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EMPLOYMENT TRIBUNALS

Claimant: **Mrs Christabel Palmer**

Respondent: **Our Lady of Grace Academy Trust**

Heard at: **East London Hearing Centre**

On: **19 and 20 April 2018**

Before: **Employment Judge Tobin**

Representation

Claimant: Mr P Palmer (husband)
Respondent: Mr K Allen (counsel)

RESERVED JUDGMENT

1. **The claimant was unfairly dismissed.**

2. **Any compensation awarded is reduced by as *Polkey* reduction of 50% of the claimant's loss of earnings, such losses to be awarded for a period of up to one year.**

REASONS

The case

3. The case was summarised by Employment Judge Ferguson in her Record of Preliminary Hearing of 15 December 2017 (promulgated to the parties on 3 January 2018). The issues identified by EJ Ferguson were as follows:

1. Has the respondent shown that the reason for the dismissal was a potentially fair reason under s98 Employment Rights Act 1996?

2. If so, did the respondent act reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant?

3. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? See: *Polkey v A E Dayton Services Ltd [1987] UKHL 8; paragraph 54* or *Software 2000 Ltd v Andrews [2007] ICR 825*.

The law

4. The claimant contended that she was unfairly dismissed, in contravention of section 94 Employment Rights Act 1996 ("ERA").

5. Section 98 ERA sets out how an Employment Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal. The employer must satisfy the Employment Tribunal that this reason was one of the potentially fair reasons set out in s98(1) & s98(2) ERA 1996. Finally, the employment tribunal must assess whether the employer handled the dismissal fairly in treating that reason as a sufficient reason for dismissal as under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of 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.

6. The claimant was dismissed because she would not agree to accept a new contract for a Teaching Assistant pursuant to the single status harmonisation process which was applied across the London Borough of Newham. The respondent's proposal to move the claimant entailed a reduction in her salary of up to £2,956 (gross) with a one-off compensation payment of £3,980. The claimant rejected the respondent's proposal and was dismissed as a result. She was paid a "redundancy payment". The respondent contends that the claimant was dismissed for a compelling business reason which amounted to "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" (pursuant to s98(1)(b) ERA 1996). The respondent contended that, in the alternative, the claimant had been dismissed by reason of redundancy. This was not a redundancy dismissal as set out below and this determination will not set out the law in respect of redundancy dismissals so as to avoid any possible confusion.

7. Some other substantial reason (or SOSR) is often invoked where an employer is trying to reorganise their business and/or change the terms and conditions of employment in some way. The respondent has specifically pleaded that the claimant's dismissal was necessitated by her refusal to accept a variation to her contract to bring her contractual terms in line with other employees undertaking work of the same kind as the claimant.

8. Employment Tribunals have long recognised the rights of employers to dismiss employees who refuse to go along with business and contractual changes. As Lord Denning MR put it in *Lesney Products and Co Ltd v Nolan and others 1977 IRLR 77 CA* "it is important that nothing should be done to impair the

ability of employers to reorganise their workforce and their terms and conditions of work so as to improve efficiency". Where an employee is dismissed for refusing to agree to a change in working conditions that the employer is entitled to impose under the contract, the dismissal may be for misconduct. However, the dismissal of an employee who refused to accept a business change, without a contractual compulsion to do so, is considered under the label of SOSR. It is the latter case that we are dealing with in this instance.

9. The employer does not have to show that a reorganisation or rearrangement of working patterns or the change of contractual terms were essential. In *Hollister v National Farmers Union 1979 ICR 542* the Court of Appeal held that a "sound, good business reason" was sufficient to establish a SOSR for dismissing the employee who refused to accept a change in his terms and conditions of employment. This reason is not one for the Employment Tribunal to determine whether or not was sound, but one "which management thinks *on reasonable grounds* is sound" [my emphasis]: see *Scott & Co v Richardson EAT 0074/04*. Therefore, it is not for this Tribunal to make its own assessment of the advantages of the employer's decision to change employees' terms of employment. In fact, the employer need only show that there were "clear advantages" in introducing a particular change to pass the low hurdle of showing a SOSR for dismissal. The employer does not need to show any particular "quantum of improvement" achieved: see *Kerry Foods Ltd v Lynch 2005 IRLR 680 EAT*.

