with him. There was ample time for her to have made a complaint.

On the day of the events there was also compelling evidence to show that (the claimant) accompanied (pupil 1) to the materials store in relation to the search for a glue gun. This was through a classroom populated by pupils and there was no evidence of her being distressed, sick or upset.

The claimant had denied unequivocally the allegation put to him. He had good cause for his memory to be good in relation to the day as it was the last day of school for the sixth formers and he was packing up his material, shutting down the department, including the blinds, which was a normal routine for him and the Judge accepted this.

The Judge went on to specifically refer to the desirability of corroboration in a case such as this. He could find none and this was accepted by the prosecution. There was no independent evidence of a recent complaint. The complainant choose (sic) *to tell nobody and no evidence was adduced. The complaint also came against the background of poor A level results where she had not performed as well as expected. She was admitted to hospital with a suspected overdose but at that time there was no mention of the assault. What she did however state was that she had not got her desired A level results which were poor, had become upset and that she should have done better. There was also evidence given in relation to an argument with her mother and a recent bereavement. She also recently had her septum pierced against the wishes of her mother and there had also been a quarrel with her sister.*

In the end (the claimant) had a clear record, previous good character which was not challenged and therefore in the Judge's view there was an unlikelihood that he would commit such an offence. He was entitled to a considerable weight to be given to his own evidence.

The Judge ended by saying he had <u>many</u> doubts in relation to the case and therefore found (the claimant) not guilty."

44. The letter written by Mr Hart LLB was clear and detailed. It noted in particular that the judge had referred to the standard of proof applicable in a criminal case but it had also listed particular inconsistencies and improbabilities which could and should

have been of interest to those properly assessing the matter on a lower standard of proof i.e. on a balance of probabilities. The tribunal will return to that matter later in this decision.

45. The tribunal accepts, in the absence of any evidence to the contrary, that Mr Hart's report of the Judge's remarks, supported by the claimant's evidence and supported by the report in the Belfast Telegraph and indeed being the careful report of an officer of the court, was accurate and that it was not in any sense meant to be, or was, misleading. The first-named respondent was not entitled to disregard it in the way it did.

46. Pupil 3, despite having been asked on two occasions to give evidence on behalf of the PPS in the criminal prosecution, did not attend the criminal hearing to support her friend, pupil 1, who had made the allegations against the claimant. The first-named respondent, if it had been acting as a reasonable employer, would have raised this issue with pupil 3 and would have considered it.

47. Following the claimant's acquittal by Judge Copeland, Dr Proudfoot, the then chair of the Board of Governors, asked Dr Barr to conduct an investigation into the allegations. This was done by an investigation panel comprising three governors i.e. Mr Proudfoot, Dr Barr and Mrs Brangham. A separate Staffing Sub Committee was set up to deal with any disciplinary charge, comprising Rev Auchmuty, Dr Gillian Clarke, Mr Corbett and Dr Patterson.

48. The remit for the investigation, as set out by Mr Corbett in writing, and which appears in the "remit" document [406] was clear and precise. It stated that:-

> "To enable the members of the Staffing Sub Committee to progress their consideration of the other two cases, I would be grateful if you would undertake an investigation to clarify what may be considered as established facts in the (pupil 1) and (pupil 2) cases."

The reference to "the other two cases" was meant to differentiate these two cases from an earlier matter in 2008 involving a complaint by an adult cleaner to which the tribunal will return later in the decision.

49. Despite the clear terms in which the remit for the investigation was set out, Dr Barr was clear that he and the investigation panel regarded the remit of the investigation quite differently. The investigation panel did not believe it had to establish facts. The job of the investigation, as he saw it and as the investigation panel conducted it, was simply to gather statements and to put them forward to the Staffing Sub Committee without comment. Dr Barr was unable to explain why he and indeed the rest of the investigation panel had not read or had not understood the remit set out by Mr Corbett.

50. The investigation panel collated the transcripts of PSNI interviews and conducted 15 interviews.

51. The investigation panel interviewed pupil 2 on 4 March 2013 [409]. Pupil 2 had not been a witness to the alleged incident involving pupil 1 but pupil 1 had telephoned her shortly afterwards. When asked to recount the content of that telephone call, pupil 2 stated that she had been told by pupil 1 that:-

> "She said she was in the technology printer room, first store off a side room where the big printer was. He hugged her and said something like I'm going to miss you, will you miss me? She is a very shy girl. She said she had her head down and no eye contact, and it was very awkward. She tried to leave as quickly as possible. She did tell me other things but that's all I can remember."

There was no mention in that attempt of an attempt to kiss pupil 1. This contradicted the earliest accounts of this alleged incident as reported to Dr Barr (paras 37 and 39 above). However, this was not a matter which the investigation panel raised with pupil 2 or pupil 1 for explanation. A reasonable employer would have done so.

52. The PSNI transcript of the interview with pupil 1 refers to two separate assaults: one where the claimant allegedly hugged her from "behind the side" and one where the claimant was facing her. This apparent inconsistency with what was allegedly reported by pupil 2 was again not considered by the investigation panel.

The PSNI transcript of the interview with pupil 1 recorded her saying that she (pupil 1) had used the Blackberry Messaging Service to contact pupil 2. The interview conducted by the investigation panel with pupil 2 referred to "the phone conversation". There may have been an explanation for the apparent inconsistency but again the investigation panel did not investigate it.

53. The interview with pupil 2 then turned to the alleged incident in 2010 which had been reported to the PSNI by the pupil 1's mother. Pupil 2 made it plain that she had not reported this incident to the police but that the police had come to her following the complaint in relation to pupil 1.

This was a complaint which was not taken further by the PSNI as part of the criminal prosecution. The investigation panel do not appear in the first interview to have raised the details of this allegation at all with pupil 2. They relied solely on the transcript of a PSNI interview with pupil 2 [216]. She referred in the investigation panel's interview at one point to it being "just gossip in the Year" and that she had told a friend. She also stated that was the reason she gave up technology in upper sixth and it was because she could not trust the teacher (the claimant).

54. Pupil 2 attended for a second interview with the investigation panel on 20 March 2013. She accepted that most of the help she had received in relation to the technology project came from Mr David Scott and the claimant. She had also asked the claimant in particular about this technology project. She stated that the claimant had a friendly helpful manner and that he was a good teacher.

At the end of reading the details of the two internal interviews, any reader would have had difficulty in trying to ascertain solely from the documents the basis of the alleged complaint which appears to have occurred at some stage in 2010. The investigation panel did not really investigate it.

At no point was the "pupil" whom, she allegedly told about the alleged incident, interviewed by the investigation panel.

At no point were the inconsistencies with Ms Hazel Neil's (see later) statement put to her or to her mother. Dr Barr was not sure the investigation panel had discussed this at all. Since Pupil 2's second interview was the day after Hazel Neill's interview this is puzzling. Dr Barr's comment to the industrial tribunal that this was not an obvious enquiry "to us", indicates that the investigation panel had accepted only the story of the pupils and was not interested in considering anything to the contrary.

At no point was pupil 2 asked by the investigation panel for the personal e-mail address which she had allegedly been given by the claimant.

The investigation panel did not put the claimant's case to her for comment. His statement that he had given her personal assistance with her project some 5-10 times after the time of the alleged incident in 2010 was not put to her.

55. Another inconsistency in the pupil's testimony was that pupil 1 in the transcript of her PSNI interview [197-198] said pupil 2 had told her mother of the 2010 allegation after her exam results. Pupil 2 in her internal investigation interview [412] said she did not tell her mother. That should have been checked and if there was a plausible explanation for this apparent inconsistency, it should have been tested. Again the investigation panel did not appear to be interested in anything that questioned the pupil's allegations.

Dr Barr in his cross examination before the tribunal agreed he should have checked, but this of course was much too late.

56. In a similar vein, the investigation panel knew that the claimant was raising the issue of pupil 1's overdose. This overdose and her failure to mention the alleged assault (or assaults) to hospital staff was not put to pupil 1 in her subsequent interview on 8 April 2013.

Again, Dr Barr in his cross examination was unable to put forward any reason why this obvious point had not been raised with pupil 1.

57. Pupil 3 said [418] the joint visit to the technology department with pupil 1 on 13 May 2011 had been before lunch. Dr Barr in his cross examination said he was clear this joint visit had been in the morning. However pupil 1 [114] said in her police interview it had been about 2.00pm.

Again the inconsistency was simply ignored by the investigation panel.

58. Another obvious inconsistency was that pupil 3 said at [419] that during the first (joint) visit on 13 May 2011 the blinds were closed and pupils were not there. However, pupil 1 in her PSNI interview [115] said that the blinds were open.

Again this obvious difference was not noticed, or if it was noticed, the investigation panel did not seek any explanation.

59. Pupil 1 said in her PSNI interview [117] that during the first visit on 13 May 2011 that the claimant had a class. That obviously contradicts pupil 3's version that the place was empty.

When it was put to Dr Barr in cross-examination that there was a glaring inconsistency, his response was "There may be, yes". However, this had not been investigated or tested at the appropriate time.

60. The claimant stated in his statement at paragraph 42 that the alleged incident during the second visit of pupil 1 on 13 May 2011 occurred when he was teaching a year 13 class. When this was put to Dr Barr, his response was "I don't know".

This strikes the tribunal as a very simple and obvious point for the investigation panel to have checked at the time of the investigation. Dr Barr as principal would have known where any class was at any time. He didn't bother to check. At the time of this tribunal hearing, he still had not bothered to check.

61. The claimant made it plain in his interview [490] that Mr David Scott the technician was coming and going at the time of the alleged incident on 13 May 2011. It was a busy afternoon. Again this was an issue which had attracted the attention of Judge Copeland.

No investigation was made and this was not checked with Mr David Scott.

Dr Barr said initially in cross examination that neither pupil 4 or David Scott had corroborated what the claimant had said about a busy environment. However, when challenged, Dr Barr agreed that this issue had not even been put to Mr David Scott. It was "my mistake".

Pupil 4 in her interview could not remember anyone being in the store when she was there for a brief period. She did not rule it out. Furthermore, she remembered other girls being "around".

There is nothing in pupil 4's evidence or in Mr Scott's evidence which was of much assistance in determining this point. The right questions were not asked by the investigation panel on this crucial point.

62. When Dr Barr was asked in cross examination whether it was at all likely that an assault would have taken place on such a busy afternoon, Dr Barr responded that the claimant may have been excited because he was going to the rugby semi finals in Dublin that afternoon. That response was bizarre. The tribunal is not aware of any spike in the number of sexual assaults around Ravenhill or Landsdowne Road on match days. That response (promptly retracted) illustrated a casual and unthinking approach to this investigation.

63. The next transcript of an interview by telephone was an interview with pupil 3. Pupil 3 was the pupil at whose house pupil 1 made the telephone call to pupil 3. She had also gone with pupil 1 to the technology department in the first visit on 13 May 2011 to get work printed.

64. Pupil 3 was not present during the second visit to the technology department on 13 May 2011. When describing the alleged incident on the second visit, pupil 3 stated that pupil 1 had stated that "he tried to hug her and she tried to avoid it". Pupil 3 reported that pupil 1 had "said she was going to get printouts and he had been acting strange, the blinds were closed and the door closed. She said when

(the claimant) was trying to hug her she said she was embarrassed. He said not to say anything".

Pupil 3 then said that pupil 2 had earlier told her that pupil 2 had felt uncomfortable around the claimant. Pupil 1 then texted pupil 2.

When pupil 3 was asked why this had not been reported at that time, she stated that "because she (pupil 1) was not sure at the time if she was overreacting."

- "She was not sure if she had interpreted it correctly, she was afraid she had overreacted."

Any ordinary observer would have found it odd and worthy of further investigation that an alleged attempt by a teacher to either hug or to kiss a female pupil was something where there could have been a doubt about "overreaction" or any doubt about whether the female pupil had "interpreted it correctly". However this was not something that was apparently raised or queried by the investigation panel in either the interview with pupil 3, the interview with pupil 1, or indeed in the report of the investigation panel to the Staffing Sub Committee.

It is odd that the investigation panel did not try to obtain pupil 3's police statement. It is also odd that after deciding at their meeting on 8 February 2013 to obtain pupil 1 and pupil 2's second "depositions" to the PSNI, they failed to do so or to enquire further.

65. The investigation panel conducted a telephone interview with pupil 1 on 4 March 2013. When asked why she had not reported the alleged incident on 13 May 2011, pupil 1 did not state as had been reported earlier by pupil 3 that she had been unsure whether she had "misinterpreted" the event or that she had been unsure whether she was "overreacting". She said instead that she had thought it would be better not to report it. She stated that the claimant had two young kids and she didn't want to mess up anything "family wise".

The obvious difference between these two versions was not raised by the investigation panel, was not tested and was not reported on in the report to the Staffing Sub Committee. That is something that a reasonable employer would have done.

66. The school conducted a second interview in person with pupil 1 on 8 April 2013. She was asked again why she had not gone to the police earlier. She put forward an expanded and different version of events i.e. that:-

> "Two years ago everything was chaotic for me, my granddad had just died and I did not want to add to atmosphere in the house. I did not want to tell anyone about it and cause more upset.
>
> Also because [the claimant] had two kids, it would ruin their family life".

Again, the variation was not put to pupil 1 as it should have been.

Pupil 1 was not challenged about her poor examination results, her alleged row with her mother or her overdose. She was not asked why she had mentioned these

matters to hospital staff but had not mentioned the alleged assault by a teacher, even to explain her poor examination results. These were obvious steps that any reasonable employer would have taken in these circumstances.

67. Pupil 1 was asked how she felt when the criminal court had decided its verdict. That seems to have been an extraordinary question for any investigation panel to ask in these circumstances since it could not possibly have had any bearing on the original allegations and since they had decided to ignore the decision of the criminal court. However, pupil 1 stated that she felt terrible and quite shocked. Dr Barr then made an even more extraordinary intervention. He stated:-

> "Policewoman said you were a very good witness all along".

Pupil 1 was then asked whether she felt "cheated" by the process. Throughout this part of the interview, pupil 1 was effectively congratulated by the investigation panel and there appears to have been no consideration of why her evidence had not been accepted in the criminal court and indeed no attempt to test that evidence against the lower standard of proof on the balance of probabilities or indeed to test it at all. Her evidence seems to have been automatically and completely accepted despite obvious inconsistencies and improbabilities which had been highlighted by the criminal court and by other evidence.

Importantly, the investigation panel did not ask pupil 1 or indeed pupil 2 for her second PSNI "deposition".

68. The investigation panel then interviewed Mr David Scott, a technician. Mr Scott made it plain that he would have been in and out of the work room where the alleged incident in May 2011 had taken place and that other pupils and staff, including Dr Driscoll would have also done so.

69. In a second interview with Mr Scott on 20 March 2013, Mr Scott confirmed that pupil 2 had given up technology in year 13. He stated that the claimant had "helped her a lot".

70. The next transcript of an interview was Mr Stephen Dempsey, the ICT Manager, on 5 March 2013. Mr Dempsey stated that girls would be in the relevant room regularly and that he indeed would have been in the area "quite a lot".

71. The next transcript of an interview was with Mr John Driscoll, on 5 March 2013. He was a technology assistant. He was asked a lot of questions in general about this area and about the work procedures in that area. However he does not appear to have been asked about the specific day and the specific incident in 2011.

72. The next transcript of an interview was Ms Ann Spence, a teacher, on 5 March 2013. This teacher was asked whether she regarded pupil 1 as being reliable or trustworthy. She stated:-

> "I could not say she was trustworthy or not trustworthy".

She was not asked whether she regarded the claimant as trustworthy or untrustworthy. However, she volunteered that when teachers had been told to

check girls' uniforms, she remembered the claimant saying that, "no way would I get involved in anything like that".

Ms Spence was not asked about the claimant's credibility or behaviour.

73. The next transcript of an interview was Mr Simon Irvine, a teacher, on 5 March 2013. He was asked whether he found pupil 1 to be reliable and trustworthy. He stated:-

> "I certainly had no major issue with "pupil 1". I was her head of year. Any contact would have been about minor infringements, uniform, non attendance in class.

He stated he had no reason to question her integrity but he stressed that he had very little contact with her.

Mr Irvine was not asked any questions about the claimant's credibility or behaviour.

74. The next interview was with Mr Finch, another teacher. When asked whether he considered pupil 1 reliable and trustworthy he said "I would have no issue at all". He stated that he had no child protection concerns or general concerns in the Technology Department, where the claimant worked. He said he had been aware of a previous incident which involved a cleaner in 2008. He stated: "It was in relation to a cleaner being moved to a different area".

As far as pupil 2 was concerned, he stated he knew her the least. He referred to another incident where she had been bullied by other girls and referred to her father being the Vice Principal of the school.

75. There then was an interview with the claimant on 6 March 2013. The trade union representative was in attendance.

The investigation panel raised the alleged incident in 2008 concerning a complaint made by a female cleaner. That was a matter in which insufficient evidence had been found to support the complaint and where it had been dealt with in an informal manner.

76. After asking general questions the panel dealt with the complaint apparently made on pupil 2's behalf regarding an alleged incident in March 2010. At this point it seemed clear in the interview that this allegation was that pupil 2 had been asked by the claimant to rate his teaching skills and that he had given her a post-it with his personal e-mail address on it.

It should be noted that at no stage in this process did the school ask pupil 2 to disclose the personal e-mail address that she alleged that she had received from the claimant. In any event, the claimant denied that this incident had ever occurred. He stated that he asked pupil 2 why she had given up technology but that pupil 2 had found certain areas of technology e.g. pneumatics difficult. Pupil 2 had told him that she was doing art now instead of technology and that she had found some parts of technology difficult.

The claimant pointed out in some detail that he had assisted pupil 2 with her technology project and furthermore that he had assisted her much later than the alleged time of the complaint in finding a particular type of adhesive to finish her project.

77. In relation to the allegation relating to pupil 1 on 13 March 2011, the claimant gave a full explanation of what he doing that day. He was preparing to go to Dublin to see the rugby semi-finals. He was clearing up the area for the end of term. He was organising exam papers for the next week. He stated that John Driscoll had a class that day. Pupil 1 and pupil 3 had come in to try and get something printed. They could not do so. They agreed to come back after lunch. Pupil 1 returned later alone and asked to print a document. He explained that he had a year 13 class to attend to. He referred to different pupils and staff being in the area. He stated in particular that Mr David Scott had come into the room. He stated that he had no reason to be concerned. Pupils were outside. The technician was coming and going. It was a busy afternoon. He denied the allegation.

78. He stated that pupil 4 who had given evidence on his behalf in the criminal court had said that she had seen nothing unusual in his manner and that he had seemed perfectly normal on that day.

79. The claimant was then asked whether he had signed pupil 1's shirt with the message "this was smells like wee". He accepted that he had done so. It was apparent in the course of this tribunal hearing that it had never been the accusation that the shirts had been worn by pupils at the time they had been signed. The claimant explained that this particular statement was from a popular comedian called Graham Norton. He stated that pupils often asked teachers to sign their shirts when they were leaving the school.

The investigation panel does not appear to have considered whether a pupil who had been left "shaking" after one (or two) assaults by a teacher would have asked that teacher to sign her shirt on leaving the school. A reasonable employer would have enquired more closely into this issue and into the alleged times of these incidents.

80. The claimant raised the issue of pupil 1's examination results, her piercing, her row with her mother and her overdose. He stated specifically that pupil 1 had told the hospital in the context of her overdose that she had bad exam results.

81. The next transcript of an interview was with pupil 4. She was asked about the evidence she gave in court relating to an incident on 13 May 2011. She stated that she had returned just after 2.00pm on that day because the claimant wanted a missing image put into her coursework. She stated that there were other girls around but she could not remember who they were. She had spent some 10 or 15 minutes working on the computer and approximately five minutes working on the printer. She had not noticed anything unusual about the claimant's attitude.

82. The next transcript was an interview with a teacher, Ms Hazel Neil. When she was asked why pupil 2 was no longer studying technology she stated that pupil 2 had not said anything but pupil 2's mother had. At a parents' meeting she had said that pupil 2 had had a hard year with one thing after another. She had boyfriend trouble and her car was stolen. She had said there had been four or five situations and an

issue with a teacher. She said that she would not go into that because it had been "sorted."

Dr Barr made it plain that there was no indication in any evidence before him or before the investigation panel that this reference to an issue with the teacher was a reference to the claimant. Since the reported statement by pupil 2's mother referred to an issued being "sorted" is seems unlikely that it referred to the allegation involving the claimant. It was in any event an obvious issue that should have been checked by the investigation panel. Dr Barr repeatedly stated that they were not trained investigators. However, none of this requires specialised training. It simply requires the investigation panel to have approached this matter carefully and with an open mind. It did neither.

Disciplinary Process

83. As indicated elsewhere, the first named respondent did not provide any witness who actually took part in the Staffing Sub Committee to give evidence in the tribunal in relation to either their procedure or their reasoning.

84. The SSC met on six occasions i.e.

(i) 14 February 2013
(ii) 16 May 2013
(iii) 31 May 2013
(iv) 19 June 2013
(v) 21 August 2013 (disciplinary hearing) (morning and afternoon)
(vi) 28 August 2013

The full Board of Governors met on two relevant occasions i.e.

(i) 19 September 2013
(ii) 12 December 2013.

85. Before the report of the investigation panel was received by the Staffing Sub Committee (SSC), the SSC met [585] on 14 February 2013. They discussed the case. At this point the SSC illustrated that they had failed to properly understand how the complaints to the PSNI originated. At paragraph 4.3, Mr Corbett, the chair of the SSC, stated:-

> "Mr Corbett explained that the two pupils went directly to the police and initiated a criminal case, following which, the claimant had been found not guilty."

