EMPLOYMENT TRIBUNALS

Claimant: Miss C Davies

Respondents: (1) Neath Port Talbot Council
(2) Governing Body of Sandfields Primary School

Heard at: Cardiff, via video **On:** 11, 12 & 13 December 2023

Before: Employment Judge S Jenkins

Representation:
Claimant: Ms A Fadipe (Counsel)
Respondent: Mr D Evans (Counsel)

RESERVED JUDGMENT

The Claimant was unfairly dismissed and her claim of unfair dismissal therefore succeeds.

REASONS

Background

1. The hearing was to consider the Claimant's claim of unfair dismissal, arising from the termination of her employment by reason of redundancy on 31 August 2022. Early Conciliation took place between 29 November 2022 and 10 January 2023, and the Claim Form was issued on 8 February 2023.

2. Although the Claimant's contract of employment was not in the hearing bundle, my understanding was that her contract was formally with the First Respondent, and that she was employed to teach at Sandfields Primary School ("the School"), governed by the Second Respondent.

3. I was informed that the Second Respondent is a governing body which has a right to a delegated budget. In those circumstances the Education (Modification of Enactments Relating to Employment) (Wales) Order 2006 requires that any unfair dismissal claim must be made, and must be carried on, against the governing body. The Order goes on to provide that where a claim is made against a governing body then it must notify the relevant local authority, and the authority is entitled to be made an additional party and to take part in the proceedings. In this case, the claim was initially brought against both Respondents which obviated the need for notice to be given to the First Respondent.

Preliminary Matter

4. Prior to the hearing, I had read the witness statements and the documents referred to within them, and I had read the Claim Form and the Response. From that reading, it did not appear that any concern was being raised by or on behalf of the Claimant that the reason for her dismissal had been anything other than redundancy. It appeared to me therefore, that the focus of the hearing would be on the fundamental question, as required to be answered by section 98 of the Employment Rights Act 1996 ("Act"), of whether the Respondent acted reasonably or unreasonably in all the circumstances in treating redundancy as a sufficient reason to dismiss.

5. In terms of the issues which would then fall to be considered in answering that question, I was conscious of the very long-standing guidance provided by the Employment Appeal Tribunal ("EAT") in *Williams v Compair Maxam* [1982] ICR 156, at 162C-F. There, Browne-Wilkinson, J set out five principles which are usually required to be observed by employers when dismissing employees by reason of redundancy, particularly where, as here, employees are represented by independent unions. Those are:

    1. The provision of as much warning as possible.
    2. Consultation with trade unions, particularly in relation to selection criteria.
    3. The establishment of selection criteria which are, so far as is possible, objective.
    4. Making the selection fairly in accordance with those criteria, considering any representations made by trade unions.
    5. Seeking alternative employment.

6. In the Claimant's Particulars of Claim, after the general statement that the Claimant claimed that her dismissal for redundancy was unfair, contrary to section 98 of the Act, two paragraphs were included:

    "*8. The Claimant claims that the Respondent failed to implement a fair selection process in that they failed to include Ms Lloyd in the*

exercise, further, the Claimant claims that the Respondent failed to consider alternatives to redundancy in that they failed to consider extending the Claimant's contract to allow her to cover for Teacher A's absence once it became clear that she would not be returning to work.

"9. The Claimant further claims that the Respondent failed to take note of its own redundancy policy that provides that the employer should consider the termination of short-term temporary contracts prior to making redundancies and that temporary staff should be included in the selection pool unless the contract is very short-term, or linked to a specific person or task."

7. No reference was made in those Particulars of Claim to concerns over consultation, whether individually with the Claimant or collectively with the trade unions, nor was any reference made to any concerns over the selection criteria used or the marking in respect of them.

8. The Claimant's witness statement similarly did not include any concerns over consultation or selection, other than a repetition of the comment that Ms Lloyd was not included in the process.

9. The focus of the Claimant's Particulars of Claim, and indeed of her witness statement, was on the criticism that she was not offered the ability to cover for the absence of another teacher (Teacher A), initially in the short-term, in September 2022, and later on a longer term basis, following Teacher A's resignation at the end of October 2022. The Claimant noted that, instead, Ms Lloyd, a teacher employed on a temporary basis whose existing contract expired on 31 August 2022, was asked to cover for Teacher A during her absence and, it appears, continued, and continues, to work at the School.

10. Before the hearing commenced therefore, my anticipation of the issue underpinning the assessment of the fairness of the dismissal was that it would involve consideration of whether the Respondent had fulfilled its duty to take reasonable steps to find the Claimant alternative employment.

11. However, at the commencement of the hearing, Ms Fadipe, acting on behalf of the Claimant, stated that she had received an additional bundle of some 60 pages from the Respondent and was awaiting receipt of a couple of other documents that the Claimant's side had requested. She mentioned that the documents related to specific scores given to the Claimant and two of her colleagues during the selection exercise, and the collective consultation that had taken place. She stated that she considered that those documents were relevant to the case and therefore would need to be read in advance of the commencement of the hearing.

12. I questioned Ms Fadipe's reference to that material having relevance for the

case, pointing out that my reading of the Claimant's claim, and indeed her witness statement, was that the focus of the complaint was on the failure to offer her alternative employment. I did not see how redundancy selection scores, or concerns over consultation, would have any bearing on that issue.

13. Ms Fadipe reminded me of the guidance provided by the EAT decision of *Langston v Cranfield University* [1998] ICR 172, that core elements of; selection, consultation, and the search for alternatives to redundancy, were matters which always fell to be considered in a case involving an allegation of unfair redundancy. I indicated that I was familiar with Langston and the guidance provided, but pointed out that it was surely incumbent on the parties to a redundancy dismissal claim, in essence the claimant's side, to identify the areas where deficiencies were said to have arisen, and no reference to deficiencies in the areas of selection and consultation had been advanced at any stage in this case. I did not therefore consider that it would be fair on the Respondents for them to have to deal with such matters when they had had no prior notice.

14. As it was some time since I had considered Langston, I indicated that I would re-read it, in order to ensure that it was indeed incumbent on me to consider those three matters, even though only one of them, i.e. the failure to seek alternative employment, had been canvassed in the Claimant's Claim Form and in her witness statement.

15. Having re-read Langston, I could see that the Appeal Tribunal said, at paragraph 30 that, "*Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer*". It went on, at paragraph 32, to say, "*In these circumstances, we think it is incumbent on the industrial tribunal to consider each of the three questions mentioned above, in the same way that an industrial tribunal would consider the threefold Burchell test in an appropriate conduct case. It is desirable that at the outset of the hearing, the live issues are identified by the industrial tribunal*".