10. Nevertheless, it is not good enough for employers to simply assert that there were "good business reasons" for contractual changes which involved a dismissal. The Tribunal must be satisfied that changes in terms and conditions were not imposed for arbitrary reasons: see *Catamaran Cruisers Ltd v Williams & Others 1994 IRLR 386 EAT.*

11. The position under contract law differs from that pertaining to unfair dismissal. The fact that an employee is contractually entitled to resist the proposed change does not mean that his dismissal will be unfair: see *Bowater Containers Limited v McCormack 1980 IRLR 50 EAT*. As a basic principle of contract law, variations to a contract of employment must be agreed by both parties in order to take effect. In the absence of an agreed variation the employer can only lawfully bring the contract to an end by giving the employee her minimum notice prescribed either by the contract or by s86 ERA 1996 (the statutory notice period), whichever is the longer of the two. An employer pursuing this course will invariably terminate the employee's contract of employment on notice with an offer to re-engage immediately on the new contractual terms. This is the usual process that employers follow to address both the contractual obligation and the statutory requirement for fairness contained in s98(4) ERA. So, an employer can fairly dismiss an employee for refusing to accept detrimental changes to her terms and conditions where there is a sound business reason to do so. *Catamaran Cruisers* confirmed "sound business reasons" are not restricted to situations where the survival of the business is at stake.

12. As stated above, under s98(4) ERA 1996, given the aforementioned caveats, the tribunal must also consider the reasonableness of the changes proposed and the dismissal. This involves considering whether, in all the circumstances, including the employer's size and administrative resources, the employer acted reasonably in treating the business reason as a sufficient reason to dismiss. The Tribunal is not entitled to substitute its own view of whether or not the employer acted reasonably in the circumstances. The correct question to ask is whether the decision to dismiss for SOSR fell within the range of reasonable responses that a reasonable employer might adopt: see *William Cook Sheffield Ltd v Bramhall & Others EAT 0899/03*. If there is a sound business reason for a reorganisation, the reasonableness of the employer's conduct must be judged in that context: *John of God (Care Services) Ltd v Brooks & Others 1992 IRLR 546 EAT.*

13. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

Evidence

14. The claimant and the respondent had exchanged witness statements prior to commencing the hearing. I (i.e. the Tribunal) heard evidence from the claimant. I also heard oral evidence from the respondent's witnesses: Mr James Allen (Headteacher of St Joachim's Catholic Primary School), Ms Jane Howard (Schools' HR Adviser for Newham Partnership Working) and Mr Mick Coleman (the Chair of Governors).

15. I also considered two large lever files containing documents which ran to 813 pages. Two large bundles of documents were excessive in the circumstances of this case and I advised the parties at the commencement of the hearing that it was important that they bring to my attention any document that they considered relevant as I would not necessarily read any document that I had not been referred to.

The facts

16. I (i.e. the Tribunal) make the following determination of facts. I did not determine all of the facts that were in dispute in this case; I merely determined those facts that I regarded as central to determining the issues of this case. Where I have determined facts that appear to be in dispute and where this is not obvious or where this requires then I have set out the reason for this determination.

17. The claimant originally commenced work for the London Borough of Newham as a Nursery Nurse on 4 November 1997. This is the date from which the claimant's continuity of employment accrued, which was accepted by the respondent in its Response.

18. The claimant moved to St Joachim's Catholic Primary School from 3 September 2001. She signed a contract of employment which identified the

"Nature of [her] Employment" as a Nursery Nurse. No further elaboration was provided. The claimant was not issued with a job description and the contract of employment made no reference to a job description. The claimant was employed for 32½ hours per week for 52 weeks per annum. The contract also provided for the claimant to keep her SEN Allowance in order for the claimant to work with any future pupils with special needs. The contract specifically identified that the claimant's terms and conditions of employment were in accordance with the National Joint Counsel for Local Government Services (The Green Book).

19. St Joachim's was formally a voluntary aided school maintained by the local education authority, which then converted to an academy and joined the respondent's multi-Academy Trust on 1 April 2015.

20. In or around March 2007 the local authority and the recognised trade unions came to an agreement on "single status". This harmonised terms and conditions of employment across the London Borough of Newham and was aimed at addressing potential pay inequality and settling historic pay discrimination claims and potential equal pay discrimination claims. The London Borough of Newham's agreement led to harmonisation across all manual and support staff, which included the claimant's role. This led to the implement of the Newham Agreement as part of the National Agreement on Pay and Conditions (i.e. the Green Book).