It is clear from the evidence, that neither pupil, who were 17 or 18 years of age, went directly to the police. The police only became aware of the allegations and only commenced a criminal investigation following a complaint by the mother of pupil 1. No pupil had themselves initiated a criminal case or indeed an internal complaint to the first named respondent.

86. The first meeting of the SSC after receiving the report of the investigation panel was on 16 May 2013. [588]. Dr Barr was in attendance to answer any questions on that report.

In paragraph 6.1 of the minutes of that meeting, the SSC recorded:-

> "There was some debate as to whether the Board had to ratify the decision of the Staffing Sub Committee before a dismissal letter (tribunal's underlining) could be sent out or whether the Staffing Sub Committee had the authority to make the decision and send out the letter. There was some ambiguity in the policy as to the process."

87. The tribunal has heard and has considered the cross examination of Dr Barr in relation to this entry in the minutes. No satisfactory explanation has been produced by Dr Barr. It is clear to this tribunal that the SSC at this early stage in the procedure were already contemplating and directing their attention towards a dismissal. It was the only outcome that was being specifically considered by the SSC. There was a reference to a dismissal letter and to nothing else.

Those remarks were not qualified by words such as "should a dismissal be the eventual outcome of the SSC considerations". No other outcome appears to have been in the contemplation of the SSC.

88. The next meeting of the SSC was [592] on 31 May 2013. Dr Barr was again in attendance at that meeting to provide any necessary clarification.

The SSC then appears to have continued the confusion about its role and the role of the investigation panel in the disciplinary process. At paragraph 6.0 Mr Corbett stated:-

> "Mr Corbett said that the purpose of the meeting was to decide if (the claimant) had a case to answer with regard to the following incidents –".

As indicated above, the investigation panel had ignored its duty to establish facts.

If matters had been left at that point there would have been simply a case of the investigation panel failing to have any regard to its stated remit and the SSC then for some reason taking over responsibility for what may have been part of that remit i.e. deciding if there had been a case to answer before moving on to a disciplinary procedure.

89. However, the SSC appears to have gone considerably further. In fact it appears to have completely decided against the claimant in relation to the two main charges at that point. In the minutes, it proceeded to assess the credibility of various identified witnesses i.e. the claimant, and pupils 2, 3 and 4. After discussing the credibility of each of those individuals and after discussing various parts of the statements or interviews, the SSC then at paragraph 8.5 of the minutes for 31 May 2013 decided:-

> "After consideration of all the information the Committee unanimously agreed that, on the balance of probabilities (pupil 1) was telling the truth and (the claimant) had a case to answer."

It seems extraordinary that at this early stage in the proceedings, the SSC had unanimously determined that, where there was a clear conflict of evidence, pupil 1 was "telling the truth". Effectively the matter was determined at that point. It was

not simply a case of establishing a prima facie case or a case to answer; it resolved the clear conflict of evidence in favour of the pupil 1 and against the claimant.

90. At paragraph 8.7 the SSC continued in this vein and determined:-

> "The Committee unanimously agreed that, on the balance of probabilities, unprofessional conduct towards a pupil took place on the day in question."

91. In subsequent paragraphs of the minutes, it seems that a debate then took place as to whether or not the "offence" which was accepted as having happened, amounted to serious or gross misconduct. The Committee appeared at this stage to have moved far beyond any consideration of whether or not the "offence" had occurred at all. That matter appears to have been completely and irrevocably determined. In fact the SSC went on to record at paragraph 8.11:-

> "There was some discussion on whether there was an option to enhance the sanctions due to the seriousness of the incident and what appeared to be repeated incidents."

92. The minutes of the SSC then proceed to another issue where it again seems plain that the SSC had moved to a final decision at this early point without ever having met the claimant or ever having allowed him to put his case to the SSC. In fact, it was even before disciplinary charges had been laid. In relation to the allegation made by pupil 2 following her nomination by the mother of pupil 1, the SSC stated at paragraph 9.3:-

> "It was noted that no physical contact had taken place. After discussion, the members unanimously agreed that, on the balance of probabilities, (pupil 2) was telling the truth, however, they were of the opinion that no offence had occurred and (the claimant) had no case to answer."

Even though at this stage the SSC had found that there was no case to answer in relation to this allegation (a decision which it later reversed) they had again decided who was telling the truth in a situation where there was a clear conflict of evidence.

93. In relation to this separate allegation of writing on pupils' shirts (which apparently were not worn by the pupils at that time) the SSC again unanimously agreed that there was a case to answer. It is not clear whether the charge had already been determined. However this was a charge where there was no significant dispute on the facts and no issue on credibility.

94. At the same meeting on 30 May 2013, it is plain from paragraph 7.10 of the minutes that the SSC had considered that, in relation to pupil 3, and her failure to turn up to give evidence on behalf of the criminal prosecution, that "it may be possible that she was not called". That was in direct contravention to the clear evidence of the claimant. Dr Barr could not say in cross-examination whether it had been checked in any way either with pupil 3 or with the PSNI or PPS. No evidence was produced to establish that this remark in paragraph 7.10 was based on anything other than speculation. If such evidence had existed, it would have been produced. The failure of pupil 3 to turn up to give sworn evidence in support of her friend's allegations was something which a reasonable employer would have considered and would have weighed on the balance. These pupils were at the end of their

second level education and were aged 17 or 18 years. The first named respondent does not appear to have considered this in any meaningful way.

95. It is probably worthwhile stating again that the members of the SSC did not attend the tribunal hearing to give evidence or to explain their reasoning. The tribunal was therefore left with the written minutes of the SSC and with the limited clarification given by the claimant, Dr Barr and Mrs Kerry.

96. The next meeting of the SSC was on 19 June 2013. Dr Barr was only present for the start of the meeting at which he appeared to be passing on legal advice about sexual harassment. It is not clear why such advice was either sought or was passed on to the SSC because the claimant had not been charged with sexual harassment.

97. The SSC minutes record that the complaint in 2008 from an adult cleaner was being treated as of a similar nature to the incidents now being investigated. As indicated above, no one was present during the industrial tribunal hearing who could explain how that conclusion had been reached. However it is entirely unclear how the SSC could properly have reached that conclusion. There had been no finding of guilt and no penalty had been imposed in relation to the 2008 complaint. There had in fact been no disciplinary action at all. The claimant had been given advice about some remarks which he had made to an adult contract cleaner. That advice had been given in an "informal discussion". The claimant had been told that it was likely that inadvisable comments made by him had led to a misunderstanding.

Given all of that, it is extremely difficult to understand how the SSC reached the conclusion that the 2008 incident was something that should be taken into account, to any extent, as "a matter of a similar nature". If the 2008 incident had indeed been of a similar nature to the allegations relating to 2010 and 2011, it would not have been dealt with in the manner that it was.

98. The minutes of the SSC on 19 June 2013 then turned to the allegation which had been made by pupil 2. This is the allegation that the SSC had previously rejected and where they had determined that there had been no case to answer. The decision to revisit this issue was apparently made on solicitor's advice. The discussion of the alleged incident which gave rise to this allegation by pupil 2 was recorded on the basis that the incident, which was strenuously disputed by the claimant, had actually taken place. Mr Corbett, the chairman, reminded the members of the SSC that they had decided pupil 2 was telling the truth. For example, the minutes record:-

> "- Whilst (the claimant) offered (pupil 2) his personal e-mail –"
>
> "She dropped Technology and did not want her younger sister to be in (the claimant's) class. In order to remind themselves of the full facts the Committee read through (pupil 2's) statement in detail."

The tribunal notes in particular the reference to "the full facts" which the SSC apparently preferred to an obvious alternative i.e. "to one version of the disputed facts".

99. A disciplinary letter issued to the claimant on 25 June 2013 inviting him to the next meeting of the SSC on 21 August 2013, which was to be the disciplinary hearing. The letter set out three charges:-

(i) in or around a date in March 2010 you acted inappropriately with a year 13 pupil in the technology department of _____ school;

(ii) on 13 May 2011 you acted inappropriately with a year 14 pupil in the technology department of _____ school; and

(iii) in or around May 2011 you wrote inappropriate comments on the shirts of two year 14 pupils."

The disciplinary letter which issued after the SSC had discussed legal advice in relation to sexual harassment did not purport to charge the claimant with sexual harassment and did not refer in any way to sexual harassment.

100. The disciplinary hearing then proceeded to take place on 21 August 2013. The SSC heard the appeal. The claimant attended represented by Mr Alastair Donaghy of the ATL.

101. The minutes record that the chairman of the SSC, despite the fact that the SSC had unanimously found that the claimant had been guilty of inappropriate conduct i.e. had unanimously determined the conflict in evidence in relation to the first two charges before the charges had even been formulated, stated that <u>if</u> the claimant was found guilty of misconduct, the SSC may decide to issue him with a verbal warning, written warning, a final written warning or to dismiss him with or without further notice. He stated in particular that these sanctions were subject to the claimant's:-

> "right of appeal under the procedures sent out in the Disciplinary Procedures for Teachers." (TNC 2007/5)

This clear acknowledgement that any decision to impose sanctions was "subject to appeal" is of some significance when considering the first respondent's later actions in relation to a successful appeal.

102. Mr Donaghy relied on the description of the criminal proceedings and of the ruling of District Judge Copeland which was set out in a letter from Mr Martin Hart LLB. That was read out to the SSC and a copy was provided.

103. The claimant raised the issue of the letter from pupil 1's mother to Dr Barr which referred to an earlier telephone conversation between pupil 1's mother and Dr Barr. The claimant asked why there had been no record of this telephone conversation and whether any other conversations had taken place. This seems to this tribunal to have been a legitimate question to have been raised by the claimant. However the chair of the SSC simply stated that the claimant was there to present his case and it was not for the SSC to answer questions. The origin of these complaints was a legitimate area of enquiry for the claimant and a proper subject for consideration by the SSC.

104. The claimant pointed out that the third disciplinary charge i.e. the shirt writing incident had never been mentioned before to the PSNI or to the criminal court and that it had only appeared after the decision of the criminal court. It was not brought to anyone's attention during the investigation.

105. The claimant then pointed out that pupil 1 had not referred the matter to the police. It had been reported to the police by her mother when pupil 1 had been in hospital (with an overdose). He pointed out various matters including that there was an obvious contradiction between pupil 1 and pupil 3 in relation to the blinds being closed during their first joint visit to the technology department. He referred to the two different versions from pupil 1 and pupil 3 about the timing of that first visit. He pointed out that a CCTV camera in technology could have identified the timings. He stated that at the time of the second visit, after 3.00pm, there would have been a number of people around, including pupils, in the main room. He denied the allegation in relation to the alleged incident on 13 May 2011. He pointed out that pupil 1 had returned to either get or to remove a glue gun and that she had not been upset. He stated that there was a year 13 class at that time in the technology department. The tribunal notes that the principal, Dr Barr, had never checked whether this was correct and that Dr Barr had never been asked by the SSC to check whether this was correct. It would have been a simple matter of checking the timetable

106. Turning to the allegation made by pupil 2, he pointed out that pupil 3 had said that pupils had been given a telephone number and an e-mail address but that neither pupil 1 or pupil 2 had mentioned a telephone number.

107. The claimant pointed out other contradictions e.g. that pupil 1 had said that she had spoken to pupil 3 on the phone whereas pupil 3 had said that she had BBMd her. He pointed out that pupil 1 had told the PSNI that she had told her mother about the incident. Pupil 1's mother had not confirmed that that had been the case and this had not been checked. Pupil 1's boyfriend and pupil 1's pupil friend had never given statements to confirm her version of events.

108. The claimant in detail pointed out that pupil 1 had taken alcohol and medication and had been taken to Accident & Emergency. That had been on the day of her poor examination results and that she had argued with her parents over a septum piercing. While pupil 1 had been taken to the hospital by her father, her father had never given any statement and had never attended the criminal court proceedings.

109. The claimant referred to medical records which had been obtained by Mr Hart LLB, who was the ATL solicitor, which showed that pupil 1 had attended a meeting with a health professional on the day she was discharged from A&E. The A&E records used in court showed that pupil 1 had not mentioned any alleged assault or incident with the claimant when explaining the alcohol and medication overdose to hospital staff. A reasonable employer would have wondered why a pupil who had taken an overdose following examination results did not mention an alleged assault by a teacher when explaining her situation. The SSC did not do so.

110. Mr Donaghy on behalf of ATL wrote a lengthy submission following the disciplinary hearing and after having considered his notes. That lengthy submission attached a

copy of the letter from Mr Martin Hart LLB and pointed out again several inconsistencies in the evidence against the claimant.

111. The SSC sent the claimant a letter on 30 August 2013 in which they found against the claimant on three grounds:-

> "(i) in or around a date in March 2010 you acted inappropriately with a year 13 pupil in the technology department of _____ school which amounts to harassment and this constitutes serious misconduct;
>
> (ii) on 13 May 2011 you acted inappropriately with a year 14 pupil in the technology department of _____ school which amounts to harassment and this constitutes serious misconduct.
>
> These offences of serious misconduct warrant dismissal with notice.
>
> (iii) in or around May 2011 you wrote inappropriate comments on the shirts of year 14 pupils and this constitutes unprofessional misconduct.
>
> This misconduct would warrant a final written warning in the absence of the offences of serious misconduct above."

112. That letter stated that his employment would terminate on 2 December 2013. It advised him that he had "the right to make representations, either in writing or orally to the Board of Governors". It advised him that if he wished to exercise that right he should make the request in writing to the Board of Governors within five days.

113. The issue arises as to whether or not this second stage amounted to an appeal for the purposes of the 2003 Order. That matter will be dealt with later in this decision but it is important to note at this stage that the claimant was not advised in respect of this first stage that this was an appeal and that an appeal hearing would be arranged accordingly. The letter was quite clear in accordance with the relevant disciplinary procedure in that it advised him that he had simply the right to make representations either in writing or orally. The letter separately set out a "right to appeal this decision" to the LRA. The ATL [699] on 5 September 2013 stated that they wished to appeal against the decision of the SSC. The ATL letter stated that (separately) they were writing to make representations on behalf of the claimant to the Board of Governors. There is no indication that the ATL confused the right to make representations with a right of appeal. The ATL letter was quite lengthy, some 21 pages, and set out the various points that the ATL wished to make in relation to the evidence which had been brought against the claimant.

114. On 12 September 2013, the Board of Governors formally invited the claimant to exercise his right to appear before the Board to make oral and written representations relating to his dismissal. Again the Board of Governors did not confuse this procedure with an appeal. It separately acknowledged ATL's intention to appeal to the LRA.

115. The SSC met on 19 September 2013 to conclude this matter and to consider the representations.

116. At this meeting the SSC were invited to make their submissions. Separately the claimant and the claimant's representative were invited to attend the meeting and make their submissions. Finally the SSC returned to comment on the claimant's earlier submissions.

117. Again the tribunal is seriously hampered by the decision of the SSC not to provide evidence to this tribunal. Moreover it seems clear from the minutes of this meeting that Dr Proudfoot seems to have misread the role of the Board of Governors in all of this. He stated in paragraph 3.1 of the minutes that the SSC had parked the decision of the criminal court while it carried out its own investigation. It was a "separate and distinct" issue. In paragraph 3.2 he stated that the SSC had attempted to "determine the correct decision regarding his re-employment on the basis of the evidence provided to it". At no stage did he apparently direct his attention to the role of the SSC in determining guilt or otherwise in relation to specific disciplinary charges. The question of re-employment, should any query about employment or re-employment emerge, was very much dependent on any finding in relation to guilt. However, that does not appear to have troubled Dr Proudfoot or the Board of Governors. That finding of guilt had already been made at a much earlier stage and there was no real attempt to review that finding.

118. Dr Proudfoot also stated that the Board of Governors "will not be swayed by the (criminal) court decision". That seems extraordinary. Although the criminal court was applying a higher standard of proof, this was not a case where the criminal court had simply given the claimant the benefit of that higher standard of proof. It was obvious from Mr Hart's letter and from the claimant's evidence that the prosecution case had comprehensively failed and that there were clear inconsistencies and improbabilities in the evidence against the claimant. No reasonable employer would have approached the matter in this way.

119. The SSC was first invited to put its side of the matter. Mr Corbett stated that while it had concluded that the claimant had a case to answer, a final decision on each allegation had not been taken until after the disciplinary hearing. That appears to be entirely contrary to the minuted records of the SSC where it seems perfectly clear that a decision had been taken unanimously on the crucial conflicts in evidence at a very early stage and before the disciplinary charges had even emerged.

120. Mr Corbett did not indicate that he had at any stage challenged or questioned the inconsistencies in the evidence which was before the SSC. However he stated that the claimant's credibility as a witness had been damaged by his failure to mention writing on the second shirt when first challenged. However it appears clear from the evidence that the claimant's responses had been clear and open in this regard. When challenged about these issues he had answered those charges fully. It is difficult for this tribunal to understand how Mr Corbett reached the conclusion that the claimant's credibility had been damaged. Nevertheless Mr Corbett reported to the full Board that it had been damaged.

121. Following the representations of the SSC, the claimant and the trade union representative were invited to make their representations separately.

122. Mr Donaghy pointed out firstly that the PSNI had been led to believe by the school that the claimant had received a caution in respect of the 2008 incident. That

simply had not taken place. The police had told the claimant at interview that he had received a warning in 2008. The truth of the matter was that no disciplinary process had taken place and no disciplinary warning at any level had been imposed.

123. Mr Donaghy pointed out that the complaint from pupil 1 had only arisen some considerable time after the date of the alleged incident and only after the claimant had been in hospital with an overdose for a number of reasons including poor exam results. He stated that pupil 1's motives had been discredited and that pupil 1's mother had been pursuing the complaint "in a very serious way".

124. Mr Donaghy pointed out that even after the case against the claimant had been discredited in the criminal court, pupil 1's mother had been in dialogue with Dr Barr in the setting up of the internal disciplinary process.

125. Mr Donaghy pointed out that there were several issues in relation to the credibility of the evidence against the claimant. The motives of pupil 1 in bringing the complaint had not been tested. The 2008 incident had been wrongly brought up to bolster charges against the claimant. Dr Barr had told pupil 1 that "the police officer said you were a good witness". That was something which was not supported to the evidence; not just the claimant's evidence but the report from Mr Hart LLB and the decision of the District Judge.

126. Mr Donaghy stressed that the claimant denied these incidents took place and that the evidence of people had not properly been taken into account. Mr Donaghy stated that the allegation against the claimant by pupil 1's mother, and subsequently by pupils 1 and pupil 2, had been false, vexatious and malicious.

127. He stated that pupil 2 had been given considerable assistance in completing her coursework by the claimant. Pupil 2 had not been able to produce any private e-mail address and that there had been no evidence of harassment.

In relation to pupil 1 he stressed that the medical records showed that the consumption of half a bottle of peach schnapps and some pills leading to admission to the A&E Department had been explained by "bad examination results". He stated that there had been lies and inconsistencies since day 1.

128. He stated that the investigation panel had been unduly sympathetic and unquestioning with pupil 1. He pointed out that they had apologised for "putting her through this again" and that they had asked her if she had "felt cheated by the system".

129. The governors decided that they "were of the opinion that the SSC had dealt with the issues raised. It was unanimously agreed, having objectively considered the points made by (the claimant) and having challenged the SSC on them, that its decision would be upheld."

130. The matter then proceeded by way of an appeal to the Labour Relations Agency under TNC2007/5. Paragraph 8 of that document provides the process for appeals to the LRA. It states at paragraph 8.5 that:-

"The body considering the appeal, as set out in Appendix 2 may:-

(a) dismiss the appeal;

(b) uphold the appeal; or

(c) substitute a lesser penalty."

131. The wording of TNC 2007/5 does not state specifically that the decision on appeal is binding or that the decision on appeal is merely advisory. However it seems perfectly plain to this tribunal that the ordinary meaning of the wording of this document means that the decision of the Independent Appeals Committee of the LRA was in fact binding and final.

The factual basis of the decision of the Northern Ireland Court of Appeal decision in ***McMaster –v- Antrim Borough Council [2010] NICA45*** can be distinguished from the present case. In ***McMaster*** the LRA appeal decision was expressly and contractually provided to be "final and binding on both parties". There was no such express provision in the present case. However, there was equally no provision that the LRA decision was simply advisory and that the first named respondent would be entitled to disregard it. On the contrary, the LRA stage was accepted by the parties and specifically described in TNC 2007/5 as the appeal. The common sense position is that an appeal is normally binding unless there is provision to the contrary. As the EAT said in ***Ladbrooke Betting and Gaming Limited –v- Ally [2006] WL1666940***, and reported with approval at para [13] of ***McMaster*** (see above),

> "18. Pausing at that stage, that case is, to my mind, clear authority for the proposition that – unless there was a contractual provision to a contrary effect as a result of an appeal process – the decision to dismiss is replaced by the decision which means that the employee is not to be regarded as having been dismissed."

132. Paragraph 7 of TNC2007/5 also makes it plain that the right of representations to the Board of Governors, which was availed of by the claimant in this case, was not an appeal. It states in clear terms:-

> "Such representation shall not constitute an appeal. The appeal in the case of dismissal is to the Independent Appeals Committee as detailed in paragraph 9."

133. The appeal hearing was heard on 21 November 2013. The claimant appeared and was represented again by Mr Donaghy. The Board of Governors appeared and was represented by Dr Proudfoot.

134. The Independent Appeals Committee firstly found that the school had been entitled to undertake its own investigation following the dismissal of the criminal case. That has not been in dispute in the present industrial tribunal hearing.