16. I reconvened the hearing and noted that the Langston case indicated that I needed to consider the three factors of; selection, consultation, and alternative employment, and that that appeared to be the case whether or not raised as part of the claim. I noted that the Appeal Tribunal had referenced that that would be the case, "*absent agreement to the contrary between the parties*", and considered whether the lack of reference to consultation and selection within the Claim Form, and indeed up to and including the Claimant's witness statement, meant that there was implied

agreement between the parties that the focus of the case would only be on the issue of alternative employment. However, in light of the submissions made by Ms Fadipe, I did not consider that it would be appropriate to proceed on the basis that there was a form of implied agreement to focus solely on the issue of alternative employment.

17. I concluded therefore that as, as it now appeared, the Claimant was advancing concerns in relation to the three core elements identified in Langston, I was going to have to deal with them. It was unclear however, as to what particular concerns the Claimant had about the issues of selection and consultation. Ms Fadipe briefly verbally explained what those were, which was the first time that the Respondent became aware of them.

18. I decided to proceed on the basis that the Claimant would be required to provide further particulars of the alleged deficiencies in relation to the issues of consultation and selection, and to do so by 3:00pm on that day.

19. I queried with Mr Evans, on behalf of the Respondents, as to how much time he felt would be needed in order for the Respondents to be ready to deal with the additional concerns raised and he, quite reasonably, noted that it was not really possible to answer that until the additional particulars were received. Ms Fadipe then made the sensible suggestion of reconvening once the additional particulars had been received, and we therefore arranged to reconvene the hearing at 4:00pm.

20. We reconvened at 4:00pm. Ms Fadipe confirmed that she had provided the Respondents with further particulars of the concerns raised by the Claimant in relation to consultation and selection. Mr Evans indicated that the matters raised could be addressed by way of a supplemental witness statement from the School's Headteacher, Mr Dennis. He further indicated that, whilst some time would be needed to prepare that supplemental statement, he was optimistic that it could be prepared by approximately lunchtime on the following day.

21. In the circumstances, I directed that the supplemental statement should be provided to the Claimant's side by 12:30pm on the second day, and that the statement and the additional documents would also need to be provided to me. We would then reconvene at 2:00pm to proceed to consider the evidence. As we were then effectively only going to have one and a half days of hearing time, as opposed to the originally allocated three days, I indicated that we would focus on liability only, with remedy, if required, being dealt with at a subsequent hearing.

22. On the second day, on reconvening at 2:00pm, Ms Fadipe indicated that she needed a little more time to consider Mr Dennis' supplemental statement in order to be ready to cross-examine him on it. We therefore

adjourned until 2:35pm, and then commenced to hear Mr Dennis' evidence.

23. I do not think I can let the matters summarised in this section of my Judgment pass without further comment. As I have noted, the Langston case makes clear that core matters will fall to be considered as part of a claim arising from a dismissal by reason of redundancy However, it is also important that parties plead their case adequately and effectively. As Langstaff J noted in *Chandok v Tirkey* [2015] ICR 527, at paragraph 16:

"*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.*"

24. In this case, as I have noted, the Claim Form, submitted on 8 February 2023, only raised concerns regarding alternative employment. No mention was made of any deficiencies in the consultation undertaken, and the only issue raised with regard to selection was that a temporary teacher, Ms Lloyd, should have been included in the selection pool, but was not. No mention was made of any deficiencies in the weighting of the criteria or the marks awarded. It was only at the start of the hearing, on 11 December 2023, over ten months after the Claim Form was submitted, that any issue relating to consultation and selection (as opposed to pooling) was raised.

25. Some latitude might be expected to be given when a claimant is unrepresented. Indeed, I note that the claimant in Langston was a litigant in person. However, in this case, the Claimant has been legally represented throughout.

26. The raising of the additional allegations at the start of the final hearing came very close to derailing the hearing. Indeed, it was only because the Respondents indicated that they would be in a position to provide supplemental witness evidence by mid-way through the second day that the hearing was not postponed. As it was, there was, literally, only just sufficient time to complete the evidence and submissions, with the hearing finishing just after 5:00pm on the third day. That, of necessity, led to this Judgment being reserved.

27. Had the hearing been confined to the alternative employment issue, or even if the other matters had been identified in advance of the hearing such that the evidence relating to them could have been obtained in advance, the hearing could then have been comfortably concluded, including the delivery

of judgment, within the allotted time. Time would also have been likely to have been available to consider remedy, in the circumstances that ultimately transpired of the Claimant's claim being successful, purely on the alternative employment issue. As it is, unless the parties reach agreement, the Claimant is going to have to wait several weeks more to receive any compensation due to the need to arrange a further remedy hearing.

28. The need to prepare a reserved judgment has also had implications for the Tribunal system. Time had to be allocated to me to produce this Judgment when I could have been dealing with other cases.

29. I would not therefore want to provide any encouragement to parties to employment tribunal litigation involving allegations of unfair redundancy dismissals to proceed by way of refining, or indeed redefining, their case at the final hearing. I doubt that the guidance in Langston was intended to encourage a claimant to revisit the fundamentals of their claims at the start of a final hearing.

30. Whilst the Appeal Tribunal in Langston confirmed that three core areas fall to be considered in redundancy cases, concerns raised by a claimant will not always cover all three areas. If there are no criticisms raised in one or more of the areas, the hearing, and the preparation of the case in advance of it, can focus on the remaining one or two areas. It is therefore important that a claimant identifies the criticisms raised of a respondent in those areas.

31. A claimant in an unfair redundancy case should therefore, as in any other case, set out the core elements of their claim in their claim form. That will enable the respondent in that case to know where it needs to adduce evidence in response, and the tribunal judge considering the case at a final hearing to know where their focus needs to be.

Issues

32. In terms of the issues I had to decide, I had, as I have noted above, anticipated that the focus would be on whether the Respondent had fulfilled its duty to take reasonable steps to find alternative employment for the Claimant. However, as I have also noted, the Claimant's case expanded to encompass issues of selection and consultation as well.

33. Ms Fadipe produced a document containing the areas of criticism relating to those areas, which was contained in the supplemental bundle I received on the second day of the hearing. That document set out the issues to be considered in relation to consultation and selection as follows:

"***Consultation***

1. *The timing of the union consultation which appeared to post-date the meeting of 29.03.2022. At that meeting on 29.03.2022 making a teaching post redundant had been decided upon.* ***[MD was at both meetings]****.*

2. *The absence of union representation at the meeting of 29.03.2022 which was a formative stage* ***[MD was at that meeting]****.*

3. *On 6 April 2022, that the union did not have the skills audit in advance (it is mentioned in the minutes of that meeting).* ***[MD was at that meeting]****.*

4. *On 6 April 2022, the union were querying whether there was a genuine redundancy situation as the proposal was for a HLTA to replace a teacher* ***[MD was at that meeting]****.*

5. *28 April 2022, that the union did not have the proposed staffing structure in advance (it is mentioned in the minutes of that meeting).* ***[MD was at that meeting]****.*