21. The Newham Partnership Working (NPW) provided HR support to the respondent's school. NPW had extensive experience in implementing the single status agreement as they had been engaged in rolling out the job evaluation and grading of support staff from 2007. Indeed, NPW had evaluated the Teaching Assistant's role as far back as May 2007.

22. From September 2007 the claimant had stopped working in the nursery at St Joachim's School. This was because many functions fulfilled by the Nursery Nurse – as set out in the job description subsequently produced – were undertaken by a senior school teacher who undertook the role as Nursery Teacher. The Nursery Teacher's role included: nursery supervision, planning activities, training nursery nurse students, and liaising with other agencies. Mr Allen, said in evidence, that the claimant was moved from the nursery because of a personality clash. The claimant disputed this and said that she moved because of operational requirements. I did not need to resolve this dispute; however, I find the claimant's response more credible in view of the introduction of a Nursery Teacher.

23. Although the claimant continued to work in the nursery on occasion (i.e. to cover staff shortages and other absences), I accept Mr Allen's evidence that the claimant worked with infants and primary school children at key stage 1 level (year 1 and year 2) as this was identified in various organisational charts in the school handbook for the years following September 2007.

24. The claimant began intervention work with individuals and small groups of pupils on a more structured basis from September 2012. This entailed the claimant working with children for whom the school had identified required

educational support, for example, extra reading or additional teaching support. The school did not have any children with special educational needs as identified in a statutory statement, or latterly, an Education, Health and Care Plan so the claimant was not trained in specialist speech and language or other therapy (which is generally provided by more specialist Teaching Assistants).

25. During September 2013 NPW commenced a job evaluation scheme (JES) across maintained schools in Newham as part of the second phase of the single status harmonisation process. Chris French (Head of Schools HR – NPW) wrote to all Nursery Nurses in Newham, stating that the final phase of the single status harmonisation process needed to be carried out and that a new agreed JES was to be applied to staff who had not had their posts evaluated since December 2006. Ms French stated:

> Over the next few weeks, you will shortly be given a generic job description for your role by your Head teacher. The Head teacher (or their nominee) will arrange to meet with you to go through your job description and consult with you as to whether it accurately reflects your role since 1st April 2010.
>
> We will also harmonise your conditions service with the rest of the support staff. This means that you would move to Scale 4 (points 18 to 21) with pro rata salary, as for all other term time employees. As you are aware, the current national grade is points 7-15, working 32.5 hours per week, term time, but you are paid as a full-time employee.

26. As part of the JES, Mr Allen met with the claimant to review her role in November 2014. During their meeting, Mr Allen and the claimant reviewed the job descriptions for a Nursery Nurse and a Teaching Assistant. They agreed a job description to reflect the actual role that she was carrying out in her day-to-day activities. The documents were then sent to NPW to assess the claimant's grade, pursuant to the requirements set out in the harmonisation process and the Green Book implementation. Although the claimant was the only Nursery Nurse at the school, this was part of the same process that Mr Allen had followed in respect of other categories of support staff at the school.

27. After some unaccounted delay, in March 2015, NPW reviewed the claimant's job descriptions and determined that she should be re-graded as a Teaching Assistant as this reflected the work that the claimant had undertaken for some considerable time. In December 2015, Ms Howard, produced figures identifying how the proposed changes would affect the claimant.

- The claimant was paid on a Nursery Nurse grade of Scale 3, point 17 for 52 weeks per annum and 32.5 hours per week. Taken account of her nursery nurse allowance a total salary was £20,359 per annum.

- The Teaching Assistant contract would place the claimant at Scale 3, point 20 for 46.51 weeks pa, working 39 weeks per year at 32.5 hours per week. This worked out at £16,840.50 pa. As the claimant would lose her nursery allowance, Ms Howard proposed putting her on Scale 4, point 21, which would give her a salary of £17,403. This gave a shortfall (or potential wage cut) of £2,956 pa. The claimant was entitled to some compensation under this single status agreement, which worked out at the maximum £3,980.