135. The Independent Appeals Committee criticised the inclusion of the 2008 incident in the disciplinary process in this matter. No disciplinary penalty had been imposed in 2008. Even if it had, the LRA report pointed out that disciplinary penalties would expire following completion of various periods of satisfactory conduct. If a verbal

warning, rather than mere advice, had been given, it would have expired after six months satisfactory conduct. The IAC concluded that considering the 2008 allegation amounted to a breach of procedure.

136. The IAC also criticised the manner in which the allegation in relation to writing on pupils' shirts had been raised. No prior warning had been given to the claimant that this allegation would be raised during the investigatory meeting. The IAC further concluded that it was significant that the school then elevated the answers given to this allegation, made without warning, to have an impact on credibility and truthfulness.

137. The IAC stated that the decision of the District Judge had not been taken into account in any way by the school. The IAC confirmed that they were not suggesting that the school should simply have accepted the District Judge's decision and have implemented it in full. However, the IAC stated that the school had not been entitled to wholly exclude from its decision making process the court proceedings and the court outcome. That had a significant impact on the claimant's and the witnesses' credibility.

138. The IAC also criticised the decision of the school to ignore the detailed input from Mr Hart LLB. The IAC pointed out that his statement had been excluded from any consideration on the basis that "his interpretation of the Judge's view and this could be sympathetically lenient towards (the claimant)". The IAC stated that it found it difficult to accept the validity of the school's response on this point. It would have been a serious breach of conduct for any solicitor to misrepresent, in any manner, what had taken place in a court hearing and in particular the comments of the presiding Judge.

139. The LRA took the trouble to obtain the Belfast Telegraph report of the criminal court proceedings. This was a step which had not been taken by either the investigation panel or the disciplinary panel or indeed the entire Board of Governors at the representation stage. The report appears earlier in this decision.

140. The IAC stated that it considered that the school's exclusion of this evidence and its failure to take any account of the Judge's comments were significant failures having regard to all available evidence.

141. The IAC in particular criticised the school's conclusions in relation to the claimant's credibility in respect of the third allegation (the shirt writing incident). The IAC stated that they were unable to reconcile that the SSC's absolute conclusions and findings on the claimant's truthfulness were a fair or reasonable reflection of the record of questioning on the third allegation on the basis of the written evidence presented. The IAC stated:-

> "We are concerned that this reflected an absence of objective consideration of credibility relevant to the appellant."

The IAC pointed out that the school had accepted the credibility of the pupils. However, they criticised the school's failure to take into account the Judge's comments in court. Those comments reflected the court's examination of the evidence under oath. The IAC considered that the Judge's comments were

relevant to the credibility of pupil 1 and were favourable towards the claimant. The IAC concluded that it should have been taken into account.

142. While the IAC accepted the obvious point that the balance of probabilities was the appropriate evidential test, it considered that the responsibility of the first named respondent had not been properly discharged in that it failed to ensure that all relevant evidence was under consideration.

143. The IAC in clear terms stated that paragraph 50 of their decision:-

> "The appeal against the termination of the appellant's employment is therefore upheld.
>
> In specific terms the Committee findings are:-
>
> (a) the appeal is upheld against the decision of dismissal with notice in respect of the charge relating to a year 13 pupil around a date in March 2010.
>
> (b) the appeal is upheld against the decision of dismissal with notice in respect of the charge relating to a year 14 pupil on 13 May 2012."

144. The IAC separately, under a different sub heading i.e. "**Recommendations**" stated that:-

> "52 The Independent Appeals Committee recommends that the school arranges for the appellant to return to his post at the earliest practical date with full continuity of service and pay.
>
> 53 The Committee appreciates that the appellant will require support to be able to resume his teaching work after this experience. We recommend that the school consult with the appellant and his trade union representative on the appropriate mechanism to provide that support."

145. The tribunal concludes that the decision of the LRA was not simply advisory or simply a recommendation. It was clear. It was final. It upheld the appeal against the dismissal. The reference to returning at the earliest practical date with full continuity of service and pay and to an appropriate support mechanism were over and above the clear and unambiguous finding within the terms of TNC2007/5. The recommendations were therefore separate to the decision to uphold the appeal against the decision to dismiss and related only to the practical outworking of that decision to uphold the appeal.

146. The full Board of Governors met on 12 December 2013. It comprised members of the investigatory panel, members of the disciplinary panel (the SSC) and other members of the Board of Governors who had heard the representations.

147. The Board discussed the pending move from voluntary to controlled status. While Dr Barr stated that he could not recall what this discussion involved, he stated that it had nothing to do with the decision not to accept the LRA appeal. It is difficult to

see how Dr Barr could really be that definite if he couldn't say what the discussion had been about. However, the minutes record without explanation:-

> "There was some discussion on how this issue might be affected by the proposed move from voluntary to controlled status".

148. Mrs Kerry in her cross-examination was quite clear that she had been informed by DE that the liability would not transfer to the second or third respondents following the change in status to controlled status. The tribunal is unable to understand how this could have been a subject of discussion and decision unless it formed some part of the decision making process of the Board of Governors. Equally when this was a specific meeting on 12 December 2013 to consider the LRA decision on appeal, it is difficult to understand why any discussion of the change from voluntary to controlled status would have consisted of anything other than its impact on the claimant's employment. It is also hard to understand how or why Mrs Kerry received the assurance that she says she did. It is difficult for this tribunal to believe that it did not have some significant impact on the decision making process.

149. The minutes recorded at paragraph 1.11 that:-

> "The Board had been unanimous in its decision at the meeting of 19 September 2013 to uphold the decision of the SSC. The decision of the SSC had been based on the balance of probabilities and it would appear that this was not the approach taken by the LRA."

That was clearly a bizarre conclusion which was entirely against the evidence. It was made perfectly plain on several occasions in the course of the LRA decision that the balance of probabilities was the appropriate test and that it was the test considered by the LRA.

150. The first named respondent recorded in the minutes that:-

> "1.13 Following discussion, the Board of Governors unanimously agreed to reject the recommendation of the Appeals Committee of the Labour Relations Agency "that the school arranges for the appellant to return to his post at the earliest practical date with full continuity of service and pay."

Again this was a very strange decision. It was perfectly plain from the LRA decision and from the terms of TNC2007/5 that the appeal against dismissal had been upheld. The recommendations were solely recommendations relating to the practicalities of implementing that decision to uphold the appeal. It was not for the Board of Governors to rewrite the contract or to ignore employment law or to flout the decision of the LRA.

151. The Board went on to record at:-

> 11.14 In addition, the Board wished to record that it had no trust and confidence in (the claimant's) professional conduct."

That was not an issue which had been raised either as a charge or in any other manner up to that point.

152. The tribunal has not been afforded the courtesy of seeing full minutes of the Board of Governors on 12 December 2013. It was presented firstly with an extract and only on a specific request did the first-named respondent provide a list of those present. Even at this stage, there is a worrying and unexplained reference to a Mrs Scott wishing to have it recorded that she had worked with on the members of the Independent Appeal Tribunal of the LRA. The significance of that remains unknown.

Decision

153. This is a claim of unfair dismissal. The tribunal is satisfied that the reason for the dismissal was (alleged) misconduct with the pending transfer to controlled status having a secondary importance. The second issue is therefore whether the dismissal of the claimant was either substantively, procedurally or automatically unfair (or any combination of the three).

154. The tribunal must be careful to remind itself of its limited jurisdiction in this area. As set out in the case law above and as re-emphasised by the Court of Appeal in **Rogan**, the tribunal's function, at this stage of the proceedings, is not to determine guilt or innocence in relation to the disciplinary charges laid against the claimant. The tribunal's function at this stage, is rather to determine:-

(i) whether the dismissal had been automatically unfair for the purposes of the 2003 Order?

(ii) whether the dismissal had been automatically unfair for the purposes of the 2006 TUPE Regulations?

(iii) whether the employer had adopted a fair procedure, leading to a reasonable belief in guilt?

(iv) whether the decision to dismiss was within the band of reasonable responses open to a reasonable employer?

2003 Order

155. Schedule 1 to the 2003 Order sets out the statutory dispute resolution procedures. These require firstly written disciplinary charges which must be sent to the employee. The second step is a meeting which must take place before any action is taken. After that meeting the employer must inform the employee of its decision and must notify the employee of the right to appeal against the decision. If the employee does wish to appeal, he must inform the employer and the employer must invite that employee to an appeal meeting. After the appeal meeting, the employer must inform the employee of his final decision.

156. In the present case there is no dispute that disciplinary charges were sent to the claimant and that a disciplinary meeting was held. However, there is a dispute as to whether or not that disciplinary meeting took place after action was effectively taken i.e. after the SSC had already unanimously made up its mind in relation to the two main charges at their meeting on 31 May 2013. It seems clear that the SSC had resolved the central issue of credibility in favour of the pupils and had therefore, in reality, unanimously determined those charges before having any form of

disciplinary hearing. The first named respondent had therefore not complied with the statutory dismissal procedure in this respect.

157. There is also a dispute as to whether or not the appeal procedures provided to the claimant offered effective compliance with the provisions of the statutory dispute resolution procedures.

The disciplinary procedures are set out in TNC 2007/5 which is issued by the Department of Education. If the employing authority issues a formal notice of dismissal, the document provides for representations to be made by the employee to the same employing authority i.e. the Board of Governors. Paragraph 7.1 is quite specific. It provides that:-

> "Such representations shall not constitute an appeal. The appeal in the case of dismissal is to the Independent Appeals Committee (of the LRA).

158. As indicated above the Board of Governors and the ATL representing the claimant were quite clear that the representations under paragraph 7.1 and the appeal to the LRA under paragraph 9 were quite separate and that they were to be treated and approached quite separately. Given the clear wording of paragraph 7.1 and given the clear understanding of all parties, it cannot be the case that the representations are at this late stage to be artificially elevated to the status of an appeal to ensure compliance with the statutory dispute resolution procedures.

159. On that basis the only possible compliance with that substantive part of the statutory dispute resolution procedures i.e. the provision of an appeal is the appeal under the terms of paragraph 9 of TNC2007/5 to the Independent Appeals Committee of the LRA.

160. TNC2007/5 is again quite specific in this regard. In paragraph 8.5 it states that the body considering the appeal, as set out in Appendix 2, may:-

(a) dismiss the appeal;

(b) uphold the appeal; or

(c) substitute a lesser penalty.

161. It is clear from this provision that the appeal is definitive, determinative and not simply advisory. It is also clear from the wording of the LRA appeal document and appeal decision in this case that it was not advisory. The first named respondent sought to argue that the decision of 5 December 2013 was simply a recommendation and that it was open to the first named respondent to ignore or accept such a recommendation as it chose. If the first named respondent were correct in this regard, it would be difficult to see how such a mechanism could possibly have satisfied the requirement of statutory dispute resolution procedures which specifically provides for an appeal, which must be an effective appeal. However, the tribunal considers that the first named respondent was entirely incorrect in this regard. Paragraphs 49, 50 and 51 under the sub heading "**Findings**" makes the position quite clear. The Independent Appeals Committee unanimously upheld the appeal against the termination of the claimant's employment. It went on separately in paragraphs 52 and 53 to make

recommendations for a return to duty at the earliest practical date and for an appropriate support mechanism. The inclusion of those recommendations on the outworking of its decision on appeal cannot possibly be read as meaning that the Independent Appeals Commission had departed from its remit and had decided simply to make vague recommendations which the employer could consider as a matter of discretion.

162. Dr Barr and Mrs Kerry on behalf of the first named respondent made valiant efforts to support their interpretation. However, those arguments were entirely without merit. The decision of the LRA was plain. The appeal against dismissal had been upheld. Having provided a proper appeal, the employer simply failed to acknowledge and to implement the appeal decision. The employer therefore cannot argue that it had effectively complied with the statutory dispute resolution procedures by providing a proper appeal in these circumstances. It offered the opportunity to make representations; a form of review falling far short of an appeal. It followed legal advice in relation to the representation stage. It concluded "it was not required to approach the matter by way of a completely fresh investigation and re-evaluation of the facts".

It also concluded "The Board should record the reasons for its decision but these do not have to be too complicated or lengthy". Furthermore it adopted an unusual procedure at this stage. The SSC gave submissions without the claimant or his representative being present. The SSC then left and the claimant and his representative made submissions. They then left and the SSC returned. The SSC then left and the first-named respondent recorded its decision in one paragraph; paragraph 8.1 of the minutes. There was no attempt at this stage to hold an appeal. That was offered separately by the IAC of the LRA. When the first-named respondent received a result it didn't like, it refused to implement it.

163. Dr Barr sought to argue that the first named respondent had been entitled to refuse to implement the appeal decision. He relied on a magazine report of an EAT decision, ***Kisoka –v- Ratnpinyutip t/a Rydevale Day Nursery UKEAT/0311/13/LA***. That argument was supported, somewhat tentatively, by Mr Wolfe.

The EAT decision does not mean that employers can ignore the result of an internal appeal simply because they disagree with such a result. The decision in ***Kisoka*** made the obvious point the tribunals should apply the overall test of fairness as set out in statute. It is also a situation where in Great Britain, in late 2011, there was no statutory dismissal procedure as in Northern Ireland. It stated that "the process needs to be looked at overall in order to see if is consistent with the fundamental requirements of fairness". It referred to the CA decision in ***UCATT –v- Brain [1981] ICR 542***:

> "Whether someone acted reasonably is always a pure question of fact so long as the tribunal deciding the issue correctly directs itself on the matters which should and should not be taken into account but where Parliament has directed the tribunal to have regard to equity and that of course means common fairness and not a particular branch of the law, and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without a lawyer's technicalities. It has to look at it in an industrial relations and employment context and not in the

context of the Temple and Chancery Lane. It should therefore be very rare for any decision of an industrial tribunal under this section to give rise to any question of law and this is quite plainly what Parliament intended."

The decision of the first-named respondent not to implement the appeal flouted the statutory dismissal procedure; a matter which did not concern the EAT in Great Britain in 2011. It was also part of a grossly unfair investigation and disciplinary procedure as described elsewhere in this decision. ***Rydevale*** does not give employers "carte blanche" to agree contractual appeal rights and then to ignore them.

Finally on this point, care must be taken in seeking to derive guidance from Great Britain decisions in an area of law which has differed significantly from that in Northern Ireland since 2009.

164. The tribunal therefore determines that the dismissal was automatically unfair for non compliance with the 2003 Order. The employer did not fully provide an appeal process in accordance with that Order. As indicated earlier, it had also not followed the statutory procedure in that it had determined the conflict in evidence against the claimant before it had even issued the disciplinary charges and before it had held the disciplinary hearing.

TUPE Regulations – Automatically Unfair Dismissal

165. Under the 2006 Regulations, as amended in 2014, if an employee has been dismissed and the sole or principal reason for the dismissal was the transfer, the dismissal is automatically unfair unless it qualifies as an economic, technical organisational reason entailing changes in the workforce [Regulation 7(1)(b)]. No argument has been presented and no evidence has been put forward to substantiate a finding that this situation could possibly amount to an ETO reason.

166. The only issue in this regard therefore is whether or not the sole or principal reason for the dismissal was the transfer from the VGS to the controlled sector and whether or not such a transfer was a TUPE transfer.

The 2014 amendment which applies to all transfers after 31 January 2014 (and which therefore applies to the present case) removes the application to dismissals merely 'connected' with a transfer.

167. In relation to the latter point, there appears to be no argument that this was in fact a relevant transfer for the purposes of the TUPE Regulations. The Henke exception enshrined in the Regulations has been narrowly interpreted and it does not apply in the current circumstances. (See later)

168. The tribunal recognises that it would be comparatively rare for a situation to arise where an employee was openly dismissed on the ground of the transfer. The tribunal has to be prepared to look critically at the evidence and at the background of any dismissal. It has to be prepared to make a decision on the basis of that evidence and to draw any necessary inferences. In this instance the Board of Governors at its meeting on 12 December 2013 at which it considered the appeal decision of the LRA, discussed in particular the proposed move from voluntary to controlled status. The minutes record at paragraph 1.10 that:-

"There was some discussion on how this issue might be affected by the proposed move from voluntary to controlled status."

Dr Barr who was present during this meeting stated that he could not remember what this discussion had been about. Mrs Kerry said the transfer played no part in the first-named respondent's decision. However it is difficult to imagine what relevance the proposed move to controlled status would have had in these circumstances where the purpose of the meeting, according to the limited extract from the minutes provided, related to the LRA appeal decision. Furthermore the record in paragraph 1.10 related specifically to discussion of the effect of the proposed move to controlled status on "this issue" which can only mean the decision of the LRA.

169. Mrs Kerry was also insistent in her cross examination that she had been informed by DE that the liability in this matter would not transfer to the ELB. It is unlikely that this would be an issue prompting discussion and a decision unless it had formed part of the conclusion reached by the Board of Governors i.e. the first named respondent on 12 December 2013 not to implement the LRA decision. If it had been otherwise there would have been no reason for the matter to have been discussed, minuted and for the opinion of someone in the DE, to be sought in relation to the transfer of liability.

170. The decision taken by the first named respondent at paragraph 1.11 of the minutes to the effect that the LRA had not based its decision on the balance of probabilities was extraordinary given the clear terms of the LRA decision. The decision to move the goalposts and make the issue now one of trust and confidence rather than one of guilt in relation to disciplinary charges was also extraordinary. No logical basis for the Board of Governors decision readily presents itself.

Furthermore, the decision of the first named respondent to ignore a contractually binding appeal decision, with no offer of compensation and no attempt to buy out a clear contractual right can only be rationally explained if it is accepted that the first named respondent's decision to ignore the LRA decision was, at least partly, in the mistaken belief that the resulting liability would die with the company limited by guarantee. That would circumvent the clear intention of the ARD and of the TUPE Regulations.

171. In the absence of any convincing explanation for their decision making process, and in the absence of any voting member appearing on behalf of the first named respondent to give evidence in this matter, the tribunal is inevitably drawn to the inference that the proposed move to controlled status played a significant role in the decision to ignore the LRA decision and to maintain the dismissal on 12 December 2013.

172. However, the tribunal is not convinced that the transfer was either the sole or principal reason for the dismissal or for the maintenance of that dismissal. It clearly played a significant part in the first named respondent's decision making but it cannot be concluded that it played a principal part.

173. The dismissal is therefore not automatically unfair under the TUPE Regulations.

Employment Rights (Northern Ireland) Order 1996 – Unfair Dismissal

174. The first named respondent had also failed to conduct a proper investigation into the potential charges against the claimant.

(i) the investigation panel failed to properly consider and properly apply its remit as set out by Dr Proudfoot;

(ii) the investigation panel failed to address the various inconsistencies and improbabilities in the evidence of pupils 1, 2 and 3 and failed to critically challenge those inconsistencies and improbabilities (see above).

175. The disciplinary panel i.e. the SSC failed to properly consider the defence put forward by the claimant and failed to challenge obvious inconsistencies and improbabilities in the evidence. As outlined above it also failed inexplicably to put any weight on the detailed report from Mr Hart LLB and it failed to place any weight at all on the decision of Judge Copeland.

The first-named respondent had not carried out a reasonable investigation and did not have reasonable grounds to hold a belief in guilt in relation to the two man charges.

176. The decision of the full Board of Governors to simply ignore the appeal decision of the LRA which had been given in accordance with TNC2007/5 was also grossly unfair.

Even if the tribunal had not found that the dismissal by the first-named respondent was automatically unfair for the purposes of the 2003 Order, it would therefore conclude that the dismissal was unfair for the purposes of the 1996 Order, in any event.

The Transfer

177. The tribunal concludes that this was a relevant transfer for the purposes of the TUPE regulations. In ***Henke –v- Gemeinde Schierke [1996] IRLR701***, the ECJ ruled that the ARD did not apply to a transfer as part of a local government reorganisation. The transfer of administrative function between administrative authorities was not a relevant transfer.

That exception has been strictly construed. For example, in ***Scattolon –v- Ministero Dell',Instruzione, Dell'Universita E Della Ricera [2012] ICR740***, the ECJ emphasised that the ARD had to be given a liberal interpretation. A transfer could be a relevant transfer even where it resulted from a decision of public authorities. That particular case concerned auxiliary staff in a school. It was determined that the services they provided "do not fall within the exercise of public powers". It was also determined that the work carried out by those individuals was similar to work carried out by others for profit. Both issues also apply to teachers. The services they provide cannot properly be regarded as the exercise of public powers. Similarly there are teachers who work in private schools operated for commercial gain.

Furthermore, Mr Wolfe did not argue against there being a relevant transfer for TUPE purposes. His argument was simply that the claimant had missed the boat. He had not been employed immediately before 1 April 2014.

The Article 17 agreement also accepted that the TUPE Regulations apply to the transfer to controlled status. It was however peculiarly worded. It referred to the Department of Education as "the transferee". That may well have been correct for the purposes of the transfer of premises and assets; it cannot have been correct for the purposes of the TUPE regulations where DE has never employed teachers.

In any event a relevant transfer occurred on 1 April 2014.

Dismissal

178. It cannot rationally be argued that the claimant had in some way been dismissed for the second time on 12 December 2013. That was a meeting of the first named respondent at which the first named respondent disclosed that one of their members was a member of the Bar who had advised in this matter. It is highly unlikely that in the context of a pending move to the Education & Library Board and to controlled status and in the presence of a member of the Bar, the Board, although they did not minute the fact, somehow decided to accept the appeal, to reinstate the claimant, and then to arbitrarily dismiss the claimant again as a result of "trust and confidence" issues without having gone through any of the obvious legal procedures set out in the 2003 Order.