6. *The documents on p.69-70 were not provided in advance of any union consultation, in particular the Annual Governing Body Budget Reports.*

Selection

7. *How far back in years the teachers were able to go (over 3 years but up to when?) and Welsh being weighted lower than English/Maths* ***[the minutes of SDDC 06.04.2022 suggest MD and Ms Bird verified the scores]****.*

8. *Teacher K, supply teaching experience used to obtain points at Q7 "Do you currently teach in Key Stage 2?", but C awarded no points for the same Q.* ***[the minutes of SDDC 06.04.2022 suggest MD and Ms Bird verified the scores]****.*

9. *Q8, Teacher M (C) being awarded 2 points rather than 3, despite being the assistant coordinator for Welsh language in the school (having done a number of Welsh courses) and the Coordinator being away on sabbatical, so C was acting up. Only Teacher H and Teacher B were scored 3. But only C used her skill/qualification directly to benefit the pupils in her current role at the time, Teacher B did not. Teacher H was on sabbatical.* ***[the minutes of SDDC 06.04.2022 suggest MD and Ms Bird verified the scores]****.*

10. Teacher I received a point for Q7 "Do you currently teach in Key Stage 2?", relying on supply teacher experience over 14 years prior. Whereas C was awarded 0 points despite her experience in KS2. ***[the minutes of SDDC 06.04.2022 suggest MD and Ms Bird verified the scores]****."*

34. The references to "MD", were to the School's Headteacher, Mr Dennis, and Ms Bird was the School's Deputy Headteacher.

35. Although not included in Ms Fadipe's document, it was noted that the Claimant continued to advance the concerns that she had raised in her Claim Form, referred to at paragraph 5 above, relating to the failure to include Ms Lloyd in the selection pool, and the failure to extend her contract to enable her to cover for Teacher A in September 2022.

36. There was, during the course of the first day of the hearing, a suggestion that the Claimant did not accept that the reason for her dismissal was redundancy, which, had that been maintained, would have left the reason for dismissal as an issue to be determined, where the burden of proof would have been on the Respondent. Ms Fadipe confirmed however, on the second day, that it was accepted that redundancy was the reason for dismissal. My focus therefore was on whether dismissal for that reason was fair in all the circumstances, taking into account the particular matters identified above.

Law

37. In terms of the legal principles which underpinned my analysis of the issues, as I have noted at paragraph 4 above, the touchstone case in relation to the analysis of the fairness of redundancy dismissals remains Williams v Compair Maxam, which outlined five areas which fall to be considered. Whilst not specifically mentioned, the reference to the need to establish appropriate selection criteria carries with it a need to establish an appropriate selection pool.

38. In relation to the core areas of consultation, selection and alternative employment, set out in Compair Maxam, and confirmed in Langston as requiring consideration in redundancy dismissal cases, the appellate courts have established a number of principles.

Consultation

39. The Court of Appeal, in *British Coal Corporation Secretary of State for Industry ex parte Price & Others* [1994] IRLR 72], at paragraph 24, examined what is generally to be encompassed within a reasonable consultation process, where Glidewell LJ said:

"*It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p19, when he said: 'Fair consultation means:*
(a) consultation when the proposals are still at a formative stage;
(b) adequate information on which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration by an authority of the response to consultation."

Selection

40. With regard to pooling, the EAT, in *Kvaerner Oil and Gas Limited -v- Parker* (UKEAT/0444/02), confirmed that the employer's choice of pool must be assessed by consideration of whether it fell within the range of reasonable responses open to an employer in the circumstances.

41. With regard to the application of selection criteria, I noted that the Court of Appeal in *British Aerospace PLC -v- Greene* [1995] IRLR 433, had endorsed the EAT's direction, in *Eaton Limited -v- King* [1995] IRLR 75, that it is sufficient for an employer to show that it has set up a good system of selection and that it was fairly administered, and that ordinarily there will be no need for the employer to justify all the assessments on which the selection for redundancy was based.

42. I also noted that the Court of Appeal, in *Northgate HR Limited -v- Mercy* [2008] ICR 410, endorsed the EAT's decision in that case that the lawful basis for intervention by an Employment Tribunal would be where a glaring inconsistency, whether as a result of bad faith or simple incompetence, evidenced a decision which was outside the band of reasonableness.

Alternative employment

43. As I have noted above, the fifth aspect of managing a fair redundancy set out by the EAT in Compair Maxam is the requirement to search for alternative employment. The Appeal Tribunal in fact said, at 162F, "*5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment*".

44. The House of Lords, in the seminal case of *Polkey v A. E. Dayton Services Ltd* [1988] ICR 142, also noted, at 162H, that, *"the employer will not normally act reasonably unless he…takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation*."

45. In addition to the case law dealing with those core areas, I was also conscious that the burden of proof in assessing the fairness of any dismissal by reason of redundancy is neutral, and that I would need to assess matters from the perspective of Section 98(4) of the Employment Rights Act, by considering whether the dismissal was fair or unfair taking into account all the circumstances and determining the question in accordance with equity and the substantial merits of the case.

46. In that regard, I was conscious that the assessment of fairness would not involve consideration of whether the Respondents' actions were correct, but an assessment of whether the actions taken were open to a reasonable employer acting reasonably in the circumstances. My overriding approach was to consider whether the Respondents' actions at each step of their conduct of the redundancy process fell within the range of reasonable responses.

Evidence and submissions

47. In view of the preliminary issue referenced above, we were not able to start the live stage of the hearing until the afternoon of the second day. On that day, we heard evidence from Mr Mark Dennis, the School's Headteacher. We continued the next morning with the evidence of the Respondents' other witnesses; Mr Andrew Thomas, the First Respondent's Director of Education, Leisure and Lifelong Learning; Ms Amy Hutchings, one of the First Respondent's Human Resource Managers; and Ms Maureen Treharne, one of the First Respondent's Human Resource Officers.

48. We then heard evidence from the Claimant and from Mr Roberto De Benedictis, the District Secretary for the National Education Union in the Neath Port Talbot region. After a pause for the representatives to finalise their written submissions and for me to quickly read those submissions, we heard submissions at the end of the third day, and the hearing concluded just after 5.00pm on that day. In the circumstances, and due to the fact that we ended up with effectively a one and a half day hearing rather than a three day hearing, it was not possible to issue judgment at the conclusion of the hearing and I therefore proceeded to produce this reserved Judgment.

Findings

49. I set out below my findings in relation to the matters relevant to my determination, reached on the balance of probability where there was any dispute. In fact, there was little material dispute between the parties on the underlying facts, and where there was such a dispute, contemporary documentation was available to assist my findings.

50. There was however, a stark difference between the evidence of Mr De Benedictis on the one hand, and the evidence of Mr Thomas, Ms Hutchings and Ms Treharne on the other, over the amount of discussion that took place between the former and the latter three individuals in relation to one of the other teachers at the School, Teacher A.