28. On 26 January 2016 Mr Allen and Ms Howard met with the claimant to discuss the proposed changes to her terms and conditions of service, specifically, her job role. The claimant was accompanied by her trade union representative, Mr Tim Linehan of the GMB. At this meeting the claimant said she did not want a Teaching Assistant contract and she would not accept a reduction of about £3,000 to her salary. The claimant said that if necessary she would return to work in the nursery. Mr Allen was quite clear that the claimant was not required to work as nursery nurse and that she did "a fantastic job with the interventions." Mr Allen said that the implementation of the single status agreement was not optional as it was agreed between the unions and the local authority and that the school had remained in line with Newham Pay Policy since becoming an academy. Ms Howard proposed to do the following:

- 1st stage – she would "do the single status for Nursery Nurses" so that the claimant could see what her salary would be. [This was already done.]
- 2nd stage – look at the claimant's job description. [This was already done.]
- Ms Howard invited the claimant to write down all her current roles and responsibilities for evaluation. [Again, this was already done.]

29. Mr Allen wrote to the claimant on 17 April 2016, inviting her to a further meeting. Mr Allen set out the claimant's current pay arrangements and confirmed "under the single status agreements this arrangement no longer exists,". He set out the new arrangements for Nursery Nurses and then said, "we no longer have a role for a Nursery Nurse, and as you have been working as a Teaching Assistant for around 7 years, we propose that a permanent arrangement is made to reflect the work you currently do." He then set out two proposals, which were essentially the same package with a choice of working either 32.5 hours or 36 hours per week.

30. On 24 February 2016 a second consultation meeting was held. The attendees were the same as the previous meeting. Ms Howard re-sated the claimant's pay details (which were those identified in the first bullet point of paragraph 26 above and also in Mr Allen's letter of 12 February 2016). Mr Allen reiterated the respondent's position that it was unreasonable for the claimant to be paid for a role she did not undertake and there was no current Nursery Nurse position available in the school. Ms Howard set out the respondent's proposals, which was substantially in accordance with the second bullet point in paragraph 26 above, Ms Howard advised the claimant that she would be made "redundant" if she did not remain in the role she was in at present and be paid as a Teaching Assistant. She gave the claimant two options: either work 32.5 hours per week on a salary of £17,403 pa or work for 36 hours per week on a salary of £18,654 pa. Both options attracted a one-off payment of £3,980. Ms Howard said that as a "goodwill gesture" by the Headteacher, she would not backdate the proposed pay cut to April of the preceding year, but that it would start from 1 April 2016. Ms Howard ignored the claimant's notice period for such contractual changes. Ms Howard similarly did not set out the basis on which she thought she was entitled to apply retrospectively what was effectively the claimant's pay cut. Mr Allen said repeatedly that the respondent would offer a "compromise" so as not to affect the pay cut from April 2015. The claimant made her position quite clear at this meeting – she would not accept a pay cut.

The claimant was clear and reiterated that her contract was for a Nursery Nurse and that she would go back to work in the nursery if necessary. However, she was very clear in that she would not accept the respondent's proposed pay cut.

31. On 2 March 2016 Mr Allen wrote to the claimant following the second consultation meeting. He reaffirmed two options from the consultation meeting. Mr Allen reiterated that he was "prepared to waive the backdated pay as a "goodwill gesture". Mr Allen also said that the one-off payment of £3,980 was also another *goodwill gesture* as "we do not have to do this, as you have not worked as a nursery nurse for over 7 years".

32. Mr Allen gave the claimant five days from the date of the letter to inform him which option she should take up. He advised her that her new contract would begin on 1 April 2016, which was 3½ weeks after the claimant was supposed to agree these changes. Mr Allen made no mention of the claimant's entitlement to notice. The claimant was entitled to a minimum of 12 weeks' notice to end her contract, pursuant to s86 ERA. Finally, Mr Allen reiterated that there was no longer a vacancy at the school for a Nursery Nurse and that if she rejected both options then her employment could be terminated.

33. The claimant rejected Mr Allen's proposals on 8 March 2016. Mr Linehan communicated this to Mr Allen as a "formal 'Failure to Agree'".

34. On 9 May 2016, Mr Allen wrote to the claimant again to invite her to a third meeting. The letter was substantially the same as he had written to the claimant on 2 March 2016.

35. On 12 May 2016 Mr Allen, Ms Howard, the claimant and Mr Linehan met again to discuss to discuss the proposed changes to the claimant's terms and conditions of service. This was the third consultation meeting. Mr Allen brought matters to a head and said that the claimant had until the morning of 13 May 2016 to accept either option one or option two, otherwise he would issue her with "redundancy" if he did not hear from the claimant. The claimant informed Mr Allen that she would not accept his proposals.