179. The tribunal concludes that the real situation is as set out in the minutes of the first named respondent on 12 December 2013. The first named respondent simply chose not to comply with the clear contractual obligation to accept the appeal decision of the LRA and to reinstate the claimant. The position was that the claimant's employment status remained as an employee reinstated following the LRA appeal decision and that the first named respondent simply chose to try to ignore it.

The decision of the EAT in ***Bangura –v- Southern Cross Healthcare and Four Seasons Healthcare UKEAT/04322/12*** is distinguishable. It concerned a case where an employee had been dismissed by a transferor but where the appeal had not been heard before the transfer. The employee therefore remained dismissed at the date of transfer. The present case is different. The LRA appeal has been heard and has been upheld before the date of the transfer on 1 April 2014. In the present case, the claimant was reinstated and the appeal decision was simply ignored by the first named respondent.

The EAT approved the analysis in ***Sainsbury –v- Savage [1980] IRLR109*** and stated:

> "that analysis leads to the conclusion that if an appeal is successful it will retrospectively have the effect that an employee is no longer to be treated as dismissed"

That analysis applies to the facts of the present case.

180. The tribunal also refers to the decision of the EAT in ***G45 Justice Services (UK) Ltd –v- Anstey [2006] IRLR 559***. In that case security guards were employed by a different company who lost the contract on 30 April 2005. It was taken over by the respondent. The relevant employees had been dismissed and had lodged appeals before the date of transfer. Unlike the present case, the appeals were not heard by their original employer until after the transfer. However, those appeals were, like the present case, successful. The respondent, like the present case, refused to reinstate. The EAT stated:-

> "In the present case, the contractual obligation to hear and determine the appeals lay with the transferors, notwithstanding the transfer. Having determined those appeals in favour of reinstatement, the original dismissals were expunged and the claimants were to be treated as having been employed by the transferor's right up until the date of transfer. The claimant's right to have their appeals heard arose under or in connection with their contracts of employment. Accordingly, the obligation to reinstate the claimants transferred under TUPE.

Applying those principles to the present case, the claimant was contractually entitled to an effective appeal. He exercised that right and was successful. He was reinstated. His dismissal was "expunged". The first named respondent's failure to fulfil its side of the contract matters not. The claimant was reinstated and continued to be reinstated and employed up to 1 April 2014. Despite the ingenious arguments of Mr Wolfe, the claimant was not, apparently without anyone noticing, reinstated and dismissed for a second time.

181. The argument that the claimant in some way accepted or condoned the decision of first named respondent in December 2013 and that he effectively accepted the dismissal is nonsense. The claimant and his ATL representative strongly objected to the failure to implement the LRA decision and lodged these tribunal proceedings. Short of actually forcing his way into a classroom to teach, it is difficult to understand what else the claimant could have done.

182. The claimant's employment status was reinstated by the LRA appeal decision and he remained as employee up to and through the transfer on 1 April 2014.

183. The tribunal therefore concludes that the claimant as an unfairly dismissed employee was reinstated and transferred to the second and third named respondents on 1 April 2014.

Vice President:

Date and place of hearing: 23, 24, 25 and 27 June 2014, Belfast

Date decision recorded in register and issued to parties:

CASE REF: 195/14IT

INDUSTRIAL TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS (NORTHERN IRELAND) 2005

BETWEEN

AB

Claimant

and

DC

Respondent 1(R1)

and

XY

Respondent 2 (R2)

and

ZW

Respondent 3 (R3)

SUBMISSIONS ON BEHALF OF THE CLAIMANT

Issues

Various issues arise in this case. Some of them are interlinked and it is not possible to completely separate the issues into distinct categories.

(1) Was the dismissal substantively unfair?

(2) Was the dismissal procedurally unfair?

(3) Was there a failure to comply with the requirement for an appeal in the statutory dismissal procedures and therefore was the dismissal automatically unfair for this reason?

(4) Was the school obliged to abide by the LRA decision?

(5) Even if the school was not obliged to follow the LRA decision did the failure to do so render the dismissal unfair as it was unreasonable for the school not to abide by the decision?

(6) What was the effect of the successful appeal?

(a) Did the appeal reinstate the Claimant's contract of employment?

(b) If so was he then still in employment by virtue of that reinstatement at the date of transfer? If so did his employment transfer under TUPE?

(c) If the appeal did reinstate his contract what was the effect of the school failing to abide by the decision? Was this in fact the point of dismissal? If so was the sole or principal reason for failing to abide by the LRA decision the impending transfer or a reason relating to the transfer? If so was the dismissal automatically unfair as the sole or principal reason for the dismissal was the transfer or a reason relating to the transfer? If so, then is the Claimant treated as an employee at the date of transfer and therefore transferred? What other impact does this have on the liability of R2/R3?

The Claimant notes that the issue of remedy will be addressed after the initial decision (if successful). However, for clarity the Claimant highlights that the issue of reinstatement/re-engagement does not arise only if the Claimant establishes that he is to be treated as having transferred under TUPE by virtue of the issues outlined above. The Claimant submits any finding of unfair dismissal should lead to a remedies hearing for the following reasons:

(a) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed. Therefore, if the Tribunal was minded to make an order against R1 that it treats the complainant in all respects as if he had not been dismissed that would in effect mean if he was not dismissed he was employed at the date of transfer and therefore would transfer;

(b) An order for re-engagement can be made against a successor employer and therefore even if the Claimant did not transfer under TUPE for any of the reasons suggested at 6 above, there can still be an order against R2/R3 as a successor employer for re-engagement.

The Claimant has not fully argued the points at (a) and (b) above in this submission and merely highlights them in order to show that any finding of unfair dismissal in this case will require a remedies hearing regarding re-instatement/re-engagement even if the Tribunal finds the Claimant did not transfer under TUPE for any of the reasons suggested at 6 above.

Unfair dismissal

This section of these submissions will deal with 'ordinary unfair dismissal'. Issue surrounding automatic unfair dismissal are dealt with below.

This was a dismissal for alleged misconduct. The law is well known and clear. The Respondent employer must establish[1]:

(i) a belief in the guilt of the employee of that misconduct at that time;

(ii) that the employer had in his or her mind reasonable grounds upon which to sustain that belief;

(iii) at the final stage at which the employer formed that belief on those grounds, that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

In addition the following are particularly relevant in this case:

In ***Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721***, the Court of Appeal considered a decision of an Employment Appeal Tribunal. Elias LJ stated[2]:-

> "Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In *A v B* [2003] IRLR 405 the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. In *A v B* the EAT said this:
>
> > "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

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[1] *British Homes Stores v Burchell* [1980] ICR 303 as approved by our own Court of Appeal in Dobbin v Citybus Ltd [2008] NICA 42, and in Rogan v South Eastern Health And Social Care Trust [2009] NICA 47 (13 October 2009)

[2] At paragraph 13 of the decision as reported on www.bailii.org

In *Rogan* the Lord Chief Justice stated[3]:

"It was accepted that the civil standard was the appropriate standard of proof for the disciplinary panel but the respondent placed emphasis on the passage in the opinion of Lord Nicholls in Re H (minors) [1996] AC 563 referring to the need for more cogent evidence to overcome the unlikelihood of what is alleged if a serious allegation is made. That passage has been considered again by the House of Lords in Re D [2008] UKHL 33 and the proper approach is helpfully set out in paragraphs 27 and 28 of the opinion of Lord Carswell.

"27. Richards LJ expressed the proposition neatly in *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, 497-8, para 62, where he said:

'Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

In my opinion this paragraph effectively states in concise terms the proper state of the law on this topic. I would add one small qualification, which may be no more than an explanation of what Richards LJ meant about the seriousness of the consequences. That factor is relevant to the likelihood or unlikelihood of the allegation being unfounded, as I explain below.

28. It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before

[3] At paragraph 17 of the decision as reported in www.bailii.org Rogan v South Eastern Health And Social Care Trust [2009] NICA 47 (13 October 2009)

accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established.""

The Claimant firmly submits that the investigation carried out in this case by the investigatory panel was woefully inadequate and fundamentally flawed with the consequence that any conclusions reached following such an investigation could not be considered to be reasonable. This was an allegation of an extremely serious nature made against a man with a long career, who was head of department and who was a married man with young children. The first Respondent was aware of this when carrying out the investigation. Dr Barr said in his evidence at one stage stated in evidence "we knew it was potentially a career threatening decision".

In addition the approach taken by the disciplinary staff sub-committee was also flawed and includes evidence of a one sided approach.

The Claimant firmly submits that even on the evidence available to the disciplinary staff sub-committee it cannot be the case that the disciplinary sub-committee had reasonable grounds for a belief the misconduct had occurred. Any proper assessment of the evidence before it on the balance of probabilities should have led to a decision that on balance they were not convinced the events had occurred.

These fundamental flaws at either of the first and second stages of the procedure would of themselves have been sufficient for a finding of unfair dismissal. When taken together the Tribunal can go further than simply finding unfair dismissal but can be extremely critical of the approach taken by the employer.

The Respondent had the opportunity to mitigate against the impact of these flaws when the Board of Governors took submissions from the Claimant. However, the lack of a critical analysis of what was in front of them and an unwavering trust in the

investigatory and disciplinary panels led them into error which compounded the significant failures at the earlier stages. In addition the disciplinary sub-committee was not fair or even handed in its submissions to the Board of Governors which further skewed the process against the Claimant. There is then the further conflict of the investigatory panel sitting in judgment on their own investigation when hearing the submissions as part of the Board of Governors.

The Claimant submits that the Tribunal having considered the evidence will be compelled to find in his favour. However, it is further submitted that in this particular case there evidence is so overwhelming that the Tribunal can go further and also make findings which demonstrate how entirely and significantly unfair and flawed the whole process was.

The catalogue of flaws in the process is so extensive that these are included in an appendix to this submission.

LRA decision/ TNC 2007/5

Paragraph 4.3 of TNC 2007/5 states that a teacher shall be advised of his right of appeal.[4] Paragraph 4.9 states:

> "Where the Disciplinary Authority decides to dismiss the teacher and this decision is upheld following the appeal process, the Employing Authority will issue the formal notice of dismissal terminating the contract of employment and stipulating the effective date of termination."

This clearly anticipates a successful appeal will not result in termination of the contract of employment.

Paragraph 7 and 8.1 state (*emphasis added*):

> "REPRESENTATIONS IN RELATION TO A DETERMINATION TO DISMISS

[4] Page 5 of the bundle

7.1 Schedule 2 of the Education (NI) Order 1998 provides that a Board of Governors shall afford the teacher, whom it proposes to dismiss, an opportunity of making representations either orally or in writing with respect to the proposal and have regard to any representations made. Such representations *shall not constitute an appeal. The appeal in the case of dismissal is to the Independent Appeals Committee as detailed in paragraph 9.*

8. APPEALS

8.1 Where the teacher is dissatisfied with the decision of the Disciplinary Authority he/she has the right of appeal against the disciplinary action. An appeal, setting out the grounds, must be made in writing to the appeals' body listed in Appendix 2 within 10 working days of the date of receipt of the disciplinary decision."

Therefore the policy does not have an internal appeal. The Respondent points to appendix 2 which suggests a 2 stage appeals process. This is simply a tabular summary of the content of the policy itself. Full weight should be given to the actual policy wording as outlined above.

The appeal was therefore to the LRA. Paragraph 8.5 states:

"The body considering the appeal, as set out in Appendix 2, may:-

a. Dismiss the appeal;
b. Uphold the appeal; or
c. Substitute a lesser penalty"

This empowers the LRA panel to decide the matter. It is final. There is absolutely nothing in the policy which suggests the employing authority can then have a further stage whereby they consider whether or not to act in accordance with the findings.

Counsel for R2/R3 tried to draw guidance from another policy in respect of a different group of staff. However, this was not the employer's argument. Dr Barr was clear. They did not follow the LRA decision because it used the word "Recommendations" in the last page. R1 did not bring any evidence of other policies or the background to the policies or what took place through the negotiating machinery which arrived at the policy in its current form.

Alastair Donaghy's analysis of the LRA decision when being cross examined was logical and persuasive and in keeping with any reasonable interpretation of the document[5]. He submitted that the findings of the LRA panel were that the Appeal against termination and dismissal was upheld in paragraphs 49 and 50 . This was the outcome of the process. The "recommendations" at paragraphs 52 and 53 were merely recommending how and when R1 should go about returning the Claimant to his employment.

Even if the Tribunal concludes the LRA decision is not binding R1's reasons for rejecting it are utterly flawed and would have rendered the decision unfair even in the absence of the catalogue of unfairness at every other stage in the internal process. The minute of the Board of Governors meeting where it was decided to rejection the LRA decision records that it appeared the LRA did not approach the decision based on the balance of probabilities[6]. This is quite simply nonsense. At three separate sections of the report the LRA accept that the "balance of probabilities" was the appropriate test.

R1 relies upon the recent decision of the EAT in *Kisoka v Ratnpinyotip (t/a Rydevale Day Nursery)*. That decision is clearly very much fact specific. In that case following the appeal hearing and decision, the Respondent investigated further and found further evidence. The appeal panel, however, refused to reconsider its decision. Subsequently the Respondent decided not to implement the appeal panel's decision. Singh J stated:

> "The question is whether by depriving an employee of a contractual right to an appeal an employer has thereby denied to the employee the opportunity of showing that in all the circumstances the employer's real reason for dismissing him could not reasonably be treated as sufficient"

Having found that the employer in this case was not obliged to follow the appeal decision, Singh J then considered whether the dismissal was unfair even if the

[5] See pages 105 and 105 of the small hearing bundle.
[6] Paragraph 1.11 on page 110 of the small hearing bundle.

Respondent was not bound to follow the decision or views of the appeal panel. He stated[7]:

> "There is no fixed or inflexible rule which applies. The question is essentially one of fact, as has been emphasised in the authorities which I have already cited. Furthermore, the Employment Judge was perfectly entitled to take into account the advice given in the ACAS Code of Practice from which I have already quoted. In particular, as the Code recommends at paragraph 3 Employment Tribunals will take the size and resources of an employer into account and it recognises that it may not always be practicable for all employers to take all of the steps set out in the Code."

In our case we are dealing with a teacher working in a grammar school with detailed jointly negotiated disciplinary procedures in place which apply throughout Northern Ireland which provides for an appeal mechanism to the LRA.

Singh J's decision also includes the following:

> "The second decision of this kind that Mr Watson placed reliance upon was the decision of the Court of Appeal in **Modahl v British Athletic Federation Ltd**. He relied in particular on two passages. The first is at paragraph 61 in the Judgment of Latham LJ:
>
> "It seems to me that in cases such as this where an apparently sensible appeal structure has been put in place the court is entitled to approach the matter on the basis the parties should have been taken to have agreed to accept what in the end is a fair decision. As Lord Wilberforce said [in *Calvin v Carr*] this does not mean that the fact there has been an appeal will necessarily have produced a just result. The test which is appropriate is to ask whether, having regard to the course of the proceedings, there has been a fair result. As Lord Wilberforce indicated there may be circumstances in which by reason of corruption or bias or such other deficiency the end result cannot be described as fair. The question in every case is the extent to which the deficiency alleged has produced overall unfairness."
>
> 51. That last sentence in particular in my view underlines the point that, far from supporting Mr Watson's submission, that passage suggests that everything depends on the overall fairness of the procedure taken as a whole. The other passage upon which reliance was placed by Mr Watson is at paragraph 115 in the Judgment of Mance LJ:
>
> "I would endorse the view that the present parties were implicitly agreeing to be bound by the ultimate outcome of the disciplinary process taken as a whole and therefore including the

[7] Paragraph 60 of the decision as reported on www.bailii.org

> independent appeal panel's determination ... A conclusion that process should be looked at overall matches the desirable aim of affording to bodies exercising jurisdiction over sporting activities as great a latitude as is consistent with fundamental requirements of fairness..."
>
> 52. Again, that does not seem to me to be a passage which takes Mr Watson's submissions further. First, that was a case as Mance LJ noted where the parties had implicitly agreed to be bound by the ultimate outcome of a disciplinary process, including the independent appeal panel's determination."

Therefore, it is clear Singh J considered the principle he was determining would not apply had the parties implicitly agreed to be bound by the ultimate outcome of an independent appeal process.

It is respectfully submitted that TNC 2007/5 is clear in its terms and is binding. In addition to purely interpreting the policy itself the Tribunal is greatly assisted by R1's own records of the disciplinary meeting. Mr Corbett at the start of the disciplinary meeting is minuted as having indicated that if found guilty the sub-committee may decide to issue him with a verbal warning, a written warning, a final written warning or dismiss him with or without further notice. The minute continues:

> "He added that these sanctions were subject to ....*the Claimant's* .... right of appeal under the procedures set out in the Disciplinary Procedure for Teachers"[8]

The use of the phrase "these sanctions were subject to ...right of appeal" clearly demonstrates the employer was treating itself as being bound by the appeal process and that the penalties it imposed could be changed on appeal. It was only when faced with the 'wrong 'result following the appeal that the employer suddenly decided it was no longer bound. In Mrs Kerry's cross examination she accepted in the meeting in December the Board of Governors specifically discussed the implications of ignoring the LRA, namely that if the Governors disregarded the LRA it could result in an industrial tribunal which she presumed would be for unfair dismissal although she appeared to clarify that these exact words were not used. She accepted that there was a "real risk" and that it was clear that they as a Board were at risk of a finding of unfair dismissal if they disregarded the LRA. Therefore, the Tribunal can conclude

[8] Page 605 of the main bundle paragraph 2.1

that the employer knew it should be abiding by the findings of the LRA and further knew that it was was exposing itself to a real risk of a finding of unfair dismissal if it did not.

It is also respectfully submitted that the decision of the EAT in *Kisoka* appears inconsistent with the following comment of Silber J in the EAT as approved by our own Court of Appeal in *McMaster v Antrim BC*[9]:

> "Finally, we refer to the useful review of the authorities by Silber J when giving judgment in the EAT in Ladbrooke Betting and Gaming Limited v Ally [2006 WL 1666940]. After noting Tipton and Sainsbury Silber J then referred to Roberts and went on to say at paragraph 18:
>
> > "18. Pausing at that stage, that case is, to my mind, clear authority for the proposition that – unless there was a contractual provision to a contrary effect as a result of an appeal process – the decision to dismiss is replaced by the decision which means that the employee is not to be regarded as having been dismissed.""

In the *Ladbrokes* case the EAT considered an earlier EAT decision in *London Probation Board v Kirkpatrick*[10]. In the *Kirkpatrick* case the EAT decision includes the following:

> "We have looked in detail at the procedure which was "drawn up having regard to the principles and standards contained in the ACAS Code of Practice on disciplinary practice and procedures in employment". It is to ensure that "any disciplinary action is administered fairly". An employee has "a right of appeal". A specific and detailed procedure must be followed at appeal hearings at the end of which the board "should announce the decision whether the appeal has been upheld or dismissed" and it should be confirmed in writing. In addition a protocol applies to these appeals which describes the role of the ACAS officer who is there as the custodian of best practice and may provide advice which the appeal board should note.
>
> From this it is clear that the appeal board had all the powers of the Respondent. In our judgment, prior to any disciplinary incident occurring, the Claimant had an enforceable contractual right, if subjected to disciplinary action, to appeal to the appeal board which would treat his case dispassionately, be guided by the ACAS officer as to best practice, and if the finding was that there were no grounds for his dismissal he should go back to work in every respect as if the original decision had not been made. That is what occurred in this case. It was a breach of contract for the Respondent to dismiss him on 10 June 2003 for, as the appeal board made clear, there were no grounds for doing so. The Respondent made up for that

[9] [2010] NICA 45 (9 December 2010) paragraph 13 of the www.bailii.org report
[10] UKEAT/0544/04 as reported on the EAT website.

breach by its decision to uphold his appeal and reinstate him. We accept Mr Pearman's analysis that the Claimant thereby waived the breach, or in any event accepted the reinstatement as an appropriate remedy for it. Contrary to the submission of Mr Brown, we hold that there was a contractual provision which entitled the Claimant to an independent hearing and implementation of any decision made in his favour. Conversely, it would not be a breach of contract for a decision to dismiss to be upheld following a properly constituted appeal board. It follows that a decision to reinstate the Claimant was binding as a matter of contract either by operation of the above procedure, or as a matter of direct promise made by the appeal board itself."

Did the successful appeal reinstate the Claimant's contract?

It is clear from *McMaster v Antrim Borough Council* and the authorities considered in that judgement that the effect of a successful appeal against dismissal is to reinstate the employee as if the dismissal had never taken place. The judgement of Coghlin LJ in *McMaster* contains the following:

"The fundamental purpose served by an agreed appeal disciplinary procedure is to ensure that both sides have a full and fair opportunity to put their respective cases and secure a just outcome to any dispute including putting right, where necessary, any errors or shortcomings apparent in the initial hearing. As a matter of principle, it is difficult to accept that the effective operation of an appeal could be simply prevented by an employer either refusing an employee the right to resort to such an agreed procedure or by rejecting an outcome considered to be adverse to his or her interest leaving the frustrated employee with compensation for breach of contract as his or her only remedy. While they were essentially delivered *per curiam,* we consider apposite the words of Lord Bridge who, when delivering the judgment in West Midlands Co-Operative Society Limited v Tipton [1986] AC 536 at 546 said:

"Adopting the analysis which found favour in J. Sainsbury Limited v Savage [1981] ICR 1, if the domestic appeal succeeds the employee is reinstated with retrospective effect; if it fails the summary dismissal takes effect from the original date. Thus, in so far as the original dismissal and the decision on the domestic appeal are governed by the same consideration, sc. the real reason for dismissal, there is no reason to treat the effective date of termination as a watershed which separates the one process from the other. Both the original and the appellate decision by the employer, in any case where the contract of employment provides for an appeal and the right of appeal is invoked by the employee, are necessary elements in the overall process of terminating the contract of employment."