51. Mr De Benedictis' witness statement referred to him having had "*numerous conversations*" with the three individuals between April and July 2022 about the fact that Teacher A was unable to return to the School. Mr Thomas and Ms Hutchings both confirmed that they had no recollection of any discussion with Mr De Benedictis about Teacher A at the relevant times. Ms Treharne confirmed that she had had a discussion with Mr De Benedictis on 9 June 2022 about Teacher A, and she appended her handwritten note of that discussion to her witness statement. She also referred to a conversation she had with Mr De Benedictis about Teacher A on 7 July 2022. None of the three Respondent witnesses were challenged about any other asserted conversations, the challenge simply being that an inability to recall any conversation did not mean that any conversation did not take place.

52. Mr De Benedictis, under cross-examination, indicated that he had many notes and emails which confirmed that such conversations had taken place, but none had been produced during disclosure.

53. In the circumstances, and whilst I was satisfied that Mr De Benedictis gave evidence in good faith and out of the best of intentions, I had to conclude that I could not find his evidence particularly reliable. The lack of any reference to any specific discussion, or the content of any such discussion, within his witness statement was stark, as was what must be considered to be a basic failure to comply with disclosure obligations if he did indeed have relevant material.

54. I also noted that Mr De Benedictis expanded his evidence further under cross-examination in a way which appeared to re-cast part of the Claimant's claim, by reference to what he contended to be an obligation within the First Respondent's Redundancy and Redeployment Policy, to offer alternative employment within a period of up to four weeks after employment has ended. The Policy in fact contains no such wording, referencing only that, in line with the statutory requirement, any identified alternative post must be one which would start within four weeks of the current contract ending.

55. Overall however, the fact that I found Mr De Benedictis' evidence less than reliable had no material bearing on my conclusions. Even though I did not consider that the "numerous conversations" that Mr De Benedictis had stated had happened with Ms Treharne, Ms Hutchings and Mr Thomas had taken place, there was nevertheless written evidence, in the form of text

messages and emails, which enabled me to make findings about the prospect of Teacher A's return, whether or not “numerous conversations” about it had taken place.

56. In terms of background facts, the Second Respondent is a primary school in Port Talbot taking pupils from the age of 3 to 11. Mr Dennis took over as Headteacher in September 2021.

57. The Claimant initially started work at the School on 1 September 2012 as a teaching assistant. She subsequently qualified as a teacher and was then employed as a teacher, starting in that role on 1 September 2017.

58. At the start of the 2021/22 academic year, the Claimant was working four days a week as a classroom teacher, having reduced from five days a week to enable her to assist her mother in caring for her father. Another teacher, Teacher A, whilst working on a full time basis, spent four days a week as the PPA teacher, i.e. a teacher who provided cover for all other classroom teachers throughout the working week to enable them to undertake their planning, preparation and assessment (PPA) work. She also then covered the fifth day in relation to the Claimant’s class.

59. Another teacher, Ms Bevan, was absent at the start of the 2021/22 academic year following an accident, and a temporary teacher, Ms Lloyd, was employed to cover for her work during her absence.

60. Ms Bevan returned to the School in January 2022, but it was anticipated that she would be absent again to undergo an operation, and that she would then need a significant period of recuperation after that operation. In view of the uncertainty, Ms Lloyd continued to teach the relevant class, with Ms Bevan providing cover for other members of staff with managerial roles in order for them to fulfil those parts of their duties.

61. Later, on 22 March 2022, as I note below, Teacher A commenced a period of sickness absence, which was anticipated to last, and did last, for several months. Ms Bevan then took on the responsibility of teaching Teacher A’s class through to the end of the Summer Term 2022, with Ms Lloyd continuing to teach Ms Bevan’s class. It was felt that that would be a better arrangement for pupil continuity purposes than for Ms Bevan to resume teaching her class and for Ms Lloyd to take over Teacher A’s class.

62. On 18 March 2022, the School’s budget for 2022/23 was published. That identified a significant budget shortfall due to pupil numbers falling from 300 to 263. A deficit of some £185,000 was forecast for the 2022/23 year, with the School only having reserves of approximately £159,000.

63. On 29 March 2022, a meeting of the School's Staff Disciplinary and Dismissal Committee ("SDDC" or "Committee") took place. Present were the three governors who formed the committee, the Headteacher and his Deputy (in an observational capacity), two HR Advisers and the Educational Support Officer from the First Respondent, the School's Bursar, and the Clerk.

64. It was reported that all temporary contracts for non-teaching staff would end over the period to the end of August 2022 and would not be replaced. It was reported that assessing reductions in expenditure that could be made, a shortfall in the budget of approximately £64,000 would then remain.

65. A discussion also took place regarding a sum of £22,000 allocated for the development of outside space for ALN (additional learning needs) children, and a sum of £38,000 for the development of a play area in the foundation phase (ages 3 to 7). It was noted that the former sum had been specifically allocated for the work, and was ringfenced and could not be used for any other purpose. The latter sum was able to be used for the School's expenditure generally, and it was noted that if it was not spent on development but was used to fund staff costs then the deficit figure would reduce to some £26,000, which would mean that it would be likely that only one teaching post would need to be lost.

66. It was noted that the School's budget in fact only funded 11 teachers whereas at that time there were 12.5 to 13 teachers employed. Mr Dennis then produced two possible structures for consideration, one with 10 classes with smaller numbers with a non-teaching member of staff covering PPA, and the other with 9 classes with bigger numbers but with the engagement of a PPA teacher. The committee confirmed that the £38,000 earmarked for development should be used towards staff retention instead.

67. The First Respondent's Redundancy and Redeployment Policy includes a "Selection Criteria Checklist" to be used by primary schools in relation to any redundancy selection process. That contains a number of criteria, with the anticipation being that points between 0 and 3 would be provided in respect of each of them, with scope for the relevant SDDC to determine the weighting of the relevant factors at the start of the process, with weightings of 1 – 5 being awarded.

68. The Policy also notes that the selection pool will need to be determined initially, with selection criteria based on the needs of the particular school then being determined, together with the relevant weightings. Staff are then to be asked to complete a skills audit, which must be verified by the headteacher, before being anonymised. The committee then carries out the selection, taking into account the evidence provided from the skills audit.

69. The Committee discussed pooling and criteria, and decided that the Headteacher and Deputy Headteacher would not be included due to their management and leadership responsibilities. The proposed criteria were then agreed by the Committee with weightings being allocated to each criterion.

70. Following the meeting, later that evening, a letter was sent by the Headteacher to the teaching staff and trade unions, summarising the budget deficit and the need to make changes to bring spending within budget limits by 31 August 2022. Mr Dennis noted that the contracts of short-term temporary teaching assistants had been terminated, and that one part-time teaching assistant and one full-time teaching assistant would be resigning during the relevant period.