36. On 16 May 2016, Ms Howard issued the claimant with a termination of employment which she regarded as "compulsory redundancy". The claimant was given 12 weeks' notice and her last day of service was 7 August 2016, which is the effective date of termination. The claimant was told that she would qualify for a redundancy payment of £8,199.24. The claimant was advised that she had the right to appeal against her dismissal and she should write to the Head Teacher within 10 days of receipt of her termination letter.

37. On 26 May 2016, the claimant gave Mr Allen a letter of grievance. The claimant's grievance centred on four aspects of her dismissal and the claimant contended that Mr Allen and unnamed white colleagues discriminated against her on the grounds of her race and ethnic origin. The allegations of discrimination and subsequent allegations of bullying and harassment were not pursued at the hearing.

38. The claimant's contract of employment gave her the contractual right to purse a grievance through the school's Grievance Resolution Policy and Procedure. However, the grievance procedure specifically precluded any appeal against the decision to terminate the claimant's employment. In fact, neither Mr Allen, Ms Howard or Mr Coleman ever checked the grievance procedure as none of the respondent's witnesses said that they undertook this very obvious and basic step and no reference was made in any contemporaneous correspondence to the school's grievance procedure.

39. Mr Allen wrote a response to the claimant's complaints/grievance that day. He did not pass the claimant's grievance on to anyone to be investigated; nor did he investigate the claimant's grievance himself. In evidence he said that he did not discuss the claimant's grievance with anyone, he did not refer to the grievance procedure nor did he review any correspondence or other documents. He responded to the claimant's grievance – which was about his handling of the claimant's dismissal and included a claim of discrimination against him – by writing a single-page letter of denial that day.

40. On 27 May 2016, the claimant handed Mr Allen her letter of appeal against her dismissal. The claimant had not yet received Mr Allen's response to her grievance and her appeal letter referred to her grievance and asked that her termination of employment be suspended until the matters dealt with in her grievance had been dealt with. The respondent did not acknowledge, or indeed, respond to the claimant's letter of appeal.

41. The claimant wrote to Mr Mick Coleman on 7 July 2016 with an "Informal Grievance complaint against Mr James Allen Head teacher". This was a detailed letter and set out the claimant's concerns about the way that she had been treated in her dismissal. The claimant set out her complaint in three sections: (1) constructive dismissal and breach of contract; (2) bullying and harassment; and (3) discrimination. In a vein similar to Mr Allen, Mr Coleman felt no need to investigate the claimant's complaint, nor to go through any proper process either in accordance with the contractual grievance procedure or any recognisably fair complaints or grievance or appeal process. The fact that he – nor anyone else – did not interview the claimant regarding her bullying and harassment complaints and her discrimination complaint renders it difficult to understand how Mr Coleman could have come to any fair or proper conclusion about these complaints. Although discrimination and bullying and harassment complaints are not before the Tribunal, Mr Coleman's response to a long established and valuable staff member's concerns are under scrutiny and his response was both inadequate and insulting.

42. Mr Coleman said in his witness statement. "I was fully aware of the matter as I had been kept abreast of developments by Mr Allen, and the school had been supported by NPW throughout; I was, therefore, able to review the claimant's grievance letter and respond in full without delay". This articulates Mr Coleman's closeness to the decision-makers but not his impartiality. He declined to instigate a proper or independent review, either by way of appeal or otherwise. Mr Coleman merely acted as a mouthpiece for Mr Allen and Ms Howard and proceeded to dismiss the claimant's grievance. He wholly

abrogated his responsibilities to properly investigate and/or determine the claimant's grievance. Given his position as Chairman of the Board of Governors, this was a significant failing.

43. Nevertheless, (despite adopting an accusatory tone) Mr Coleman did articulate the respondent's reason for making such changes when he said:

> … The single status process started before we converted to an Academy. We agreed when converting that we will continue as we were and not make any changes, this also included continuing with the single status rollout.
> You have been paid as a Nursery Nurse with the old terms and conditions for the last 7 years, even though you were not carrying out the role of a Nursery Nurse. The process came to St Joachim's and you are the last person to complete the process.
> … you were offered to alternatives… By not accepting these offers; you were in effect, refusing to accept a role within the school, thus making yourself redundant. Therefore, the School began the redundancy process. During this process you had ample opportunity to accept the offers you have been made, but we receive no response.
> It is sad that your many years loyal service have ended this way; however this is something you have chosen to do…

44. Having her appeal against dismissal ignored by the respondent, the claimant instigated a further and formal grievance on 10 July 2016. This grievance was also ignored by the respondent. No response was ever sent to the claimant

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My determination of the issues

45. The wording of s98(1)(b) ERA, which refers to the act of justifying the dismissal of *an* employee, not *the* employee, so the whole picture has to be examined, not just the position of the affected employee.