[12] In London Probation Board v Kirkpatrick [2005] ICR 965, when delivering the judgment of the EAT, the words of Lord Bridge relating to the analysis extracted from Sainsbury were quoted with approval by Judge McMullen when he said that:

"It represents what the lay members on this tribunal consider to be absolutely standard employment relations practice since the whole point of internal appeals is to allow for bad or unfair decisions to be put right."

In the course of delivering the judgment of the Court of Appeal in Roberts v West Coast Trains [2005] ICR 254 Mummery LJ noted at paragraph 24 that the appeal decision had been taken within the terms of the relevant contract and that it was not necessary to effect an express reinstatement to the position previously held by the employee nor was it necessary to make an offer to him to enter into a new contract in order to continue the contract of employment. At paragraph 29 he referred with approval to the general principles enunciated by Lord Bridge in Tipton. Arden LJ delivered a concurring judgment in the course of which she said at paragraph 34:

"The applicant's demotion was not a dismissal and the decision of the appeal process of the employer, made pursuant to the applicant's contract with the employer, to demote the applicant, resulted in the continuation of the original contract of employment. That is the normal result of an internal appeal procedure unless the contract otherwise expressly provides: see per Lord Bridge in *West Midlands Co-Operative Society v Tipton* [1986] ICR 192, 198."

[13] Finally, we refer to the useful review of the authorities by Silber J when giving judgment in the EAT in Ladbrooke Betting and Gaming Limited v Ally [2006 WL 1666940]. After noting Tipton and Sainsbury Silber J then referred to Roberts and went on to say at paragraph 18:

"18. Pausing at that stage, that case is, to my mind, clear authority for the proposition that – unless there was a contractual provision to a contrary effect as a result of an appeal process – the decision to dismiss is replaced by the decision which means that the employee is not to be regarded as having been dismissed."

He then proceeded to deal with the argument in that case that there was a distinction in legal effect to be made between a decision that dismissal had been wrongful and a decision that, while dismissal may have been justified, an alternative sanction was appropriate and said at paragraph 23:

"23. I am unable to accept that reasoning, because in both cases, the effect of the appeal being allowed is to stop the original decision to dismiss from taking effect, but to replace it with a decision which continues the employment of the employee. I agree with the point made by Mr Sendell in his admirable written skeleton that it makes no difference at all whether the decision on the appeal is that the initial decision was wrongly made, or that – although dismissal might have been permissible – some other penalty is more appropriate. Once the decision to dismiss is overturned, the inevitable consequence is (in the absence of any contractual provisions to the contrary) that the employment continues."

[14] Applying the principles derived from the above authorities to the decision of the Industrial Tribunal in this case we have reached the conclusion that the appeal must be

> allowed. The appellant enjoyed a right of appeal to an external agency, namely the LRA, as an integral part of his contract of employment agreed with the respondent and that contract specifically provided that the decision of the Arbitration Panel appointed by the LRA would be "final and binding on both parties." The appellant exercised that right of appeal and obtained a successful outcome. The legal result is that the plaintiff's contract must be regarded as reinstated at the date of the successful appeal. In our view the refusal by the respondent to accept the contractually binding result of the appeal could arguably, in itself, amount to a repudiatory breach of the contract giving rise to potential grounds for wrongful dismissal."

It therefore seems clear from a long line of authority endorsed by our Court of Appeal that the successful appeal reinstated the Claimant's employment.

This view is further supported by the EAT decision in *G4S Justice v Anstey* [2006] UKEAT 0698_05_3003 (30 March 2006) in which Clark J considered a case where employees were dismissed for misconduct prior to a TUPE transfer and appealed to the transferor who heard the appeal post-transfer, over turned the original decision and reinstated the employee. Clark J held this had the effect of the employees being treated as if they had never been dismissed and consequently were employed, retrospectively viewed, immediately before the transfer and therefore were transferred to the transferee. Clark J accepted the following analysis[11]:

> "Having determined those appeals in favour of reinstatement, the original dismissals were expunged and the Claimants were to be treated as having been employed by GSL up until the transfer date. Therefore, the obligation on GSL to reinstate the Claimants to the Escort Contract transferred to G4S under TUPE."

<u>How is R1's refusal to follow the LRA appeal to be viewed?</u>

The Court of Appeal stated in McMaster:

> "In our view the refusal by the respondent to accept the contractually binding result of the appeal could arguably, in itself, amount to a repudiatory breach of the contract giving rise to potential grounds for wrongful dismissal"

It is not clear from the above that the refusal to accept an appeal would be a repudiatory breach of contact. This seems to have been an obiter comment. Therefore, it is respectfully submitted that the point has not been decided in the *McMaster* case.

[11] At paragraphs 27 and 28 of the www.bailii.org report

(i) If the refusal was a repudiatory breach giving rise potentially to a wrongful dismissal

It is useful to refer at this point to a summary in Harvey of wrongful dismissal[12]:

> "At common law an employee is wrongfully dismissed if his or her dismissal was in breach of the contract of employment. Normally this will mean dismissal without the notice due under that contract, but it could also cover a purported summary dismissal for cause where in fact the employee had not been guilty of gross misconduct (see para [520] below); exceptionally, there could be a wrongful dismissal if the contract placed restrictions on the reasons for which the employee could be dismissed and the employer acted in breach of those restrictions. The terminology is important here because, although the media can be trusted to treat wrongful and unfair dismissal as synonymous, they are totally different in origin and content. It is essential legally to keep them separate and realise that more often than not they will be subject to different legal principles. One well known example illustrates this. At common law, an employer can defend a wrongful dismissal claim on the basis of facts found out after dismissal which *would have* justified summary dismissal for gross misconduct, as with the undisclosed secret profits in one of the foundation cases on wrongful dismissal, *Boston Deep Sea Fishing & Ice Co Ltd v Ansell (1888) 39 CHD 339, CA*. Under statute, by contrast, in an unfair dismissal claim the tribunal must judge the fairness of the employer's decision to dismiss only on the facts known to that employer as at the date of dismissal, so that after-acquired evidence of misconduct may *not* be used to determine fairness (*W Devis & Sons Ltd v Atkins [1977] IRLR 314, [1977] ICR 662, HL*).
>
> [392.01]
>
> It is trite law that if the contract is wrongfully terminated by the employer, the employee may not claim as a liquidated sum the amount of the wages which he would have earned but for the breach of contract; for he has not been allowed to perform his side of the contract, and so has not in fact earned those wages. Rather he must in those circumstances sue for damages for wrongful dismissal (see *Marsh v National Autistic Society [1993] ICR 453, ChD*). This was reaffirmed by the Supreme Court in *Societe Generale, London Branch v Geys [2013] IRLR 122*, in spite of the fact that as a matter of principle they were upholding the 'elective' or 'acceptance' theory of termination, that an employer repudiation still has to be accepted by the employee (ie it does not 'automatically' terminate the contract)—giving the Court's judgment on this point, Lord Wilson adopted the above reasoning that there was no open-ended action for future wages because they could not be earned, thus leaving the ex-employee to pursue an action for damages for wrongful dismissal (subject to all the qualifications and limitations below)."

The Supreme Court case of *Societe Generale, London Branch v Geys* [2013] IRLR 133 is of relevance. The headnote of the IRLR report contains the following:

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[12] Division AII Contract of Employment paragraphs 392 and 393

"The first main issue before the Supreme Court was whether the bank's repudiation of the contract on 29 November terminated that contract; more generally, whether a party's repudiation of a contract of employment automatically terminated the contract ("the automatic theory") or whether their repudiation terminated the contract of employment only if and when the other party elected to accept the repudiation ("the elective theory"). It was common ground that, whichever theory was chosen, it would have applied equally to wrongful repudiations by employers (ie wrongful dismissals) and wrongful repudiations by employees (ie wrongful resignations). The second main issue was whether the bank had lawfully operated the PILON clause on, for example, 18 December 2007 with the payment into the bank account constituting notice of its operation."

The headnote further states that the Supreme Court held:

"Under common law, the general rule is that a repudiated contract is not terminated unless and until the repudiation is accepted by the innocent party. Contracts of employment cannot provide a general exemption to that rule because it would be manifestly unjust to allow a wrongdoer to determine a contract by repudiatory breach if the innocent party wished to affirm the contract for good reason. Repudiation cannot determine a contract of service or any other contract while there exists a reason and an opportunity for the innocent party to affirm the contract. One must be careful not to assume that, just because in practice an employee may have little choice but to accept a repudiation, he has in law no alternative but to do so. The requirement is for a real acceptance – a conscious intention to bring the contract to an end, or the doing of something that is inconsistent with its continuation."

"The overall effect of the automatic theory is to reward the wrongful repudiator of a contract of employment with a date of termination which he has chosen, no doubt as being, in the light of the terms of the contract, most beneficial to him and, correspondingly, most detrimental to the other, innocent, party to it. The essential difference between the two theories is that under the automatic theory the decision as to whether the contract is at an end is made beyond the control of the innocent party in all circumstances, whereas under the elective theory it is for the innocent party to judge whether it is in his interests to keep the contract alive. Manifest justice favours preferring the interests of the innocent party to those of the wrongdoer. If there exists a good reason and an opportunity for the innocent party to affirm the contract, he should be allowed to do so. Further, the automatic theory is inconsistent with prior jurisprudence in cases in which an employer wrongfully repudiated a contract of employment in circumstances in which its terms required it to have implemented a disciplinary procedure, and those involving the enforcement of non-compete covenants following wrongful repudiation."

In this case there is evidence the Claimant did not accept the repudiatory breach (if indeed that is what it was). His union wrote to Mrs Kerry on 21 March 2014[13] and stated that the Claimant must absolutely transfer to BELB with existing staff

[13] See page 119 of the small hearing bundle

members. The primary basis for this was stated to be that the Claimant's successful appeal reinstated his contract as an existing employee as per *McMaster v Antrim BC*. An alternative submission was put forward also which will be considered below.

(ii) Was the refusal to abide by the LRA in fact a termination of a contract which had been reinstated by the appeal?

In the alternative to the above the Tribunal may determine the letter of 16th December 2013[14] advising the Claimant of the Board of Governor's decision was in fact a termination of his contract (which had been reinstated by the appeal).

The letter states:

> "It was unanimously agreed to abide by the decisions made at the Board meeting of 19 September 2013 and, as a result, the decision and sanctions outlined in the letter of 30 August 2013 apply."

Therefore, this may properly be viewed as again notifying the Claimant of his dismissal and therefore terminating his reinstated contract. If the Tribunal determine this is the correct analysis then it raises the question of whether the sole or principal reason for this decision was the impending transfer.

TUPE and the reason for refusing to abide by the LRA decision

The following is only relevant if the Tribunal determine that the letter of 16 December was terminating the contract reinstated by the appeal.

Transfer of Undertakings (Protection of Employment) Regulations 2006:

> "*Dismissal of employee because of relevant transfer*
>
> 7. —(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part XI of the 1996

[11] Page 110a of the small bundle

Order (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce"

Effect of relevant transfer on contracts of employment

4. —(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) **Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1),** including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

Therefore, employees who are dismissed where the sole or principal reason for the dismissal is the transfer or a reason connected to the transfer[15] under s7(1) are

[15] The "economic, technical or organisational reason entailing changes in the workforce" exception is not relevant for our purposes.

automatically unfairly dismissed but also such an employee's contract has effect as if made originally with the transferee, i.e. the employee transfers by virtue of regulations 4(3) and 4(1).

This analysis of the regulations is confirmed in the following quote from Harvey[16]:

> "The normal principle, of course, is that the person dismissing is liable for the legal consequences of the dismissal. However, according to the decision of the House of Lords in *Litster v Forth Dry Dock and Engineering Co Ltd* [1990] 1 AC 546, [1989] 1 All ER 1134, if the dismissal is by reason of the transfer, and but for the dismissal the employee would have been employed in the undertaking or part transferred at the time of transfer, so as automatically to be transferred under the Regulations, the liability for the unfair dismissal is deemed to have transferred to the transferee. Indeed, the transferee then steps into the shoes of the transferor for all purposes, and not merely for the purposes of picking up the liability for unfair dismissal. This means that the transferee cannot escape liability by requesting that the transferor dismiss certain employees before the transfer. It also means that the rights of the employees are not defeated if the transferor is insolvent."

This is further confirmed in the judgement of Kerr J in *Willis v McLaughlin & Harvey* discussed below.

In relation to whether the dismissal is in fact by reason of the transfer or for a reason related to the transfer Harvey states[17]:

> "Whether a dismissal is by reason of the transfer is a question of fact for the tribunal to determine in the light of all the circumstances. If the employer can show that it would have occurred wholly independently of the transfer, and is therefore unrelated to the transfer, the dismissal is not automatically unfair and fairness must be considered in accordance with normal principles."

In Willis v McLaughlin & Harvey [1996] NI 427 (CA) Kerr J considered the previous version of the regulations and stated[18]:

> Mr Lavery argued that, to come within this expanded version of reg 5, an applicant must show that the *sole* reason for his dismissal was the transfer and therefore that, if the transfer had not occurred, he would have continued to be employed. The tribunal should have focused on the question whether the applicants would have been employed if the transfer had not taken place, he suggested. If it had done so it was bound to conclude that the applicants would not be employed because the business would have ceased to exist.
>
> I do not accept that the question whether reg 5 applies in these circumstances must necessarily depend on one's estimate of what is likely to have occurred had a transfer not taken place. It

[16] Division DI(16) paragraph 2209
[17] Division DI(16) paragraph 2206
[18] At 440

may well be, of course, that if one can be confident that an employee would continue to be employed but for the transfer one may readily conclude that his employment was ended because of the transfer. It appears to me, however, to be possible to decide that an employee ceased to be employed in an undertaking by reason of the transfer without being confident that he would have continued to be employed if the transfer had not taken place.

Nor do I accept that the decision in *Litster* should be construed so as to impose on an employee who was not employed at the very moment of transfer the additional obligation of proving that the transfer was the sole and exclusive reason for his dismissal. It is true, as Mr Lavery pointed out, that Lord Oliver referred (at 575) to the jurisprudence of the Court of Justice of the European Communities which had established that 'a dismissal effected before the transfer and solely because of the transfer of the business is, in effect, prohibited', but there is no warrant for concluding that he intended thereby to impose as a prerequisite for qualification under his construction of reg 5(3) the requirement that the transfer be solely responsible for the dismissal. Lord Oliver said (at 577):

> 'It follows from the construction that I attach to regulation 5(3) that where an employee is dismissed *before and by reason of* the transfer the employment is statutorily continued with the transferee by virtue of the Regulations [emphasis added] ...'

The expression 'by reason of' in this passage should not be interpreted to mean 'by sole reason of' precisely because, to do so, would be to fail to acknowledge the fundamental reasoning behind the implication of the words in reg 5 which Lord Oliver proposed. He concluded that if a person was dismissed in the circumstances described in reg 8(1) then the fact that there was a temporal gap between the dismissal and the transfer should not operate to deprive an employee of rights which would have been preserved by reg 5 if the dismissal had occurred at the moment of or after transfer. To use the words of reg 8(1) itself if 'the transfer or a reason connected with it is the reason or principal reason for his dismissal' then he is to be treated as being employed for the purposes of reg 5."

Mrs Kerry and Dr Barr stated the reason for rejecting the LRA decision was safeguarding. They also stated there was a loss of trust and confidence. However, the minute of the meeting of the Board of Governors[19] demonstrates that the Governors decided to reject the LRA and then having decided that "In addition, the Board wished to record that it had no trust and confidence in Mr McClelland's professional conduct." This was clearly an afterthought and not part of the actual decision.

The Respondent had stated through the disciplinary panel at the Disciplinary Hearing on 21st August 2013 that any sanctions imposed on the Claimant were subject to his

[19] Page 110 small hearing bundle

right of appeal under the procedure set out in the disciplinary procedure for teachers.[20] The shows a clear belief that the Appeal procedure would have teeth. In addition the letter dismissing him[21] advised him of his right to appeal to the Independent Appeals Committee. Clearly again this shows a belief that the procedure should be followed. The Board of Governors had the opportunity to consider this matter in September 2013 at the representations stage. At this point they were specifically on notice of the Claimant's intention to Appeal to the LRA[22]. However, despite being specifically on notice of this the Governors did not decide at this stage that they would not be in a position to abide by a successful appeal such was the overriding nature of their safeguarding duty. To the contrary they provided a 9 page written submission to the LRA, attended the hearing and took a full role in the process. This is not consistent with a belief that they may not have to abide by the decision or would override the decision if successful.

It is clear that at all points until 12 December 2013 the Governors actions showed a belief that the Appeal mechanism was valid and could overturn the sanctions imposed.

Therefore the Tribunal can readily conclude that something changed in the mind of the Governors. It is interesting to note that the Chief Executive of R2 was formally notified by the Department of Education by letter of 12th December 2013 of the request to transfer. The letter[23] from DENI states that "colleagues are working closely" with the school to co-ordinate and finalise a communications plan. Therefore, according to R2 in the time leading up to 12 December 2013 DENI were working closely with the school in relation to the transfer.

The minute of the Board of Governors meeting on 12 December 2013 records that it appears the LRA did not approach the case on the balance of probabilities. As stated above this is quite simply nonsense. At three separate sections of the report the LRA accept that the "balance of probabilities" was the appropriate test. This alleged reason for criticising the LRA is so illogical in light of the LRA's clear finding that the

[20] Page 605 of the bundle
[21] Page 697 and 698 of the bundle
[22] Claimant's union representative's letter at page 699 and specifically at the top of page 700
[23] At appendix 1 to Linda Magowan's witness statement

balance of probabilities was the test to be applied, that the Tribunal can reject this explanation. It seems inconceivable that the Board of Governors having read the LRA decision could conclude that the LRA did not appear to apply the balance of probabilities.

Therefore, the Tribunal is entitled and should ask why was this apparently illogical reason recorded in the minute? It is interesting to note that this reason was recorded at paragraph 1.11 immediately after the following at paragraph 1.10[24]:

> "There was some discussion on how this issue might be affected by the proposed move from voluntary to controlled status."

At this stage in the meeting the risk of an industrial tribunal had been discussed. Whether insurance would cover legal proceedings had been discussed.[25]

It is submitted that the LRA failing to approach the case on the balance of probabilities was simply a smokescreen to disguise the real influence of the transfer on the decision. This point was put to Mrs Kerry. Her evidence in cross examination included the following:

> The school had been told not to assume 2 liabilities would transfer and this was one of those liabilities. She stated further that we were told by the Department of Education not to assume and therefore it was for R1 to appear at a Tribunal. Like Dr Barr she believed the Board of Governors was the limited company. She knew after the transfer the limited company would be wound up.

It was with this knowledge or belief that the meeting on 12 December 2013 took place. It was put to Mrs Kerry that R1 therefore believed if the Claimant was not allowed back to work the liability would not transfer to BELB and it was therefore safe not to allow him to return as a company that was due to be wound up would be "left holding the baby".

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[24] Page 110 small hearing bundle.
[25] Paragraph 1.6 page 110 small bundle

This is the logical conclusion when one extrapolates Mrs Kerry's evidence.

It is firmly submitted that the Tribunal can conclude on the balance of probabilities that given the change in the Governors attitude to the LRA process the only new factor seems to have been consideration of the transfer at paragraph 1.10. This minute combined with the beliefs of Mrs Kerry and Dr Barr regarding the limited company and non-transferring liabilities and the utterly illogical smoke screen at paragraph 1.11 when taken together with Mrs Kerry's evidence, which was unsatisfactory on the "balance of probabilities" issue, are evidence and sufficient evidence for the Tribunal to conclude that the transfer was a principal reason or reasons related to the transfer (i.e. the liabilities) were principal reasons not to abide by the LRA decision. It is the only thing that makes sense when one looks at the case in the round.

Other TUPE issues

Council Directive 2001/23/EC

CHAPTER II

Safeguarding of employees' rights

Article 3

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer.

TUPE 2006

Effect of relevant transfer on contracts of employment

4. —(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

The Tribunal have helpfully indicated that they wish to hear submissions on some specific authorities. These will now be addressed.

In *Bangura v Southern Cross Healthcare Group Plc & Anor (Transfer of Undertakings : Transfer)* [2013] UKEAT 0432_12_1203 (12 March 2013) the EAT considered a case where an employee had been dismissed prior to the date of transfer. She has raised an appeal with the transferor but it was outstanding at the date of transfer and remained outstanding at the date of the Tribunal. The decision of the EAT includes the following:

29. As I have said, the lynchpin for the Appellant's submissions before me is to be found in the decision of Judge Clark in G4S. In my judgment that decision does not bear the weight which has been placed upon it. The material point of distinction is that in the present case the First Respondent had an appeal pending before it at the time of transfer but has not to date determined that appeal, still less directed the Appellant's reinstatement. In those circumstances, in my judgment, the ordinary position still applies as analysed by this Tribunal in Sainsbury v Savage and subsequently approved by higher courts. That analysis leads to the conclusion that if an appeal is successful it will retrospectively have the effect that an employee is no longer to be treated as dismissed. However, if the appeal is not successful then the dismissal takes effect on the original date. The fundamental point is that when a notice of immediate dismissal is given that dismissal takes immediate effect.