71. He went on to note that, should there be an identified requirement to reducing staff levels, and subject to discussions with trade union representatives, the selection criteria would be focused on the needs of the School. He asked staff to complete the skills audit, which was attached to his letter, in order to assist the SDDC with its decision making, with forms needing to be returned by 8:50am on 6 April 2022.

72. Mr Dennis went on to stress that, at that stage, no decision had yet been taken. He noted that early retirement/voluntary redundancy may be possible, as might the options of job sharing or voluntary reductions in hours. Staff were invited to speak to him about that in the first instance. Mr Dennis concluded the letter by noting that a meeting with trade unions would take place on 6 April 2022.

73. That meeting took place as scheduled, with exactly the same attendees as had attended the meeting on 29 March 2022, together with representatives from the NEU and the NASUWT. The NEU representative produced an email, that had been prepared by her colleague who was unable to attend, raising various queries about the redundancy situation and the procedure to be followed. The comments from that email, together with issues raised by the NASUWT representative, were considered.

74. Following the ending of the meeting with the trade unions, the SDDC and other attendees continued with the meeting to discuss the redundancy and the selection. It was confirmed that a redundancy of a teacher would be made, and that, following the scoring of the teachers against the criteria by reference to their audit forms, the Claimant had been identified as the lowest scorer.

75. The minutes of the Committee's meeting note that a question relating to the Welsh language was discussed by the panel at length. It was noted that staff had been asked if they had attended a Welsh language course and

that that could be read as referring to any Welsh course. The notes record that the Committee agreed to consider the question at the end to ensure fairness and consistency of the scoring with the descriptions given.

76. After undertaking the scoring, the Committee then went through the Welsh language question to ensure that the scores were fairly allocated to all, and looked at the three lowest scorers' questions to understand the reasons why they had come to the scores.

77. The Claimant was then informed, on 7 April 2022, by Mr Dennis, that she had been identified as redundant. A formal meeting was arranged with the Claimant and her union representative for 28 April 2022.

78. On 22 April 2022, a letter was sent to Ms Lloyd confirming that her temporary contract would end on 31 August 2022.

79. On 26 April 2022, Carla Banham, the First Respondent's HR Manager who was assisting the School with the redundancy process, emailed the Claimant, noting that she had been placed on the First Respondent's "At Risk" register, which gave prior consideration for posts within the Authority. She also noted that she would seek permission from individual schools where any vacancies arose for priority for those posts. A link was provided to the First Respondent's intranet to enable the Claimant to look for current vacancies, and she was directed to look at that on a daily basis. Ms Banham referred to her prior discussion with the Claimant, in which she had indicated that her preference was for a teaching post at 0.8, but that she would be happy for a 0.6 or a 0.8 post, but would also consider working full time in a primary school setting.

80. The meeting between the Claimant, her representative and the SDDC then took place on 28 April 2022. In addition, also present were the Headteacher and Bursar, three members of the First Respondent's HR department, and the School's Clerk. The minutes of the meeting record that Ms Banham, who was present, asked if the Claimant or her representative had any queries or concerns regarding the skills audit, and that the representative replied that there were no concerns. The representative then asked several questions and answers were given.

81. The Claimant then read out a pre-prepared statement noting the efforts she had put in to becoming a teacher, and the dedication she had shown to the School over her ten-year career. She confirmed that she would be prepared to reduce her working hours, and to consider alternative employment in the School.

82. The Claimant's representative then thanked everyone for the way in which the meeting had been conducted. He stated that there was no criticism of

the School, and he thanked Mr Dennis for the way he had communicated with the staff. Mr Dennis responded by saying that it would be with regret that the Claimant would be made redundant as he agreed with her statement and reiterated that she was a good teacher.

83. The Claimant and her representative then left the meeting and the Committee discussed the points that had been raised. The minutes record that the Committee made a point of noting that the representative had stated that he had no concerns about the skills audit or about how the process had been carried out. The Committee ultimately concluded, with regret, that the decision to make the Claimant redundant should be upheld, subject to her right to appeal.

84. Following that meeting, on 25 May 2022, Mr Andrew Thomas, the First Respondent's Director of Education, wrote to the Claimant noting that he had been informed that the Claimant's employment as a teacher at the Second Respondent was to come to an end with effect on 31 August 2022 by virtue of redundancy. He confirmed that, as the Claimant was employed by the First Respondent, it was now for it to consider the issue of suitable alternative employment, and that an HR officer would be in contact with her to offer support and to seek suitable alternative work. He confirmed that if it was not possible to find suitable employment then her employment would come to an end on 31 August 2022 and that she would then be entitled to a redundancy payment.

85. Discussions by email then took place between Ms Banham and the Claimant throughout June 2022 about the prospect of other vacancies within the Authority. They included the prospect of the Claimant taking up a higher level teaching assistant ("HLTA") post at the School. Ultimately, on 24 June 2022, the Claimant confirmed by email that she was not able to accept the HLTA position. She noted that the role being offered was currently being undertaken by a teacher but that the salary and professional status would be downgraded. She confirmed that her financial position did not allow her to accept the role, and that morally she felt that it was unacceptable for her to be put in such a difficult position.

86. The Claimant confirmed that she was currently undertaking a caring role within her family, and could not support a position of a five-day working week. In that regard, during this hearing the Claimant confirmed that additional caring support became available for her father at the end of June or beginning of July of 2022, which meant that a full time role became feasible again, although she accepted that she did not communicate that to the Respondents at any time.

87. On 29 June 2022, Mrs Banham emailed the Claimant about the possibility of a teacher being needed at the School for the Autumn 2022 term. That

arose in relation to cover for Ms Bevan. The operation that she had been waiting for since the start of the year was then scheduled to take place on 13 July 2022 and, if it went ahead, it was anticipated that there would be a recovery period of some six months. Ms Banham noted therefore that the School would need someone to cover that class until at least the end of term in December 2022, and potentially longer. The Claimant was asked, if she was interested, to contact the Headteacher about the post by 1 July 2022. Ms Banham concluded her email by noting that, if the Claimant accepted the temporary post then it would delay her redundancy until the "*end of this temporary contract*", and that she would continue to be on prior consideration for posts for the duration of the temporary contract.

88. Although not in line with the time limit that Ms Banham had set out, the Claimant contacted Mr Dennis, on 4 July 2022, noting that she would like to accept the temporary position in September. Unfortunately, it then became apparent that the planned operation had been cancelled with no revised date being provided. Mr Dennis then sent an email to the Claimant on 12 July 2022 noting the change of circumstances, and that the School was not in a position to offer a temporary post to cover Ms Bevan's absence in September.