46. No one factor is given greater weight than another, and the whole context needs to be examined: see *St John of God (Care Services) Ltd v Brooks [1992] IRLR 546.* Factors to consider are:

a. The reason for the proposed changes.
b. The effect of a pay cut on the claimant.
c. What is the balance of advantages and disadvantages to both parties.
d. Whether the employer consulted with the claimant, and any employee representatives;
e. Whether the employer considered alternative courses of action;
f. Whether the changes were those that a reasonable employer would offer;
g. Whether the majority of employees have accepted the change.

47. The Tribunal is not allowed to second-guess the employer's business or organisational objectives, so the respondent could establish a "fair reason" relatively easily. The respondent's reason for embarking upon this course arose from the implementation of a fair pay system across the London Borough of Newham, which had been agreed with the recognised trade unions and entailed a job evaluation. The claimant's job evaluation highlighted an anomaly in that the claimant was paid as a Nursery Nurse, yet she was undertaken the role of a Teaching Assistant. The respondent chose to deal with this anomaly and pay the claimant the correct wages for the job that she, in fact, undertook.

48. The employer is not required to demonstrate that there was a "pressing business need" for the change or even that the change could be demonstrated as advantageous. The respondent merely needs to establish that there is a sound reason: see *Hollister v National Farmers Union [1979] ICR 542* or even merely that the change was beneficial to the organisation: see *SW Global Resourcing Limited v Doherty [2012] IRLR 727*.

49. A pay cut of almost 15% is substantial. For a relatively low-paid employee earning £20,359, a reduction of £2,956 (gross) is a considerable shortfall. The respondent has never disputed the deep financial concerns which the claimant articulated at the hearing. Nevertheless, the potential hardship for the claimant was one factor – albeit a significant factor – that needed to be set against other matters.

50. The respondent would not receive a particularly significant financial benefit from changing the claimant's contract. The matter was more of principle than financial benefit and centred on implementing a regularised, fair and non-discriminatory pay system. In this regard, there was no alternative course of action, save as the modification to include the compensatory payment which was agreed with the trade unions.

51. Addressing unequal pay and implementing a fair and transparent pay system across the local authority is a laudable aim. Although the respondent was an academy and outside the control of the local authority, its decision to implement the outstanding pay harmonisation process that had been underway for some time was rational and consistent with good employment practices. This is consistent with the decision that a reasonable employer would make.

52. I did not hear evidence as to how other Nursery Nurses had responded to the single status harmonisation. The claimant was the only Nursery Nurse at the respondent school. So therefore, I can make no determination to whether others have accepted or resisted such changes.

53. Given that the respondent had a good or sound business reason to compel these changes, and that they were in implementation of a fair and non-discriminatory pay structure, even taking into account the financial hardship to the claimant – which I find would be substantial – I determine that the reason given for the claimant's dismissal, namely some other substantial reason was a potentially fair one.

54. The claimant's contract of employment identified her as a Nursery Nurse, yet she undertook the role of a Teaching Assistant. That was her "work of a particular kind". The respondent experienced no reduction in the need for the work of a particular kind undertaken by the claimant (i.e. the Teaching Assistant role) so this was not a redundancy dismissal. If it was a redundancy dismissal case, then I am not sure whether the respondent sufficiently explored any suitable alternative employment options available for the claimant because Ms Howard did not canvass whether there were Nursery Nurse vacancies elsewhere in Newham or explain to the claimant why she could not transfer to any Nursery Nurse vacancy in a local authority-maintained school.

55. As there are good business reasons for the change in the claimant's terms and conditions of service, the respondent has established SOSR as the potentially fair reason for dismissal – under s98(1)(b) ERA – in respect of an employee who refuses to accept such change. However, this is only part of the fairness test. Under s98(4) ERA the Tribunal must also consider the reasonableness of the dismissal process. This involves considering whether, in all of the circumstances, including the employer's size and administrative resources, the employer acted reasonably in treating the business reason as sufficient reason to dismiss.