34: Regulation 7 already gives effect in a purposive way to article 3 and refers in terms to dismissal. As I have already indicated, the dismissal in this case had nothing to do with the transfer. In those circumstances, as it seems to me, Regulation 7 has no role to play for the

reasons I have already given. Furthermore, I accept the submission that Mr O'Reilly made to me as to what the underlying Directive requires; in particular he referred me to a passage in the speech of Lord Oliver of Aylmerton in **Litster** at page 637 where Lord Oliver cited an earlier decision of the European Court of Justice in case 101/87 **P.Bork International A/S v Foreningen af Arbejdslederre I Danmark** [1989] IRLR 41. At page 44 of that Judgment, the Court of Justice said:

> "The only workers who may invoke [the] Directive ... are those who have current employment relations or a contract of employment at the date of transfer. The question whether or not a contract of employment or employment relationship exists at that date must be assessed under national law subject however to the observance of the mandatory rules of the Directive concerning the protection of workers against dismissal by reason of the transfer ..."

35. The words which I have emphasised in that quotation make it clear, as indeed the House of Lords held in **Litster**, that the ordinary analysis under national law will have to be modified so as to protect a worker against dismissal by reason of the transfer. That is now given effect by Regulation 7. In the absence of such a situation however, the question whether or not a contract of employment or employment relationship exists at the relevant date must be assessed under national law. The analysis which applies under national law is the one which I have already sought to set out.

This suggests that if an employee is dismissed for a non-transfer related reason prior to dismissal and had not subsequently had a successful appeal then this employee cannot avail of TUPE in protection of his rights.

This authority combined with *McMaster v Antrim BC* and the *G4S* case all lead to the conclusion that if the LRA appeal in this case had been post-transfer the Claimant would have been an employee at the date of transfer (by virtue of his successful appeal reinstating him) and therefore would have transferred.

The *Bangura* case does not defeat the Claimant's argument that he transferred. The Claimant did have a successful appeal whereas in *Bangura* that had not occurred. The only difference between the Claimant and the employees in the *G4S* case is that the Claimant's successful appeal was pre-transfer and not post-transfer. It cannot as a matter of logic be the position that employees who have a successful appeal prior to the transfer date are at a disadvantage compared to employees who have a successful

appeal after the transfer date. This certain does not seem to be in keeping with the principal of safeguarding employees rights under the Directive.

Henke

The Tribunal also highlighted the case of *Henke*.

Mrs Henke was secretary to the mayor of the municipality of Schierke. All the tasks of the municipality of Schierke were transferred to a new local government body and the municipal administration of Schierke was dissolved. The headnote of the IRLR report states that the ECJ held[26]:

> "The reorganisation of the structure of public administration or the transfer of administrative functions between public administrative authorities does not constitute a "transfer of an undertaking" within the meaning of Directive 77/187/EEC. The concept of a "transfer of an undertaking, business or part of a business" does not apply to such a transfer."

The TUPE 2006 regulations state[27]:

> ***A relevant transfer***
>
> 3. —(1) These Regulations apply to—
>
> (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;
>
> ~~(b) (not NI).~~
>
> (2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
>
> ~~(3) (not NI)~~
>
> (4) Subject to paragraph (1), these Regulations apply to—
>
> (a) public and private undertakings engaged in economic activities whether or not they are operating for gain;
>
> (5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer.

[26] HENKE (applicant) v. GEMEINDE SCHIERKE and VERWALTUNGSGEMEINSCHAFT "BROCKEN" (respondents) - [1996] IRLR 701

[27] Annotated version as reported in Valentine's All the Law of NI

Harvey states[28]:

> "*Henke* was subsequently narrowly construed, confining its application to cases involving simply a re-organisation of public administrative structures or the transfer of administrative functions between public administrative authorities (*Mayeur v Association Promotion de L'Information Messine*: C-175/99 [2000] IRLR 783, *ECJ*, and *Collino v Telecom Italia SpA*: C-343/98, [2000] IRLR 788, *ECJ*) and it is this that is reflected in the wording of reg 3(5). Regulation 3(5) is unhappily drafted (slavishly borrowing the language of art 1(1)(c) of Directive 2001/23/EC) in that it contains no clear definition of what is sought to be excluded in terms of 'administrative re-organisations' and so far as it refers to 'administrative re-organisations', along with the transfer of administrative functions, as being out with TUPE 2006, it lacks clarity."

Therefore, it seems that the 2001 directive has since moved matters on from when *Henke* was decided.

In *Law Society of England and Wales v Secretary of State for Justice & Anor* [2010] EWHC 352 (QB) (26 February 2010) Akenhead J in the English High Court commented as follows:

> "• However, it is well established that the determination of whether there has been a transfer of an economic entity for the purposes of the TUPE Regulations does not depend upon there being some contractual, statutory or otherwise clearly documented transfer or transaction. One needs to apply what has been called a "multi-factorial" factual appraisal test whereby one considers what it is that actually in some way goes over from the old to the new operator. Useful guidance was given in the Employment Appeal Tribunal by Lindsay P in **Cheesman v R Brewer Contracts Ltd** [2001] IRLR 144 after he had reviewed a number of cases referred to by Counsel in this case such as the **Suzen** and **Sanchez Hidalgo** cases:
> "10. From those four cases we distil the following. We shall attempt, although it is not always a clear distinction, to divide considerations between those going to whether there is an undertaking and those, if there is an undertaking, going to whether it has been transferred. The paragraph numbers we give are references to the numbering in the IRLR reports of the ECJ's judgments. Thus:
> (i) As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which

[28] Division F Transfer of undertakings-Paragraph 28

pursues a specific objective - Sanchez Hidalgo paragraph 25; Allen paragraph 24 and Vidal para 6 (which, confusingly, places the reference to "an economic activity" a little differently). It has been held that the reference to "one specific works contract" is to be restricted to a contract for building works - see Argyll Training infra EAT at paras 14-19.

(ii) In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible - Vidal paragraph 27; Sanchez Hidalgo paragraph 26.

(iii) In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower - Sanchez Hidalgo paragraph 26.

(iv) An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity - Vidal paragraph 27; Sanchez Hidalgo paragraph 26.

An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it - Vidal paragraph 30; Sanchez Hidalgo paragraph 30; Allen paragraph 27."

The school clearly was an entity pre-transfer and further clearly had the objective of pursuing an economic activity, whether or not that activity was central or ancillary. It was a voluntary school outside the public sector. The Financial Statements show the school derived income from various sources in addition to DENI grants[29]. It was specifically because of the failures in the economic activity that the school had to be transferred to R2.

In our own Court of Appeal in *McGrath v NIHE*[30] the Court of Appeal did not rule out that as a matter of law a district of Direct Labour Organisation (DLO), a department of the Northern Ireland Housing Executive, could potentially be "an economic entity which was capable of transfer as an ongoing concern". It appears the matter was remitted back to the Tribunal for consideration.

In *Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca* the IRLR headnote records that it was held:

> "The takeover by a public authority of a Member State of staff employed by another public authority and entrusted with the supply to schools of auxiliary services including, in particular, tasks of maintenance and administrative assistance constitutes a transfer of an undertaking falling within Council Directive 77/187/EEC of 14 February 1977 on the approximation of the

[29] See pages 20 and 23 of the Governors Report and Financial Statements dated 31 March 2012.
[30] [1996] NI 586

laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, where that staff consists in a structured group of employees who are protected as workers by virtue of the domestic law of that Member State."

Most importantly it is not in dispute that TUPE applied.

Taking all of the above into account the Tribunal can readily find a TUPE transfer occurred.

Automatic unfair dismissal by virtue of the Statutory Dismissal Procedures

The Employment (NI) Order 2003 outlines the 3 step procedure at Schedule 1:

Step 1: statement of grounds for action and invitation to meeting

1. (1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2. (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless—

(a)the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b)the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3. (1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision.

The TNC 2007/5 policy specifically states that representations to the Board of Governors are not an appeal. Further the decision made by the Board of Governors following representations is not the final decision in the process. The LRA Appeal is the final decision in the process. Even on the Respondent's own argument (which the Claimant firmly disputes) the decision of the Board of Governors after representations was not the final decision of the employer because after the LRA appeal they had to decide whether to abide by it or not.

Therefore, TNC2007/5 is not compliant with the statutory procedures and in this case the procedures were not applied. Therefore the dismissal was automatically unfair.

Conclusions

For any one of a number of different reasons this dismissal was grossly unfair.

The Claimant must be returned to his role. There is ample evidence and legal principle outlined above to permit this to happen.

Neil Phillips
Bar Library
27 June 2014

CASE REF: 195/14IT

INDUSTRIAL TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) REGULATIONS (NORTHERN IRELAND) 2005

BETWEEN

AB

Claimant

and

DC

Respondent 1(R1)

and

XY

Respondent 2 (R2)

and

ZW

Respondent 3 (R3)

FURTHER SUBMISSIONS ON BEHALF OF THE CLAIMANT

Submissions on behalf of R2 and R3

1. The Claimant refers to the second and third Respondents' submissions. The Claimant has already addressed many of the points made in these submissions the Claimant's

original submissions. The Claimant notes that very little if any of the matters outlined in paragraphs 7 to 20 were put to the Claimant in cross examination. This is because R1 did not cross examine the Plaintiff and Counsel for R2 and R3 was not acting for R1. Yet we find these various matters put forward in submissions on behalf of R2 and R3 who had no input whatsoever into the dismissal, appeal etc. Therefore, neither R2 nor R3 are in a position to comment upon the dismissal, appeal etc. It is noted that R2 and R3 accept "It is for the first named Respondent to account for its own actions with regard to the Claimant" but yet the submissions on behalf of R2 and R3 then go onto to try and justify the actions of R1.

2. R1 had the opportunity to cross examine the Claimant and chose not to do so. R1 had the opportunity to make submissions and chose not to do so. Counsel for R2 and R3 did not "take up the baton" for R1 in his cross examination of the Claimant. Therefore, the Tribunal can disregard any matters within the submissions of R2 and R3 which should have been put to the Claimant.

3. The reference at paragraph 20 that "It may be that the Independent Appeal Committee did not appreciate that the employer no longer had trust and confidence in the claimant's professional conduct. Had it done so, it may have come to a different view." is nothing other than pure speculation. In addition even if the Independent Appeal Panel was not aware that R1 alleged it had lost trust and confidence where does responsibility for this alleged failure lie? With R1. Even if there was in fact a breach of trust and confidence, and due to the lack of witnesses called by R1 this has not been proved, any such breach of trust and confidence was premised upon such an utterly flawed, one sided and inadequate process than any conclusions reached by the Board of Governors regarding trust and confidence are completely undermined.

<u>Implications of an order for reinstatement against R1</u>

4. An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed. Therefore, if the Tribunal was minded to make an order against R1 that it treats the complainant in all respects as if he had not been dismissed that would mean he was to be treated as not dismissed immediately

before the transfer. Therefore, he would be treated as employed immediately before the transfer and therefore would transfer to the transferee.

5. It has been suggested that R1 appears to have been constituted as a body corporate as a consequence of Art 40 of the Education (NI) Order 1996. Under Art 40(1):

> "A Board of Governors constituted in pursuance of Part III of the 1986 Order on or after the appointed day shall be constituted as a body corporate."

6. It is therefore necessary to ask whether the Board of Governors was constituted in pursuance of Part III of the 1986 Order?

7. The "1986" Order is defined in the interpretation section of the Education (NI) Order 1996 as the Education and Libraries (Northern Ireland) Order 1986. The Scheme of Management of the School states at paragraph 2[1] that the scheme is prepared in pursuance of Art 9B(4)(b) of the Education and Libraries (Northern Ireland) Order 1986 providing for the membership and procedure of the Board of Governors. Art 9B(4)(b) falls within Part III of the 1986 Order. Therefore, it appears the Scheme of Management shows that the Board of Governors is constituted in pursuance of Part III of the 1986 Order.

8. Therefore, under Art 40 it appears R1 was constituted as a body corporate.

9. Under Art 40(3) on the incorporation of a Board of Governors, any property, rights or liabilities attributable to the Board of Governors immediately before incorporation shall be transferred to, and by virtue of this Article vest in, the body corporate. Obviously any liabilities incurred by the Board of Governors after incorporation will also vest in the body corporate.

10. Therefore, the Claimant's remedy against R1 is against the body corporate in the first instance. There are circumstances where the individual governors may be liable for example when acting in bad faith, however for the purposes of any reinstatement

[1] Page 4 of the Scheme of Management

order it is sufficient that this remedy would be or have been against the body corporate.

11. By virtue of Art 40(5) of the 1996 Order, section 19 of the Interpretation Act (Northern Ireland) 1954 applies to a Board of Governors incorporated by virtue of Art 40. Section 19 of the Interpretation Act (NI) 1954 provides:

> Effect of words of incorporation.
>
> (1)Where an Act passed after the commencement of this Act contains words establishing, or providing for the establishment of, a body corporate and applying this section to that body those words shall operate—
>
> (a)to vest in that body when established—
>
> (i)the power to sue in its corporate name;
>
> (ii)the power to enter into contracts in its corporate name, and to do so that, as regards third parties, the body shall be deemed to have the same power to make contracts as an individual has;
>
> (iii)the right to have a common seal and to alter or change that seal at pleasure;
>
> (iv)the right to acquire and hold …F1 any real or personal property for purposes for which the corporation is constituted and to dispose of or charge such property at pleasure;
>
> (v)the right to regulate its own procedure and business; and
>
> (vi)the right to employ such staff as may be found necessary for the performance of its functions;
>
> (b)to make that body liable to be sued in its corporate name;
>
> (c)to require that judicial notice shall be taken of the common seal of that body, and that every document purporting to be a document sealed by that body and to be attested in accordance with the statutory provisions, if any, applicable to the attestation of documents so sealed shall, unless the contrary is proved, be received in evidence and be deemed to be such a document without further proof;

(d)to vest in a majority of the members of that body the power, subject to any quorum fixed by the enactment under which it is established or by any relevant standing orders, to bind other members thereof; and

(e)to exempt from personal liability for the debts, obligations or acts of that body, such members thereof as do not contravene the provision of the Act under which the body is established.

12. Under Schedule 4 to the Education (NI) Order 1996:

"Dissolution of Board of Governors

2. (1) A Board of Governors incorporated under Article 40 is dissolved by virtue of this paragraph—

(a)if the school under its management is discontinued;"

13. The clearest interpretation of this provision is that it does not apply to this case as the school managed by R1 was not discontinued, it was transferred to the Department/R2/R3. In the alternative the provision could be interpreted as stating that it is when board of Governors' management of the school is discontinued that the Board of Governors dissolved. It is respectfully submitted that this is a more stretched and less natural interpretation of the provision.

14. However, if the Tribunal does adopt an interpretation of the above provisions which results in a finding that R1 was dissolved by virtue of the above provision Schedule 4 further provides:

Directions as to transfer of property, rights and liabilities of dissolved Board of Governors

3. (1) Where it appears to the Department that a Board of Governors is to be dissolved by virtue of paragraph 2(1)(a), the Department may give such directions as it thinks fit with respect to the winding up of the Board of Governors and in particular with respect to the transfer of any property, rights or liabilities of the Board of Governors.

(2) Before giving any directions under this paragraph in relation to the Board of Governors of a school the Department shall consult—

(a)the Board of Governors of the school,

(b)in the case of a controlled school, the board responsible for the management of the school,

(c)in the case of a voluntary school, the trustees and (where the school is a Catholic maintained school) the Council for Catholic Maintained Schools.

(3) Where directions under this paragraph provide for the transfer of any property, right or liability to any person or body, that property, right or liability shall, by virtue of this paragraph, vest in that person or body on such date as is specified in relation thereto in the directions.

15. There is no evidence that the Department gave such directions as it thought fit with respect to the winding up of the Board of Governors and in particular with respect to the transfer of any property, rights or liabilities of the Board of Governors (R1).

16. Therefore, in the absence of the liabilities of R1 vesting in another body under a direction of the Department exercising its statutory power under Schedule4, it seems the liabilities of the Board of Governors still lie with that Board of Governors (i.e.R1).

17. Therefore, the Claimant respectfully submits that if liability for actions of R1 still lies with R1 then the Tribunal is entitled to order a remedy against R1 whether that be monetary or an order that R1 treats the Claimant all respects as if he had not been dismissed (i.e. what is termed a reinstatement order).

18. The reinstatement order is not in fact an order that R1 give him his job back. It is merely an order that R1 treats the Claimant in all respects as if he had not been dismissed. Once this is recognised then it becomes clear that an order that R1 treats the Claimant as if he had not been dismissed means he must be treated as still employed immediately prior to the transfer. Therefore, he transfers.

19. Although no authority specifically on point can be found it is respectfully submitted that ample support for this argument is found in the authorities on successful appeals reinstating contracts of employment as outlined at pages 13 to 15 of the Claimant's original written submission dated 27th June 2014.

20. In the *G4S Justice v Anstey* [2006] UKEAT 0698_05_3003 (30 March 2006) an employee was dismissed prior to a TUPE transfer but post-transfer had a successful appeal with the transferor post-transfer. Clark J held this had the effect of the employees being treated as if they had never been dismissed and consequently were employed, retrospectively viewed, immediately before the transfer and therefore were transferred to the transferee. Clark J accepted the following analysis[2]:

> "Having determined those appeals in favour of reinstatement, the original dismissals were expunged and the Claimants were to be treated as having been employed by GSL up until the transfer date. Therefore, the obligation on GSL to reinstate the Claimants to the Escort Contract transferred to G4S under TUPE."

21. Therefore, this is authority for the fact that a transferee under TUPE is fixed with contracts for employees not employed immediately before the transfer, but who are retrospectively reinstated (i.e. treated as having never been dismissed) post-transfer.

22. This is therefore clear authority that if the Tribunal orders R1 to treat the Claimant in all respects as if he had never been dismissed then the Claimant will transfer to R2 and has a contract to work at the school under the current management of R3.

23. It is therefore clear that any finding of unfair dismissal in this case will require a remedies hearing on the issue of practicability, which the Tribunal are obliged to consider, under Art 150(2) of the Employment Rights (NI) Order 1996. The Tribunal have not heard any argument or evidence from R1 on the question of practicability to date, neither have the Tribunal heard any argument from the Claimant on the issue of practicability. Therefore, it is respectfully submitted that the Tribunal is not in a position to consider practicability at this time and therefore a remedies hearing will be required.

[2] At paragraphs 27 and 28 of the www.bailii.org report

Re-engagement by a successor or associated employer

24. Under Art 149 of the Employment Rights (NI) Order 1996 the Tribunal may make an order for re-engagement against the employer and also any successor employer. Art 149(1) states:

> "An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment."

25. Art 2 of the Employment Rights (NI) Order 1996 defines successor employer as follows:

> ""successor", in relation to the employer of an employee, means (subject to paragraph (4)) a person who in consequence of a change occurring (whether by virtue of a sale or other disposition or by operation of law) in the ownership of the undertaking, or of the part of the undertaking, for the purposes of which the employee was employed, has become the owner of the undertaking or part,
>
> (4) The definition of "successor" in paragraph (3) has effect (subject to the necessary modifications) in relation to a case where—
>
> > (a)the person by whom an undertaking or part of an undertaking is owned immediately before a change is one of the persons by whom (whether as partners, trustees or otherwise) it is owned immediately after the change, or
> >
> > (b)the persons by whom an undertaking or part of an undertaking is owned immediately before a change (whether as partners, trustees or otherwise) include the persons by whom, or include one or more of the persons by whom, it is owned immediately after the change,
>
> as it has effect where the previous owner and the new owner are wholly different persons."

It is respectfully submitted that sub-articles (4)(a) and (b)are not relevant for present purposes as the current owner of the undertaking is wholly different to R1.

26. Art 17 of the Education and Libraries (NI) Order 1986 deals with the transfer of voluntary schools to the controlled sector. Art 17 states:

> "17. (1) Notwithstanding anything in any instrument of government of a voluntary school, the trustees of the school may, with the consent of the Department given after consultation with the appropriate board, transfer to the Department the school (which expression in this Article includes any land, equipment or teachers' residences held or used in connection with the school by the trustees or managers of the school) upon such terms as may be agreed by the trustees, the Department and the relevant board and the provisions of Schedule 9 shall apply to any such transfer.
>
> (2) The terms on which a school is transferred to the Department under paragraph (1) may contain a provision that in specified circumstances the school should be transferred back to the original transferors or transferred to such other persons as may be specified.
>
> (3) A school transferred under paragraph (1) shall, on the date of the transfer, become a controlled school and the Department shall place it under the management of the appropriate board and may, subject to the terms on which the school was transferred to the Department, convey to that board any estate in land relating to the school and, whether or not it does so, may transfer to the board any equipment, furniture or other movable contents of the school transferred to it under paragraph (1).
>
> (4) The trustees of a school transferred under paragraph (1) shall, from the date of the transfer, be absolutely freed and discharged from all responsibility in connection with the school whether under any deed of trust or otherwise.
>
> (5) The existing staff of teachers in a school transferred under paragraph (1) shall from the date of transfer be placed as regards appointment, dismissal and remuneration on terms not less favourable than those applicable to them before the transfer and any question which may arise as to the fulfilment or observance of the provisions or requirements of this paragraph shall be referred to the Department whose decision thereon shall be final.
>
> (6) Where a school is vested in the Department, it may place the school under the management of the appropriate board but shall not do so without the consent of the managers of the school and where it does so, the Department may convey to that board any estate in land relating to the school.

(7) In this Article "the appropriate board" in relation to a school means the board for the area in which the school is situated,"

27. Therefore it seems either the Department or R2, by virtue of any transfer of the estate to the Board, may be the successor to R1. Give that R2 are the employing authority post-transfer it seems logical that R2 are the successor.