89. With regard to Teacher A, an issue had arisen in relation to her prior to Mr Dennis's arrival at the School in September 2021. He decided that the issue merited referral to external agencies. That referral was made in March 2022, and, on 22 March 2022, Teacher A commenced a period of sickness absence which was anticipated to last for some months. It was that absence which led to Ms Lloyd's contract not being terminated at the earliest possible time following the budget on 18 March 2023, i.e. at the end of the Easter term, with Ms Lloyd continuing in her role and Ms Bevan then switching to teach Teacher A's class in her absence.

90. In April 2022, the external agencies decided that the concern was unsubstantiated, i.e. that there was insufficient identifiable evidence to support or not support the concerns. The matter was then referred back to the School to consider under its disciplinary procedures. An investigation was then undertaken by Mr Dennis, and a meeting took place between Mr Dennis and Teacher A on 7 June 2022, at which Ms Treharne and Mr De Benedictis were also present.

91. A conversation took place between Mr De Benedictis and Ms Treharne on 9 June 2022, notes of which were, as I have noted, taken by Ms Treharne at the time. Those notes, which I accepted as an accurate, albeit brief, record of the conversation, indicated that Mr De Benedictis was pursuing the possibility of redeployment for Teacher A, which would have had the effect of allowing the Claimant to remain at the School. A redeployment or secondment was suggested.

92. Ms Treharne replied that secondments or redeployments could not just be created. Mr De Benedictis noted that Teacher A was adamant that she would not return, but when asked by Ms Treharne as to whether she intended to resign, he replied that she did not. Ms Treharne noted that her advice would be for Teacher A to wait for the outcome of the disciplinary investigation before taking any further steps. The prospect of Teacher A raising a form of bullying grievance against Mr Dennis was raised by Mr De Benedictis, but no such grievance was ever pursued.

93. On 5 July 2022, the School's disciplinary investigation in relation to Teacher A was complete, and the decision taken by the Chair of Governors was that the matter would be handled informally under normal supervisory arrangements.

94. Teacher A attended the School on 7 July 2022, for a "meet the teacher" day where the teacher in line to teach the particular class from the following September would meet the pupils in that class. Teacher A attended to meet the class that she was due to teach in the September. Whilst no documentary evidence was put before me, I was informed that it had been planned that Teacher A would return to the School for the remaining couple of weeks of the Summer term on a phased basis. Whilst Teacher A was at the School, the Headteacher and Deputy met with her.

95. Mr Dennis, in his witness statement, noted that it was fair to say that Teacher A was nervous about returning and was unhappy with the proposed supervision that he had suggested should be undertaken on her return. In fact, from evidence in the bundle in the form of a text message from Teacher A to a colleague, she appeared to be under the impression that she would be subjected to a six-month probation period during which her conduct would be monitored. In the message, Teacher A noted that she was sorry to say that she would not be "*coming back at present*".

96. Teacher A then emailed Mr Dennis on 9 July 2022 noting that she was "*currently in no position to make any decision or plans to return to work yet*". Following that, on 11 July 2022, Mr Dennis referred Teacher A to Occupational Health, but as no appointment could be scheduled before the end of term, it was scheduled for a date after the school holidays, 13 September 2022.

97. Mr Dennis then, prior to the end of the term in July 2022, spoke to Ms Lloyd about the possibility of her being required to cover for Teacher A in September.

98. Mr Dennis was at pains to stress in his evidence that this was on a contingency basis as it was unclear as to whether Teacher A would be

returning in September or not, or, if she did not return, as to how far into the term it would be before she returned to work. It appeared to me however, that. whilst there may have remained uncertainty as to how long cover arrangements were to be put in place, cover arrangements were indeed put in place. Ms Lloyd texted Teacher A on 31 July 2022, i.e. some time after term had ended, noting, "*You've probably heard that I'm covering you until you're feeling better*". She asked if Teacher A wanted her to do anything with the classroom or set up any particular routine. In my view the reference to "*I'm covering you*" indicated that the School was not anticipating that Teacher A would return in September, and that Ms Lloyd would be engaged to cover for her.

99. That view was supported by evidence in the hearing bundle that Ms Lloyd accessed the School's "Hwb" SharePoint, on 23 August 2022 and accessed lesson planning materials.

100. In July of this year, i.e. 2023, the Respondents' legal representative emailed Ms Lloyd noting the text exchange she had had with Teacher A on 31 July 2022, and that the Claimant's representatives were suggesting that it demonstrated that Ms Lloyd was aware that Teacher A would not be back in September 2022. He noted that it was not his reading of the text exchange, but that, to assist him in clearing up the point and hopefully to avoid Ms Lloyd needing to attend the Tribunal Hearing as a witness, he asked her to confirm the purpose of the text exchange, whether Teacher A had told her that she would not be returning in September, and, if so whether she had passed that information to the Headteacher or Bursar. Ms Lloyd was also asked why she had accessed the Hwb in August.

101. Ms Lloyd's reply was in the hearing bundle. She noted that she was asked by the School if she would be prepared to cover for Teacher A if she did not return, although she did not confirm the date upon which that request had been made. She confirmed that she had been asked to be prepared to go into school on the first day of term if needed, and that, in light of that possibility, she had messaged Teacher A to ask her about the class set up.

102. With regard to Hwb access, Ms Lloyd noted that her access had been terminated as her previous contract had finished, and that she did not try to access it until closer to the school term starting so that she could plan lessons for her own benefit. She commented that Mr Dennis and the School's Bursar had made it clear that her engagement was "*just in case*". She confirmed that she was then employed on a week by week basis, coincident with Teacher A's Fit Notes, and was then employed temporarily (I presumed that, by that, she meant temporarily but on a longer term basis than week by week) from the beginning of November 2022.

103. Mr Dennis, when asked under cross-examination as to why he had not discussed the prospect of the Claimant providing temporary cover for Teacher A, confirmed that his understanding, from his discussion with the First Respondent's HR department about the Claimant's redundancy being deferred in order for her to cover for Ms Bevan, was that the deferral would need to be made until 31 December 2022, i.e. on the basis that any teacher under the nationally agreed terms and conditions would need to be given notice expiring either at the end of the Easter, Summer or Autumn terms. He indicated that, as Ms Bevan was anticipated to be due to be absent for some six months from July 2022, then a deferral of the redundancy through to the end of December would have had no financial consequences for the School. However, in circumstances where Teacher A's return was uncertain, in terms of it not being clear whether or not she would return in September, and, even if she did not return at the start of September she could potentially return at very short notice thereafter, then deferring the Claimant through to the end of December could have left the School effectively with two teachers, and the obligation to pay for two teachers, for the entirety or most of the Autumn 2022 term.

104. With regard to Teacher A's return, Mr Dennis confirmed that the Bursar had tried to contact her in August about her return, following receipt of a further Fit Note covering the month of August, but had not had a reply. The Bursar had then contacted Teacher A again on 2 September 2022, i.e. the Friday before term was due to start on the following Monday, 5 September 2022, and received a message in reply. That was that Teacher A was still suffering with anxiety, and that it had got worse the previous Sunday. The Bursar then noted in her text exchange with Teacher A that she assumed that she would be submitting another Fit Note, and Teacher A replied noting that she had ordered one the day before.