56. However, as with any unfair dismissal claim, the manner in which the employer handled the dismissal is still important in considering whether the respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the claimant's dismissal was affected in an appropriate way, i.e. within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available.

57. The respondent sought to vary the claimant's contract of employment so contractual considerations are key to the statutory analysis. Under contract law an employer (or employee) is not entitled to vary a contract unilaterally. The contract can be varied either by individual agreement or through the use of collective agreements. Although the respondent has argued that they reached an agreement on single status with the trade unions, Mr Allen did not pursue, nor indeed argue, that the collective agreement entitled the respondent to amend the claimant's contract of employment. When wanting to change an employee's terms and conditions of service, the well-worn – and obvious path – to deal with such eventuality is as follows:

    a. The respondent should set out the proposed changes to the claimant's contract of employment and the reasons for these.
    b. The respondent should then consult with the employee about such changes (and such consultation ought to be meaningful).
    c. If an agreement cannot be achieved, then the respondent should terminate the claimant's employment on proper notice and offer immediate re-engagement on the new terms. If the employee still refuses to accept this option, the employer will then need to justify its reasons and process in any ensuing unfair dismissal claim.

58. Not only is this an established process, it is the process that any reasonable employer of this size and administrative resources would follow.

59. The respondent followed 57(a) and (b).

60. Mr Allen was clear and decisive following the first consultation meeting when he wrote to the claimant on 17 April 2016. However, I am puzzled by Ms Howard's proposals at the meeting of 26 January 2016 (stated above), because this work had already been undertaken. This appears to be the stage that the claimant had lost faith with NPW's input, and that is entirely understandable. I cannot understand why Ms Howard suggested that

adjustments could be made to the salary bands or that the claimant's job description could be revisited. All of this preparatory work had been undertaken and it was quite obvious that the respondent was committed to the single status harmonisation. This raised expectations for the claimant that would, and could, never have been met. So Miss Howard's proposals were misleading. A reasonable employer would have been clear and consistent with its strategy throughout this process, and certainly not have sent these mixed messages at the initial consultation meeting.

61. Mr Allen's supposed "goodwill gesture" of waving backdating such a high pay cut at the meeting of 2 March 2016 did not represent any *goodwill gesture* that a reasonable employer could recognise. This was an attempt to pressurise the claimant into agreeing a significant pay cut. In any event the implication that Mr Allen would force through a retrospective pay cut was not legally enforceable.

62. Mr Allen's implicit threat that he could remove the compensatory payment of £3,980 was also erroneous in law. As the claimant had a valid contract in law and the respondent wanted to change this then such an implicit threat was misleading and unenforceable. If the claimant accepted single status harmonisation then she was entitled to the compensatory payment as this had been part of the agreement negotiated with the trade unions. Mr Allen was disingenuous to say that she was not so entitled. Given that the respondent is required to be judged by the standards of a reasonable employer, by presenting the compensatory payment as a gesture of goodwill that could – and might – be withdrawn at his discretion Mr Allen failed, again, to conduct himself in the manner of a reasonable employer.

63. Ultimately, the respondent did correctly terminate the claimant's employment on proper notice. However, the respondent terminated the claimant's employment because she did not accept one of the two options (i.e. ultimatums) offered by Mr Allen. First, this termination represents something of a hybrid between dismissing a claimant for not accepting he changes (which is more akin to circumstances where the respondent has a contractual right to impose such changes) and the correct course outlined at paragraph 59(c) above. The claimant was not offered the benefit of immediate re-engagement on the new terms. Second, the options themselves were flawed. The options put to the claimant ignored her contractual notice period and also attempted to hoodwink the claimant over her entitlement to the compensatory payment.

64. Denying an employee the right to appeal against a decision to dismiss is likely to lead to the conclusion that the dismissal was unfair. This recognises the essential nature of an appeal to any fair dismissal process: see *West Midlands Cooperative Society Ltd v Tipton 1986 ICR 192 HL*. However, the refusal to acknowledge the claimant's appeal is particularly central in this case, where the right of appeal was contractual as the dismissal letter specifically provided for such a right. Furthermore, a dismissal is likely to be unfair on procedural grounds, if the rules of natural justice are not observed in any appeal process.

65. In the Grounds of Resistance the respondent contends that there was no absolute requirement on it to allow the claimant to appeal against her dismissal. This is a misunderstanding of the law so far as it applies to the claimant's dismissal. It would be a wholly exceptional case for any dismissal to be determined as fair without allowing a dismissed employee the right to appeal against her dismissal and this is not one of those exceptional circumstances.