28. Despite Counsel's extensive research and also having reviewed a variety of searches carried out by the Bar Library librarians, Counsel has failed to uncover any authority on re-engagement orders against successor employers. Therefore, it is respectfully submitted that in order to aid with interpretation of the provisions it may be helpful to consider the intention of parliament when enacting the provision for re-engagement by successor employers. As outlined in the extract below the concept of re-engagement by successor employers was introduced in the Industrial Relations Act 1971.

29. In the Court of Appeal case of *Cowley v Manson Timber* [1995] ICR 367 Neill LJ stated:

"We have had the advantage of hearing the argument of Mr Kibling on behalf of Mr Cowley, who has obviously given a great deal of care and attention to this case and done a lot of research. In his carefully prepared submissions, he has drawn our attention to the history of the legislation and the history of s.68 of the 1978 Act. The statutory remedy for unfair dismissal was first introduced by the Industrial Relations Act 1971. At that stage, a complaint to an Industrial Tribunal was made under s.106 of the 1971 Act, and by s.106(4) it was provided:

'Where on a complaint under this section relating to dismissal the industrial tribunal –

(a) finds that the grounds of the complaint (as specified in paragraphs (a) to (c) of subsection (1) of this section) [and that included the nature of the dismissal] are well founded, and
(b) considers that it would be practicable, and in accordance with equity, for the complainant to be re-engaged by the employer, or to be engaged by a successor of the employer or by an associated employer,

the tribunal shall make a recommendation to that effect, stating the terms on which it considers that it would be reasonable for the complainant to be so reengaged or engaged.'

Mr Kibling points out that at that stage the statute was merely making provision for a recommendation to be made by an Industrial Tribunal. The concept of reinstatement as contrasted with re-engagement had not yet been introduced, and there was no provision in the statutory machinery that, if the recommendation for re-engagement was not given effect to, there would be any penalty imposed as a result.

10

The 1971 Act was in due course followed by the Trade Union and Labour Relations Act 1974. That Act reenacted s.106 with certain amendments and included for the first time the possibility of reinstatement. Reinstatement was introduced by a new s.106 which was substituted for the earlier section by para. 17 of the First Schedule to the 1974 Act."

30. The Industrial Relations Act 1971 arose following a White Paper in 1969[3]. However, unfortunately the White Paper is of little assistance when trying to determine the intention behind permitting re-engagement against successor employers. The relevant paragraph in the White Paper regarding introducing legislation prohibiting unfair dismissal simply states that the "exact form of procedure and of the machinery to operate it …….will be discussed in detail with the CBI TUC, nationalised industries and other interests." The full paragraph from the White Paper is as follows:

> 104. The Industrial Relations Bill will make it clear that dismissal is justified only if there is a valid reason for it connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking, establishment or service ; and that in the absence of such valid reasons it is unfair. Employees who consider themselves unfairly dismissed will have a right to complain to the present Industrial Tribunals, which will have to be extended and equipped to deal with this additional role. Compensation or re-instatement may be awarded by the Tribunals. The exact form of the procedure and of the machinery to operate it, and the extent to which voluntary procedures can be exempted, will be discussed in detail with the C.B.I., T.U.C., nationalised industries and other interests.

[3] "In Place of Strife: A Policy for Industrial Relations" Cmnd 3888

31 Counsel has been able to locate in the online version of Hansard[4], a debate in the House of Lords in 1971 regarding the Industrial Relations Bill. An amendment was proposed to the bill whereby reinstatement would also be included. Lord Windlesham, who appears to have been representing the government, stated:

> "Similar considerations apply where engagement by a successor of the employer or an associated employer is concerned. We must take into account the circumstances in which a change of ownership of the business occurs after the employee's dismissal, which brings with it changes in the organisation which preclude exactly the same job being offered back to the employee."
>
> "We must not lose sight of the fact that this provision will operate to the benefit of the employee."

32. At the time of drafting Counsel has been unable to find earlier references to successor employers in the context of this legislation in Hansard online beginning with the point the White Paper was written in 1969 up to the point of the debate referred to in paragraph 31 above. Neither has Counsel been able to locate any debate on what is meant by successor employer in any subsequent consideration of later pieces of legislation which have in turn superseded the 1971 Act and each other.

33. It does seem from the debate in the House of Lords quoted above that the House of Lords and the government were treating the provisions as protecting an employee against a situation where a change in ownership occurs in his employer after his dismissal (but obviously before the remedy is ordered by the Tribunal). Therefore, the situation the Claimant finds himself in is exactly the mischief it seems Parliament intended to address.

34. There is no reference to TUPE in the definition of successor employers. The TUPE regulations themselves provide for the circumstances in which an employee dismissed before the transfer can have a remedy against the transferee (dismissal where the sole or principal reason for dismissal is the transfer or reasons connected to the transfer). The remedy of re-engagement against successor employers under the Employment

Rights (NI) Order and previous incarnations of the legislation has continued to exist despite the advent of TUPE[5]. The clear implication is that the continued existence of this remedy

[4] http://hansard.millbanksystems.com/lords/1971/may/27/industrial-relations-bill-1#S5LV0319P0_19710527_HOL_291

[5] Regulations first introduced in 1981

and the lack of reference to TUPE in the definition of successor, strongly point to the definition of successor employers not being limited to employers against whom a Claimant has a remedy under the TUPE provisions.

35. Therefore, even if the Tribunal finds that the Claimant is not to be treated as having transferred under TUPE or does not have a remedy against R2/R3 under TUPE, the Claimant can still seek re-engagement against the successor employer under the Employment Rights (NI) Order 1996. Therefore, the Claimant against submits that a finding of unfair dismissal in this case must lead to a remedies hearing for consideration of an order for re-engagement against successor employer(s).

Question posed by the Tribunal

36. During the hearing on Friday 27th June the Tribunal posed a matter for consideration to the parties. This matter to be considered was as follows:

(a) If the Tribunal finds the Claimant was unfairly dismissed by R1; and
(b) If the Tribunal finds the Claimant was reinstated by the LRA appeal; and
(c) If the Tribunal finds the Claimant was dismissed for a second time in December 2013; and
(d) If the Tribunal finds the Claimant did not transfer under TUPE to R2 or R3; and
(e) If the Tribunal finds the Claimant has a remedy against R1; and
(f) If the Tribunal finds the appropriate remedy was reinstatement; and
(g) If the Tribunal finds R1 ceased to exist on 1 April 2013 and if therefore the primary remedy of reinstatement was thwarted by the transfer and R1 cannot implement a reinstatement order;

What is the Claimant's position taking into account TUPE, the Acquired Rights Directive, the requirement for a purposive interpretation in light of the Acquired Rights Directive? Is the position affected by the fact that the Tribunal and R2 are public bodies taking into account *Foster v British Gas?*

37. In relation to (c) above the Claimant refers to the submissions on the obiter comments in *McMaster v Antrim BC* at pages 15 to 18 of the original written submission dated 27 June 2014.

38. In relation to (d) above the Claimant refers to the submissions on dismissal for a reason relating to the transfer in the Claimant's original written submissions at pages 18 to 24.

39. In relation to (g) above the Claimant highlights paragraphs 12 and 13 above and submits that it may well be R1 has not been dissolved. Even if R1 has not been dissolved then under Schedule 4 of the Education (NI) Order 1996 where it appears a Board of Governors will be dissolved the Department may give such directions as it thinks fit with respect to the winding up of the Board of Governors. There is no evidence before the Tribunal that an actual winding up of the Board of Governors has taken place.

40. However, in order to address the specific scenario where the Tribunal makes all of the findings referred to at (a) to (g) above the Claimant says as follows:

41. The Claimant's remedy of re-engagement against a successor employer is not denied in the circumstances of the scenario outlined above. If the Tribunal decides against reinstatement the Tribunal should go on to consider re-engagement against a successor employer. The Tribunal at this point, if it determines it practicable following a remedies hearing, can then make an order for re-engagement against the successor employer as discussed above.

42. In addition at the point of 'dismissal' the Claimant had viable prospects of having a remedy against R1. At the point of instituting these proceedings in January 2014 the Claimant had viable prospects of having a remedy against R1. At the point of R1 serving its response the Claimant had viable prospects of having a remedy against R1. If the Tribunal does find that R1 ceased to exist on 1 April and also finds this

therefore means the Claimant's primary remedy of reinstatement against R1 was thwarted, then this was thwarted by the transfer.

43. The Acquired Rights Directive was replaced by **"**Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses"**.** The preamble to Council Directive 2001/23/EC includes the following:

> (3) It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.

44. If the scenario outlined above is correct then Department/R2 as public bodies entered into a transfer which had the effect of denying the Claimant his right to the remedy of reinstatement. Therefore, these public bodies acted in a manner contrary to one of the stated purposes of the directive, namely providing for the protection of employees to ensure their rights were protected. In fact the Department's actions are potentially open to even greater criticism. If R1 was dissolved by the transfer, the Department, a public body, had power under domestic legislation under Schedule 4 to the 1996 Order) to make directions regarding the liabilities of R1 which would have allowed those liabilities to vest in another body. In other words the Department had the power to preserve the Claimant's remedy by vesting the liability in another body and thus give effect to a stated purpose of the Directive (ensuring an employee's rights were safeguarded) but failed to do so.

45. In terms of the Tribunal, the Tribunal is required to give a purposive interpretation of the legislation in order to give effect to the directive. The Directive states:

> "Safeguarding of employees' rights
>
> Article 3
>
> 1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.
>
> Member States may provide that, after the date of transfer, the transferor and the transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer."

46. It therefore appears that the directive's specific wording is aimed at contracts of employment or employment relationships existing on the date of a transfer. Therefore in the scenario the Tribunal has asked the parties to address, this provision of the Directive would not seem to apply as the scenario is premised upon the Claimant having been dismissed in December.

Conclusions

47. The Claimant therefore submits that there are clearly issues surrounding the potential remedies if there is a finding of unfair dismissal which require a remedies hearing.

48. There are many interlinked legal issues in the case however, one way or another for the reasons outlined in these submissions and the original submissions dated 27th June 2014 there are ample legal and factual grounds for the Tribunal to make an order for reinstatement and or re-engagement.

Neil Phillips
Bar Library
2nd July 2014

IN THE OFFICE OF THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

BETWEEN

AB — CLAIMANT

-AND-

DC (1) — FIRST NAMED RESPONDENT

-AND-

XY — SECOND NAMED RESPONDENT

-AND-

ZW — THIRD NAMED RESPONDENT

SUBMISSIONS

ON BEHALF OF THE SECOND AND THIRD NAMED RESPONDENTS

Background

1. It appears from the evidence given by the witnesses on behalf of the first named respondent, that there were inadequacies with the investigation which was conducted into the claimant's alleged misconduct. It is claimed on behalf of the claimant that because of these inadequacies there was insufficient evidence to support the finding that he was guilty of harassment, and that arising from this, the decision to dismiss him was ultimately flawed.

2. The second and third named respondent played no part in the decision to investigate the claimant's conduct or the decision to dismiss him from employment.

3. It is clear that these respondents have necessarily become involved in this tribunal process because it is the claimant's intention to argue that they will be responsible for implementing any remedy which the tribunal may see fit to apply if it finds that there has been an unfair dismissal.

Dismissal

4. The Tribunal is familiar with the standard legislative provisions and case law governing this territory: **Article 130 of the Employment Rights Order (NI) 1996; Rogan -v- South Eastern Health and Social Care Trust [2009] NICA 47; Dobbin -v- Citybus Limited [2008] NICA 42; British Home Stores -v- Burchell [1980] ICR 303; and Iceland Frozen Foods Ltd -v- Jones [1993] ICR 17.**

5. The well known approach set out in British Home Stores is perhaps worth reciting in full:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question...entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it.

Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think that the employer at the stage at which he formed the belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case... It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the kind of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only on the basis of being 'sure' as it is now said more normally in a criminal context... The test, and the test all the way through is reasonableness, and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion."

6. Tribunals have been repeatedly cautioned that if the employer's approach can be judged as reasonable in all of the circumstances, it is impermissible for the Tribunal to substitute its own view of the appropriate course to adopt.

7. It is for the first named respondent to account for its own actions with regard to the claimant, but upon consideration of the evidence of their witnesses and the documentary material which has been produced, it is quite clear that from that employer's perspective this was an extremely difficult situation. The first respondent was responsible for managing a school of some 700 girls. The safeguarding of those pupils is expressed in the guidance material available to the school as being of the highest priority ("the welfare of the child must be the paramount consideration," per paragraph 4 of Pastoral Care in Schools Child Protection). The school was required to balance its obligations to safeguard the children and at the same time protect the rights of the claimant, its employee.

8. The first respondent was placed in an invidious position. When faced with these allegations, it had to conduct an investigation to the best of its ability and decide who to believe. There could be no middle ground.

9. Were they to believe a teacher with a long history of service and a clear disciplinary record, albeit one who had been accused by a cleaner in 2008 of making inappropriate remarks, some of which he had admitted (see page 240 of the bundle), and who had placed himself alone behind closed doors with a pupil? He was denying any suggestion of wrongdoing.

10. Or were they to believe the allegations advanced by the pupils whose accounts may not always have been entirely consistent, but who had no obvious axe to grind, and whose concerns about the inappropriateness of the claimant's interaction with them were not far removed from those of the cleaner whose allegations they could not have known about?

11. Of course it is important for an employer to conduct an appropriate investigation. It is observed that where there is a dispute over the facts, employers are obliged to conduct the investigation conscientiously and fairly, particularly where the employee's ability to work in his chosen profession might be adversely effected by the outcome: **Salford Royal NHS Foundation Trust -v- Roldan [2010] ICR 1457.**

12. However, it is also necessary to apply a modicum of commonsense and proportionality. It is submitted that the tribunal should recognise that this process was overseen by members of a Board of Governors, the majority of whom would have been volunteers, whose experience of dealing with such matters would necessarily have been limited. It would be inappropriate to apply the standards or to expect the safeguards which are to be found in the criminal justice system: **A -v- B [2003] IRLR 405.**

13. These are matters for the tribunal to consider, taking into account the difficulties faced by the first respondent in giving evidence without legal representation.

14. It is submitted that the investigation could be regarded as satisfying the requirements of reasonableness. There is always more that could in theory be done by way of investigation, other questions that could have been asked and other lines of inquiry pursued. But that is not the test. Ultimately, a view had to be taken about the credibility of the pupils and it is submitted that the fact that the first respondent accepted the word of those pupils having conducted an investigation (which went far beyond the cursory) was not unreasonable in the circumstances.

15. There may always be some element of doubt in these cases, but the test was and remains proof on the balance of probabilities. Moreover, in the context of child protection and safeguarding it is submitted that there cannot be a counsel of perfection.

Appeal

16. As has been seen, the claimant had a contractual entitlement to appeal to an Independent Appeal Committee. The language of the procedure does not state whether the decisions of this Committee are binding or advisory. It is quite clear that the appeal was upheld, although the steps which the Committee expected the employer to take in response to the successful appeal were expressed as recommendations.

17. The refusal on the part of the first named respondent to accept the recommendation of the Independent Appeal Committee does not of itself, render the dismissal unfair. A tribunal, applying Article 130 of the 1996 Order, cannot automatically regard as unreasonable a refusal on the part of an employer to accept the findings on appeal: **Kisoka -v- Ratnpinyotip UKEAT 0311/13/1112.**

18. As appears from the evidence of the first named respondent's witnesses, the allegations raised by the pupils gave rise to a significant child protection issue. The first respondent felt that the Independent Appeal Committee had not given any or adequate weight to this, and the concerns which the allegations generated in the context of the Governors responsibilities and their relationship as employer with the claimant.

19. In rejecting the decision of the Appeal Committee the Board of governors emphasised that there concern was child protection, allied to a loss of trust and confidence in the claimant:

> "[1.12] It was appreciated that this was not an easy decision to make and the issue was of trust, confidence, safeguarding and the Governor's duty of care to the pupils. The School's Child Protection Policy clearly states that a teacher is in a position of trust over a child or young adult. The Staffing Sub-Committee had spent many hours considering the matter."

20. It may be that the Independent Appeal Committee did not appreciate that the employer no longer had trust and confidence in the claimant's professional conduct. Had it done so, it may have come to a different view. It is nevertheless suggested, that the absence of trust and confidence may provide a reasonable basis for the first respondent's decision to reject the appeal finding.

Schedule 1 of the Employment (NI) Order 2003

21. Schedule 1 of the 2003 Order provides that after taking a disciplinary decision, an employer must notify an employee of his right of appeal, and if the employee requests an appeal, the employer must invite him to attend a further hearing, and must thereafter inform the employee of his final decision. A failure to comply with this step will render the dismissal automatically unfair.

22. Counsel have been asked to address whether the provisions of the first named respondent's disciplinary process, as they were applied to the claimant, satisfied the requirements of schedule 1 of the 2003 Order.

23. It does not appear that this was a point which was taken by the claimant in his pleading of his case, and so far as counsel's researches allow, the point does not appear to have been adjudicated upon in any other teachers case in Northern Ireland since the introduction of the 2003 Order.

24. The disciplinary procedures contained within TNC 2007/5 are of course in common and regular usage across schools in this jurisdiction. There has been no suggestion that employee organisations, who would have been involved in the negotiation of these procedures after the 2003 Order came into operation, have any concern about compliance with the Order. Would they have agreed to a disciplinary procedure which offends against the 2003 Order?

25. Moreover, here has been no suggestion that the LRA (which appoints the chairman of the Independent Appeals Committee) has made any adverse comment in relation to whether the procedures comply with the Order.

26. The concern which has been expressed appears to have derived from a reading of paragraph 7.1 of the procedure, which states that the process by which representations may be made to a Board of Governors in respect of a proposal to dismiss "shall not constitute an appeal." It is then stated that the appeal in the case of a dismissal is to the Independent Appeals Committee.

27. There is something of an inconsistency in the language used within the procedure in that Appendix 2 of the procedure (by contrast with paragraph 7.1) lists representations to the Board of Governors in the column headed "Appeals by Assistant Teacher." It describes this mechanism as "stage 1."

28. The 2003 Order does not prescribe the necessary ingredients of an appeal for Step 3 of the standard disciplinary procedure. It does not define what an appeal should look like. It is submitted, however, that whatever about the language used within TNC 2007/5 to describe the process, the facility for representations to the Board of Governors should be regarded as having provided a compliant appeal: the Claimant was entitled under the process to make detailed submissions to the Board of Governors in support of his view that the proposal to dismiss was wrong; he was invited to follow this up with oral submissions at a meeting held by the employer (ie the Board of Governors) which was charged with making a decision; the panel also heard from the Staffing Sub-Committee responsible for making the proposal to dismiss, and challenged its reasoning; the panel was empowered to reject the proposal to dismiss or uphold it as it saw fit.

29. In the circumstances it is unclear how it can be contended that given these characteristics of the process, the requirements of Schedule 1 were not satisfied. It is of course sensible to point out that the language of the procedure itself rejects the nomenclature of 'appeal' but this cannot be decisive if, as is submitted here, the process afforded to the Claimant was in fact an appeal by any other name. It is difficult to see any difference in character between the representations stage and the Independent Appeal Committee stage, save that one panel was internal, the other external.

30. There is an alternative argument if this primary submission is rejected. It is submitted that the appeal to the Independent Appeal Committee satisfied the requirements of Step 3 of Schedule 1. The requirements of Step 3 do not appear to require the employer itself to conduct the appeal, only that an appeal meeting is arranged. There is no reason why the employer cannot provide a right to an appeal (under the contract of employment) which is in fact heard by other persons or another body.

Effect of the Decision to Uphold the Appeal

31. There are a number of decisions which address the legal effect of a successful domestic appeal against an initial decision by the employer to dismiss an employee for misconduct.

32. In **J Sainsbury Ltd -v- Savage [1981] ICR 1**, an employee was dismissed for gross misconduct. He exercised a right of appeal. During the period pending the appeal decision his contract provided that he would be suspended without pay. It was held that if his appeal had been successful, he would have been reinstated with retrospective effect. However, in answer to the question whether his employment had continued during the period of suspension (his appeal having been dismissed) it was held that he was "to be regarded as having been deprived of the right to work and remuneration" during that period and that he was therefore dismissed from his employment, the effective date of termination of his employment being the date on which he was suspended.

33. The principle set out in Savage concerning the effect of a successful appeal against a dismissal, is now uncontroversial. **Roberts -v- West Coast Trains [2004] EWCA Civ 900** was a situation in which the employee was demoted after a contractual appeal, the original decision to dismiss having been overturned, so that (according to the court) the original contract of employment continued, it having been revived. However, after instigating his appeal, the Claimant resigned and claimed unfair dismissal, while the appeal was still pending. The Tribunal rejected his claim of unfair dismissal and reached the view that the effect of the contractual appeal was that he had not been dismissed, merely demoted (a sanction contemplated by the contract). The Court of Appeal held, "This is the normal result of an internal appeal procedure unless the contract otherwise expressly provides."

34. In **London Probation Board -v- Kirkpatrick [2005] ICR 965** it was confirmed that the consequence of a decision to reinstate the applicant as a matter of contract was that he was not to be regarded as having been dismissed (para 20). But following the decision of the appeal to reinstate him, he was dismissed. The EAT found (para 16) that there was a contractual provision which entitled C to an independent hearing and implementation of any decision made in his favour. Accordingly, by counting the period during which it took for the appeal to be adjudicated upon, it was held that he had sufficient continuity of service to bring an unfair dismissal complaint.