105. Further communication then took place between the Bursar and Teacher A on 6 September 2022, as the School had not received the Fit Note. Teacher A replied that she had gone to collect it, but that the doctor had left without doing it, and she had therefore had to collect it that day and would be posting it later. She confirmed that the Fit Note was covering a further one month, i.e. the month of September 2022.

106. In the circumstances, Ms Lloyd returned to the School on 5 September 2022 to teach Teacher A's class. Mr Dennis confirmed a contract was then put in place with her, backdated to 1 September 2022 to maintain her continuity of employment.

107. In the event, following the Occupational Health appointment on 13 September 2022, it became clear that Teacher A did not wish to return to her post, and the termination of her employment was subsequently agreed with effect from 31 October 2022. Ms Lloyd was then engaged on a longer

term basis to teach the relevant class for the remainder of the 2022/2023 academic year, and Mr Dennis confirmed that Ms Lloyd remained at the School in the 2023/2024 academic year.

108. In answer to a question from me about the provision of notice to teachers expiring at the end of a term, and whether he might have had a discussion with the First Respondent's HR department about a deferral of the Claimant's redundancy on a more flexible basis, Mr Dennis confirmed that, with hindsight, it would have been possible to have had that discussion. The Claimant, when giving her oral evidence, confirmed that she would have been open to such a flexible arrangement.

Conclusions

109. Applying my findings and the applicable legal principles to the issues I had to determine, my conclusions are set out below. I focused on the three core areas, as outlined in Langston, i.e. consultation, selection and alternative employment, and deal with each in turn.

Consultation

110. With regard to the asserted deficiencies in consultation, I noted that Ms Fadipe, in her closing submissions, had stated that one of the primary reasons to uphold the Claimant's claim was that there was no meaningful consultation at a formative stage, thus rendering the process unfair. She had, in the document she had prepared summarising the additional issues to be addressed, identified six separate elements said to give rise to deficiencies in consultation, as noted at paragraph 32 above, and I focused on those.

111. Both representatives reminded me of the need for me not to impose my own standards and consider whether the employer should have acted differently, and to assess the Respondents' actions from the perspective of whether they fell within the range of responses that a reasonable employer acting reasonably could have adopted.

112. Both representatives reminded me of the guidance provided in ex-parte Price, in which earlier guidance set out ex-parte Bryant was adopted, which involves consultation taking place when the proposals are still at a formative stage, the provision of adequate information on which to respond and adequate time in which to respond, followed by conscientious consideration of the response.

113. Considering those matters, I was satisfied that the consultation had taken place when the proposals were at a formative stage, and had been adequate.

114. The Claimant contended that the decision to make a teaching post redundant had been taken at the meeting of the SDDC on 29 March 2022, and that that was done in the absence of union representation. However, whilst it was clear that the SDDC, in that meeting, did form the view that a redundancy would be likely to be required in order to deal with the budget deficit, that was nevertheless a provisional view, subject to consultation with, and input from, the staff and their representatives.

115. I noted that the minutes of the 29 March 2022 meeting initially indicated that a budget deficit of £64,000 would arise, but that that could be reduced to £26,000 by the reallocation of money, earmarked for development of a foundation phase play area, to staffing costs. The minutes suggest that the Headteacher's preference had been to reduce staffing further due to other schools offering a better learning environment and the School being in dire need of development, but that was not accepted by the SDDC. That suggested to me that the SDDC approached its duties conscientiously, and with a view to minimising the impact on staff.

116. The SDDC then went on to discuss the skills audit, but I did not consider that doing that, in circumstances where a redundancy was clearly likely, took the process outside the range of reasonable responses.

117. With regard to the absence of union representation at the 29 March 2022 meeting, I did not consider that that was surprising or should be criticised. That was the first meeting of the SDDC, quickly following on from the identification of the significant budget deficit, and was the first opportunity for the SDDC to consider the figures, and what expenditure could potentially be removed or reduced, before ultimately moving to consider whether a redundancy or redundancies might be likely.

118. During that meeting, the various steps that were to be implemented to reduce costs, such as the cessation of temporary teaching assistants' contracts and the non-renewal of contracts that would come to an end in the lead up to August 2022, were discussed. Indeed, as I have noted, discussion took place about the reallocation of £38,000 towards staffing costs which seems likely to have saved a further redundancy. I did not consider that it would be incumbent upon an employer to consult with unions at that stage in a potential redundancy process. I certainly did not consider that the Respondents' actions fell outside the range of reasonable responses in that regard.

119. Following the meeting on 29 March 2022, in the evening, the staff were provided with the letter from Mr Dennis, outlining the difficult financial position and that the budget problem could mean a reduction in staffing levels. Staff were informed that, should there be an identified requirement to

reduce staffing levels, and subject to discussions with trade union representatives, the selection criteria would be focused on the needs of the School by reference to the skills audit. Mr Dennis stressed in his letter that, at that stage, no decision had yet been taken, and he invited discussions about voluntary redundancy, job sharing or reductions in hours.

120. The Bursar then provided, on the evening of 29 March 2022, to various union representatives, including the Claimant's union collectively and to representatives individually, various information regarding the budget issue at the School. That information included Mr Dennis' letter, various budget reports, the proposed budget for 2022/23, the Redundancy and Redeployment Policy, the School Development Plan, the proposed skills audit, and the staff structure and proposed structure.

121. Some criticism can legitimately be made of the provision of the skills audit to staff for completion before the meeting with the union. Indeed, that was not in compliance with the suggested procedure set out within the First Respondent's Policy, which noted that, in order to assist with the identification of selection criteria and skills audit questions, it was advised that a Development Officer from the First Respondent be in attendance, who, during consultation with trade unions, would advise the committee and Headteacher on the weighting of selection criteria and any additional criteria.

122. However, the unions had the skills audit, which confirmed the criteria being assessed and the weighting to be applied, on the evening of 29 March 2022. Had they had any concerns over the criteria being assessed, or the weighting being applied, then they had an opportunity to bring them to the attention of the Respondents before the audits were required to be returned by members of staff. No such concerns were raised, whether prior to the meeting on 6 April 2022 or during that meeting. Furthermore, at the individual consultation meeting with the Claimant on 28 April 2022, her representative, in answer to a question of whether there were any queries or questions regarding the skills audit, replied by saying that there were no concerns about it. It was only at the start of this hearing that concerns around the selection criteria and marking were raised, and I have addressed them below in relation to selection issues.

123. The focus of the discussion with the trade unions on 6 April 2022 was on the need for a redundancy, with questioning around whether the First Respondent could be asked to increase funding, whether additional pupils might arise, and whether all opportunities for volunteering for redundancy or reducing hours had been explored.