66. Notwithstanding the claimant's dismissal letter specifically provided for a right of appeal, the respondent then completely ignored this process. Whilst I accept that Mr Coleman received the claimant's representations regarding her dismissal, it cannot be said that he "carefully considered" these before deciding to uphold the claimant's dismissal (as contended in the Grounds of Resistance). Mr Coleman was not impartial. The respondent's ignored the claimant's appeal. Mr Coleman did not bother to undertake any recognisably fair process to determine the claimant's grievance (which may have been the substance of her appeal).

67. Accordingly, the procedural failings highlighted above were manifest and hugely significant and give rise to a finding of unfair dismissal.

68. The claimant was resolute throughout the respondent's consultation that she would not accept such a substantial reduction to her pay because she did not regard this as "fair". I have determined that the reason for such changes to the claimant's contract of employment, which entailed this pay cut, was substantially fair.

69. At the hearing the claimant was committed to her case and, when pressed by me, she said that she would not accept a pay cut. She said she was committed to her contract and would not willingly work for a substantial reduction. Later, in submissions, Mr Palmer submitted, on behalf of his wife, that rather than face unemployment, the claimant would have accepted a pay cut. This was echoed by the claimant – although it was not the claimant's position when she gave evidence. I am satisfied that the claimant, although not wanting to diminish her case on substantive unfairness at the hearing, when faced with unemployment or accepting the new terms in the 12 weeks prior to her dismissal may have accepted the new terms, at least to avoid unemployment, while she sought alternative employment opportunities. Indeed, that is logical and consistent with the response of the vast bulk of employees in such difficult circumstances. The answer is somewhat counterfactual because the respondent did not follow a process to allow the claimant to have that time for further consideration.

70. There were major defects in the respondent's application of its dismissal procedures. These were dismissing the claimant for not accepting either one of two unenforceable and ill-chosen options and then ignoring the claimant's grievance (or failing to address properly the claimant's concerns/complaints/ grievance). These defects were fundamental and profound. However, Mr Allen's role in the consultation was clear and effective. The respondent had a substantially fair reason for affecting the changes and merely made a hash of forcing the issue by way of dismissal. Some processes adopted by the employer are so unfair and so fundamentally flawed that it is impossible to

formulate the hypothetical question of what would be the percentage chance the employee had of still been dismissed even if the correct procedure had been followed: see *Davidson v Industrial & Marine Engineering Services Ltd EATS/0071/2003*. However, this is not one of those cases and I am satisfied that it is appropriate that I assess whether or not the claimant would still have been dismissed if a fair and reasonable process had been followed, pursuant to *Polkey* and *Software 2000*.

71. In respect of a fair process and the application of *Polkey*, this inevitably results in a degree of speculation. I need to assess what would happen if the respondent followed a substantially fair process and whether the claimant would still have been dismissed fairly. A substantially fair process – which a reasonable employer would follow – was to combine the claimant's dismissal with an offer of re-engagement on the new terms (as outlined in paragraph 57(c) above. There are substantial grounds for believing that the claimant would have accepted such an offer, which was her modified position at the hearing. However, I note that this is an after-the-event justification and the claimant has not been consistent in her evidence in this regard. Rather than face unemployment and financial uncertainty, I am prepared to accept the claimant's subsequent submission/evidence that when faced with dismissal and the offer to re-engage she may well have seen "the writing on the wall" and accept the change to her terms – at least for the short term. I am prepared to give the claimant the benefit of doubt, to some extent – on a 50-50 basis. As I partially-believe the claimant might have accepted the pay reduction in the short-term, especially as the compensatory payment of £3,980 would have delayed the effective pay cut for well over a year, I do not believe that the claimant would have remained in the respondent's employment in the long-term. I believe she would accept such changes to tide her over until she was able to obtain suitable employment elsewhere. Accordingly, I make a *Polkey* reduction of 50% on any compensation in respect of loss of earnings, such loss of earnings likely to be effective for up to one year by which time, I determine, the claimant would have found another suitable job.

72. This case will now be listed for a remedy. I will write to the parties separately to set case management orders. As these preparatory steps or orders arises from the exercise of my case management functions, such orders should be made privately.

Employment Judge Tobin

18 May 2018