35. In **Ladbrooke Betting v- Ally [2006] WL 1666940,** the employee was dismissed. She appealed pursuant to contract, and was told that she would be reinstated. However, she refused to accept the decision and issued unfair dismissal proceedings. The conclusion of the EAT was that she had not been dismissed, since the effect of the appeal was to reinstate her and to revive the contract.

36. The same approach was taken by the Northern Ireland Court of Appeal in **David McMaster -v- Antrim Borough Council [2010] NICA 45.** At the heart of this case was the claimant's need to establish that a claim had been presented to the Tribunal within the there month time limit for an unfair dismissal complaint. The Court upheld the claimant's contention that since he was successful in persuading an appeal panel that the decision to dismiss him was wrong, the legal effect was that his contract would be regarded as having been reinstated.

37. Accordingly, based on these authorities the second and third named respondents accept that it can be contended on behalf of the claimant that as of the date of the decision of the Independent Appeal Committee to uphold his appeal, his employment with the first named respondent was reinstated.

38. However, matters did not end there because as has been discussed, the first named respondent did not accept this decision. It will be noted that the primary submission set out above is that in the circumstances the employer was entitled to disregard the appeal outcome.

Another view is that at its meeting on the 12 December 2013 the employer had decided to repudiate the contract. In any event, the claimant was notified of the first respondent's final position on the 16 December (page 21 small bundle).

39. It is submitted that from that date (whether the 12 December or the 16 December) it is clear that the claimant was no longer in the employment of the first named respondent. Using the language of Article 127 of the Employment Rights (NI) Order 1996, the claimant was dismissed since his employer had terminated the contract under which he had been employed. He did not attend for work, and was no longer paid. Thereafter, (on or about the 23 January 2014) in recognition of this development, the claimant commenced proceedings for unfair dismissal.

TUPE

40. Why is this analysis significant? This analysis is significant because the claimant has set out a number of legal issues (at page 47 of the small bundle) concerning the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereinafter "TUPE"), the first of which asks whether he was employed by the first named respondent immediately before the transfer, and if so, whether his contract of employment transferred to the second named respondent.

41. For TUPE to apply there has to be a contract of employment between the employee and the transferor: **Askew -v- Governing body of Clifton Middle School [1999] IRLR 708.** The claimant has persuaded the tribunal that his employer was the first named respondent (ie the old Board of Governors) whereas the transferor within the terms of the Article 17 Agreement (and the entity which claimed to be the employer of teaching staff at the school) was the company limited by guarantee.

42. Leaving this significant point to one side, it will be noted that the parties to the Article 17 Agreement (which included the second named respondent) "anticipated" that TUPE would apply to the circumstances in which the school transferred to the Department of Education. In fact for present purposes the second and third respondents can go further and are prepared to accept that the provisions of TUPE did in fact apply to that transfer (albeit that on the tribunal's findings the claimant's employer was not the transferor).

43. For the avoidance of doubt, the second and third respondent do not place reliance upon the public administration exception derived from **Henke -v- Germeinde Schierke [1996] IRLR 701**, (and subsequently narrowed in **Scattolon [2011] IRLR 1020**) since it is accepted that the facts of our case go beyond the mere reorganisation of the structure of the public administration, or the exercise of public powers.

44. However, the second and third respondents do not accept that the protections provided by TUPE apply to the circumstances of the claimant's dismissal (even if the facts are unravelled in order to place the first named respondent in the position of transferor). In essence, TUPE has no relevance to the facts of this case.

45. Regulation 4(1) of TUPE describes the effect of a relevant transfer on contracts of employment. Regulation 4(3) makes it clear that the protection afforded by Regulation 4(1) only extends to those persons "employed immediately before the transfer," or those dismissed in the circumstances described in Regulation 7(1).

46. I will address the Regulation 7 point below, because the Claimant has claimed that the transfer was a relevant factor in his dismissalr. However, for now I will concentrate on the question of whether he was an employee immediately before the transfer, within the meaning of Regulation 4(1). It will be recalled that the transfer occurred on the 1 April 2014. It is submitted that the termination of the claimant's employment occurred in advance of that date, either on the 12 December 2013 when the Board of Governors decided to reject the recommendations of

the Independent Appeal Committee, or on the 16 December 2013 when that decision was notified to the claimant.

47. In **P. Bork International A/S -v- Foreningen af Arbejdsledere i Danmark [1989] IRLR 41 (at 44)** the ECJ said:

> "the only workers who may invoke Directive 77/187 EEC are those who have current employment relations or a contract of employment at the date of the transfer. The question whether or not a contract of employment or employment relationship exists at that date must be assessed under national law, subject, however, to the observance of the mandatory rules of the Directive concerning the protection of workers against dismissal by reason of the transfer..."

48. In **Litster -v- Forth Dry Dock and Engineering Co. Ltd [1989] ICR 341**, Lord Oliver held at page 22:

> "Where, before the actual transfer takes place, the employment of an employee is terminated for a reason unconnected with the transfer, I agree that the question of whether he was employed "immediately" before the transfer cannot be sensibly be made to depend upon the degree of temporal proximity between the two events...[either] the contract of employment is subsisting at the moment of the transfer or it is not, and if it is not, then, on the pure textual construction of regulation 5, neither paragraph (1) nor paragraph (2) (which is clearly subsidiary to and complementary with paragraph (1)) can have any operation."

49. It is submitted that as a straightforward matter of fact the claimant's contract of employment cannot be regarded as being subsisting at the "moment" of (or "immediately before") transfer. Accordingly, it is submitted that regulation 4 of TUPE cannot have any operation.

Regulation 7 TUPE - Dismissal for a Transfer Related Reason

43. Regulation 7(1) TUPE provides that if an employee of the transferor or the transferee is dismissed, whether before or after the transfer, then he shall be regarded as having been (automatically) unfairly dismissed if the sole or principal reason for the dismissal is the transfer itself.

44. The claimant asserts clearly in his statement that the first named respondent dismissed him for a transfer related reason: "[69] I believe that the impending transfer to XY was the real reason DC failed to implement the actual reinstatement decision of the LRA appeal panel."

45. The evidence given on behalf of the first named respondent has been that the claimant was dismissed for reasons which were wholly unrelated to the transfer.

46. Whether a dismissal is by reason of a transfer is a question of fact for the tribunal to determine having regard to all of the circumstances, and by asking the question, 'what was the reason, what caused the employer to dismiss the claimant?' See **Smith -v- Trustees of Brooklands UKEAT/0128/11; and Addison -v- Community Integrated Care (unreported).**

47. In support of his claim that the impending transfer was the real reason for the first respondent's refusal to accept the appeal outcome, the claimant relies upon the fact that the minutes for the Board of Governors meeting of the 12 December 2013 record that there was some discussion about how the issue (ie. the decision to dismiss the Claimant) might be affected by the proposed transfer of the school into the controlled sector. Having heard the explanation for this note, he still maintained his position albeit not so boldly. It is submitted that the Claimant's assertion does not have any evidential basis and is in any event illogical.

48. Firstly, the lack of evidence. Both of the witnesses who were cross examined on the point (Dr. Barr and Mrs. Keery) made it clear that the decision to refuse to implement the reinstatement

decision of the LRA bore no relationship with the impending transfer. They explained that the only reason(s) for the decision was the Governors concern for safeguarding, allied to the fact that they had lost trust and confidence in the Claimant (paragraphs 1.12 and 1.14 of the minutes at page 110 small bundle). There was no contrary evidence, and certainly no basis for drawing any inference that these witnesses were not being truthful on this question.

49. Secondly, the assertion is illogical. As the claimant began to accept when cross examined, if you ask the question why the claimant was dismissed, the answer which emerges has nothing whatever to do with the transfer. Rather, as he appeared to acknowledge, there would have been no question of him being dismissed but for the fact that allegations had been raised against him, and the view which the Governors took of those allegations.

50. It was submitted that these were the sole/principal reasons for the dismissal, and cannot constitute a reason connected to the transfer. In other words, the Board of Governors did not sit down and say we must dismiss this man because of the transfer.

51. It was suggested to Mrs. Keery that the thought processes of the Governors involved a consideration that they shouldn't let the claimant return to work so that any claim that he might have would be worthless as it would end up in the hands of the company, which was going to be wound up. It is respectfully suggested that this is simply a contrived argument and is in actual fact meaningless in this context. Even if it was the Governors belief that any claim which might be brought would come against the company, that is not a reason which would contravene Regulation 7.

Dismissal for a Reason Which is Unrelated to the Transfer

52. it is clear that the transferee inherits all the accrued rights and liabilities connected with the contract of employment of a transferred employee. However, the new employer does not inherit the liabilities associated with the contract unless that person was employed by the transferor immediately before the transfer, or was dismissed for a reason related to the transfer.

53. If a dismissal, as was the case here, is unrelated to the transfer, regulation 4(1) TUPE does not operate and liability for that dismissal will remain with the employer/transferor, and would not skip to the transferee: **Secretary of State for Employment -v- Spence [1986] ICR 651**.

54. **In Bangura -v- Southern Cross Healthcare and Four Seasons UKEAT/0432/12**, the employee had been dismissed summarily on grounds of misconduct and lodged an appeal. A transfer took place before her appeal had been dealt with. It was held that her employment did not transfer to the transferee because she was not an employee of the transferor immediately before the transfer (having been dismissed), and the transferee did not inherit the liability of conducting the appeal.

55. The EAT noted the findings of the Employment Tribunal (page 2), including its view that "any liability in respect of any employees who were dismissed before the transfer but for other reasons does not transfer to the transferee."

56. It is submitted that the position in Bangura is the same as in the instant case. Liability for the Claimant's dismissal (if it is found to be unfair) must rest with the first named respondent. The position might arguably be different (subject to the transferor point) if the claimant had been in employment immediately before the transfer, but for the reasons discussed above this was not the case.

Summary

57. The claimant contends that if he has been unfairly dismissed that he should be entitled to move to a remedy hearing at which the question of reinstatement should be explored. Article 148 of the Employment Rights (NI) Order 1996 directs the order for reinstatement to "the employer."

58. Since the first named respondent is no longer his employer, then presumably the claimant will seek to contend that the order for reinstatement should be directed to the second and third named respondents. The basis for this contention is not immediately clear, since they have never been the claimant's employer.

59. In the legal issues document (at page 47 small bundle) it appears that question 3) is focussed on what effect an order for reinstatement would have in circumstances where the claimant was to be regarded as having been reinstated by the decision of the Independent Appeal Committee.

60. It is submitted that on a proper analysis the claimant was dismissed by the first named respondent. If he was reinstated by dint of the appeal, then this was for a very short period of time, and that his contract didn't transfer to the second or third respondents. If this is correct, and if the termination of his contract was unrelated to the transfer, then the claimant must look to the first respondent for his remedy.

61. Whether or not he has an effective remedy against the first respondent is unclear but it is submitted that is nothing to the point.

MARTIN WOLFE
BAR LIBRARY
24 JUNE 2014

IN THE OFFICE OF THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

BETWEEN

AB

CLAIMANT

-AND-

DC (1)

FIRST NAMED RESPONDENT

-AND-

XY

SECOND NAMED RESPONDENT

-AND-

ZW

THIRD NAMED RESPONDENT

SUPPLEMENTARY SUBMISSIONS

ON BEHALF OF THE SECOND AND THIRD NAMED RESPONDENTS

Correspondence

1. By correspondence dated 2 July 2014, directed to the ELB solicitor, the solicitor acting for the Claimant raised issues concerning paragraphs 9 and 10 of the submissions lodged by the Second and Third Named Respondents' on the 24 June.

2. It will be helpful to set out once again the submissions contained in those paragraphs, and to set them in the context of the paragraph which preceded them:

> *"(8). The first respondent was placed in an invidious position. When faced with these allegations, it had to conduct an investigation to the best of its ability and decide who to believe. There could be no middle ground.*
>
> *(9) Were they to believe a teacher with a long history of service and a clear disciplinary record, albeit one who had been accused by a cleaner in 2008 of making inappropriate remarks, some of which he had admitted (see page 240 of the bundle), and who had placed himself alone behind closed doors with a pupil? He was denying any suggestion of wrongdoing.*
>
> *(10) Or were they to believe the allegations advanced by the pupils whose accounts may not always have been entirely consistent, but who had no obvious axe to grind, and whose concerns about the inappropriateness of the claimant's interaction with them were not far removed from those of the cleaner whose allegations they could not have known about?'*

3. The first issue raised by the Claimant's solicitor concerns paragraph 10. She correctly makes the point that the proposition that the pupils concerned could not have known about the allegations raised by the cleaner in 2008, was not put to the Claimant in cross-examination.

4. It is accepted on behalf of the Second and Third Named Respondents' that a more appropriate and fairer way to have addressed this point would have been to say that there is nothing on the papers before this Tribunal, including the documents generated by the disciplinary process and the appeal to the Independent Appeals Commission, or in the witness statements, to suggest that the pupils knew about the cleaner's allegations (or that the Claimant believed that they did).

5. In the submission made on behalf of the Claimant to the Independent Appeal Committee, the following point was made in respect of the cleaner's allegations:

> "We remain extremely concerned at the way in which 'the cleaner case' was brought up. The matter should not have been linked to the false allegations against Andrew - nor should there have been an attempt by the panel to try and suggest that there was a 'pattern of behaviour'. We totally rebut this wholly inappropriate line of questioning during the process. We are clear that the incident was dealt with appropriately at the time through the disciplinary policy. It is clear that no disciplinary case was made, and no disciplinary penalty imposed. Andrew confirmed at the investigation stage that all advice given to him by the school at the time was followed. It was therefore disingenuous of the panel to try and suggest that there was a pattern of behaviour or a link between an incident that was concluded and false allegations made against him." (page 77, small Tribunal bundle)

6. If the Claimant was concerned or suspicious that the pupils had become aware of the cleaner's allegations (or indeed if his concern was that they had been influenced by her allegations) then this was a point which he no doubt could and should have made during the disciplinary process. He did not do so.

7. Indeed before the Tribunal itself, Dr. Barr introduced (at the start of his evidence) the allegations which the cleaner had raised. The Claimant's representatives choose not to cross-examine Dr. Barr about the relevance of that evidence, the part played by the cleaner's allegations in the disciplinary process, or the propriety of examining the cleaner's allegations.

8. With regard to paragraph 9 of the Second and Third Named Respondents' submissions, the Claimant's solicitor has raised a concern about the proposition that "the Claimant had placed himself alone behind closed doors with a pupil." She is again correct to make the point that this proposition was not put to him in cross examination so that he could comment upon it.

9. The Second and Third Named Respondents' do not resile from the content of paragraph 9. However, a number of additional points might be made in order to be entirely fair to the Claimant.

10. Firstly, it will be noted that the full text of paragraph 9 includes the plain acceptance of the fact that the Claimant denied any wrongdoing.

11. Secondly, the Second and Third Named Respondents' accept that the Claimant has always sought to place the "closed door" issue in what he would say is its proper context: see for example at page 490 of the bundle.

12. The Claimant has (through his counsel) made the point on several occasions that even though the door was closed, the number of people who were in the vicinity on the day of the alleged incident, made it unlikely (of itself) that he would have engaged in inappropriate behaviour.

Scenario Raised by the Tribunal

13. At the brief hearing which took place on the 27 June the Tribunal posed the following scenario and invited the comments of the parties:

> "If the Industrial Tribunal finds that the Claimant was unfairly dismissed; and if it finds that he was reinstated by the effect of the Labour Relations Agency's decision; and if it finds that the Claimant was then dismissed for a second time by reason of the Board of Governor's decision taken at their meeting on the 12 December 2013; and if it then decides that the Claimant didn't transfer to the Second and Third Named Respondents' on the 1 April 2014 (because he wasn't employed immediately before the transfer); and if it then decides in the context of a remedy hearing involving (only) the First Named Respondent, that the most appropriate remedy would have been reinstatement -
>
> what effect would taking a purposive (teleological) approach to the interpretation of domestic law (in the context of the requirements of the Acquired Rights Directive 2001/23/EC) have on the remedy which could be granted to the Claimant?

14. The Second and Third Respondents' submit that the proper answer to the above scenario is that there is no incompatibility between the TUPE Regulations 2006 and the requirements of the Acquired Rights Directive within the terms of the stated scenario and the facts of this case, and that therefore, an order for reinstatement (within the terms of Article 148 of the Employment Rights Order) cannot operate so as to have any effect against them in this context.

15. It is submitted that the decision in Bangura -v- Southern Cross Healthcare and another is instructive.

16. This was an unfair dismissal case. There was a debate about the appropriate respondent. The employee had been dismissed and had lodged an appeal with her employer before the date on which a transfer of the care home where she worked took place. Her employment did not transfer. The EAT emphasised that when a notice of immediate dismissal is given, that dismissal takes immediate effect (para 29). Accordingly, the Employment Tribunal held that she was not an employee immediately before the transfer, and that therefore an application to add the transferee as a respondent to her complaint would be refused. This approach was upheld by the EAT.

17. Plainly, the employee (Bangura) had issued unfair dismissal proceedings because she was keen to have her job back; she wished to be reinstated. Since the care home where she had worked was now in the hands of the transferee, it made sense (to her) to seek to make the transferee a respondent to her complaint. She sought to arrive at that conclusion by arguing that her employment status was preserved because she had an appeal pending (see paragraphs 16-17 in particular). However, the EAT rejected her argument:

> [32] ....in the present case, in my view, the obligation to hear and determine any appeal rested with the [transferor]. If there has been or [if] the [employee] considers that there is any breach of that obligation that, as it seems to me, is a matter between the [employee] and the [transferor]. It does not have the effect of bringing into play the TUPE Regulations and somehow deeming the [transferee] to have become the [employee's] employer, still less, as it seems to me, does it impose an obligation on the [transferee] to hear, conduct and determine any such appeal...."

18. It can be seen that the EAT reached its conclusions after having taken a purposive approach to the application of Article 3 of the Acquired Rights Directive: paragraphs 33-36.

19. Presumably, if having applied its mind to the requirement to adopt a purposive approach, the EAT had thought that upon a finding of unfair dismissal it could be argued that the remedy of reinstatement could be applied against the transferee, it would have said so in clear terms and it would necessarily have joined the transferee to the proceedings. However, the EAT was clear that TUPE had no application.

20. The principles visited and endorsed in Bangura are equally applicable in the instant case:

- The Claimant was dismissed with immediate effect following the decision of the Board of Governors on the 12 December 2013. He was not granted an appeal and he didn't prosecute an appeal
- The Claimant was not employed immediately before the transfer which took place on the 1 April 2014
- The Claimant was not dismissed for a transfer related reason
- The only workers who may invoke the Directive are those who have current employment relations or a contact of employment (assessed by reference to national law) at the date of transfer, or who would have been employed had they not been dismissed for a transfer related reason (see P. Bork's case cited in Bangura and referred to in our earlier submissions)
- Unless the Claimant can bring himself within those two scenarios, the Acquired Rights Directive / TUPE Regulations cannot assist him

21. The plain language of the Acquired Rights Directive does not extend its protection to workers who have been dismissed in advance of a transfer for reasons which are unrelated to the transfer. If this analysis is correct, it would be wrong in principle and unnecessary to strain or stretch the interpretation of domestic law in order to afford the Claimant the remedy of reinstatement against the Second and Third Named Respondents'.

22. It would appear that the reality is that an order for reinstatement would be ineffective if it was to be made against the First Named Respondent, but plainly, that does not provide a lawful basis for looking to the Second and Third Respondent's for that particular remedy. As was stated in Bangura, (at para 7) the fact (if it be a fact) that the First Named Respondent's financial position (or indeed current status) might deprive the Claimant of reinstatement, does not affect the legal position.

23. The decision in Group 4S -v- Ansty (2006) can be distinguished. The employee's appeal against dismissal was successful with the effect that by operation of has contract of employment he was to be regarded as having been in employment as at the date of transfer. That was not the case in Bangura and is not the case here.

24. Even if the Tribunal takes the view that an order for reinstatement would have been the appropriate remedy on the basis that the Claimant should not have been dismissed by the First Named Respondent on the 12 December, there is no warrant for extending the reach of an order for reinstatement to the Second and Third Respondents'.

Repudiation

25. From page 16 of the Claimant's original submissions, there is a discussion about whether the First Respondent's refusal to abide by the decision of the Independent Appeal Committee amounted to a repudiatory breach, and if so, whether the Claimant should be regarded as having accepted that breach. The issue is introduced in the context of the common law concept of 'wrongful dismissal'. Ultimately, at page 18 of the submissions, the analysis proceeds to the alternative consideration of whether the refusal to abide by the Appeal Committee's decision should be regarded as a termination of a contract which had been reinstated by the appeal.

26. It is respectfully submitted that the introduction (in the Claimant's submissions) of the analysis compiled by Harvey in relation to the implications of the decision in Societe Generale London Branch -v- Geys [2013] IRLR 122, is not particularly helpful nor relevant in the context of this unfair dismissal complaint.

27. The following additional commentary from Harvey (extracted from Volume 1, Division DI, para 209) is useful. Referring to the decision of the Supreme Court in *Society Generale,* Harvey reminds us:

> *"However, the key point here is that that was a common law claim for damages for breach of contract. It therefore remains highly arguable that, whatever might be the position at common law, the concept of dismissal under the ERA 1996 remains purely statutory and is premised on the assumption that the automatic termination theory applies so that for*

statutory purposes at least, a dismissal by the employer constitutes a termination by him whether lawful or wrongful..."

28. Accordingly, in the context of this (statutory) unfair dismissal complaint the Claimant cannot cling to the common law 'elective' approach in order to base the argument that he has refused to accept the termination of his contract of employment which was expressed (for the second time) in the First Named Respondent's decision taken at their meeting on the 12 December 2013.

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