124. Following that meeting with the trade union representatives, the SDDC moved immediately on to consider the points raised and whether or not to

confirm the potential redundancy and, if so, to identify the person selected. Bearing in mind that the SDDC had been convened, had heard what the representatives had to say, and had all information about whether redundancies could be avoided, I did not consider that there was anything deficient in their consideration of the responses.

125. Overall therefore, I considered that the Respondents had satisfied the expectations required by ex-parte Price with regard to consultation.

126. With regard to the specific elements raised in Ms Fadipe's initial document, I have dealt with the first three in my analysis above. With regard to item 4, the only reference made regarding a HLTA was that PPA cover could be provided by a teacher or a HLTA, with that attracting a significantly lower salary. That step did not obviate the need to proceed with the redundancy of a classroom teacher.

127. With regard to item 5, the proposed staffing structure had been sent to the trade union representatives on 29 March 2022, and therefore they did have it in advance of the 28 April 2022 meeting.

128. With regard to item 6, the trade union representatives were provided with the documents set out in the Redundancy Policy. The concern appeared to be that annual Governing Body Budget Reports for the preceding three years had not been provided, and it is not completely clear that those documents were attached to the Bursar's email on the evening of 29 March 2022. However, the attachments did include documents entitled "Sandfields Primary Budget Share 2019.20", "Copy of Sandfields Primary Budget Share 2020.21", and "Sandfields Primary Budget Share 202122". Whilst I did not have sight of the documents themselves, that suggested that the required documents were indeed provided in advance of consultation with the union.

Selection

129. I was conscious of the guidance provided by the Court of Appeal, in British Aerospace and in Northgate, that it is sufficient for an employer to show that it has set up a good system of selection and that it was fairly administered, and that an Employment Tribunal would only have cause to intervene in a selection exercise where there had been a "glaring inconsistency", which demonstrated that a decision was outside the band of reasonableness.

130. Although, as I have already noted, the Claimant's trade union representative, in the meeting on 28 April 2022, had expressly confirmed that there were no concerns about the skills audit, i.e. the selection criteria, and although no issue was raised in the Claimant's Claim Form, or indeed in her witness statement, about any such concerns, specific concerns were

raised in Ms Fadipe's document produced on the first day of the hearing. I therefore deal with the four contended deficiencies, set out at paragraph 32 above, in turn. Before doing that however I considered one of the other "primary" contentions of Ms Fadipe about unfairness which was that Ms Lloyd should have been included in the selection process. Whilst that was not covered in the Claimant's witness evidence, it had been referenced in her Claim Form.

131. The focus of this contention appeared to be around paragraph 5.1 of the Redundancy and Redeployment Policy. That paragraph, after stating that consideration should be given to alternative means to avoid a redundancy situation e.g. by the freezing of vacant posts, the termination of short term temporary contracts and job sharing, then moves on to note, in parentheses, "*Please note – all temporary employees should be considered "in the pool" unless the contract is* ***very short term****, linked to a named person or specific task etc, as above*". The contention on behalf of the Claimant appeared to be that, as Ms Lloyd was not engaged on a very short term contract, she should have been included in the pool.

132. Ms Treharne had provided somewhat strange, albeit I considered entirely genuinely advanced, evidence regarding what was meant by "very short term". She indicated that, when she had started work for the First Respondent, she had questioned what was meant by very short term, and had been told that it meant up to two years.

133. That seemed extremely strange to me, and it may well be that Ms Treharne had been misinformed about what was really to be considered very short term. In my view, regardless of the wording used, the focus of the pool needed to be on those employees who, if not made redundant out of the exercise, would nevertheless remain at the School.

134. Notwithstanding that Ms Lloyd did return to the School in September 2022, as things stood in April, when the pooling and selection process was being undertaken, she was already due to be leaving the School at the end of August 2022, and she was notified of that on 22 April 2022.

135. In my view, the reference, within the Policy, to temporary employees being considered in the pool only applied to those who would otherwise have remained in employment in September 2022. In those circumstances, the Policy, quite correctly, would have required them to be considered "in the pool" unless the contract was very short term. I considered that that could potentially have arisen had a person been employed to work on a particular project or to cover for a particular member of staff, e.g. someone away on maternity leave, whose contract was due to expire in short order, e.g. at half-term in October 2022. In those circumstances, even though the temporary person may have remained in work at a time when a permanent

member of staff had been made redundant, their departure would nevertheless have been anticipated in the relatively short term.

136. However, none of that applied to Ms Lloyd. She was working on a short-term temporary contract, and that contract was due to be brought to an end at the end of August 2022.

137. I put to Ms Fadipe, during the course of her oral submissions, that this contention appeared to arise from an assessment of what ended up happening in September 2022 rather than what was understood to be the position in April 2022 when the selection exercise was undertaken. I also pointed out that, had Ms Lloyd been included in the selection process and scored higher than the Claimant and thus been retained, the Claimant would, justifiably, have had significant cause for complaint. Ms Fadipe did not demur.

138. Moving to the specific contentions regarding the selection exercise, the contentions advanced on behalf of the Claimant appear to cover two areas. The first was the question regarding Welsh language qualification or skills which was, "***Do you have any particular Welsh language skills or qualifications that benefit our pupils' learning?*** *If you have attended a Welsh language course in the last 3 years – please indicate. If you have been but more than 3 years ago – please indicate.*".

139. The Claimant noted that she had been awarded 2 points for this criterion, which meant, with a weighting of 2, that she ended up with a score of 4. Two colleagues were awarded marks of 3 weighted up to 6, one being the Welsh Co-ordinator (the Claimant was the Assistant Welsh Co-ordinator). Both those teachers had undertaken a term's sabbatical course, "Sabothol Cymraeg", which enhances teachers' ability to teach Welsh as a second language at all primary levels, and also potentially enables them to teach Welsh as a first language in certain circumstances. It was noted that one of the teachers awarded 3 points (weighted up to 6) for that course had undertaken the sabbatical course in 2018/19, and that the other teacher was at the point of completing the course that term. The Claimant contended that she had also attended a number of Welsh language courses.

140. Whilst none of the members of the SDDC provided any evidence to me, it seemed to me that the focus of their attention was on the initial question set out in this criterion set out in bold type, i.e. did the person have any particular Welsh language skills or qualifications that benefitted the pupils' learning. The question about attending Welsh language courses was, to my mind, a secondary one.

141. With regard to the primary question, the two individuals awarded a 3 were fluent or near fluent Welsh speakers, whilst the Claimant confirmed that she would not describe herself as a fluent Welsh speaker. Furthermore, even though one of the other teachers had attended the sabbatical course some four years previously, the two of them had attended term-long sabbatical courses which operated on an intensive basis. In my view, there was clearly adequate evidence for the SDDC to conclude that those two teachers should be awarded a 3, consequently multiplying up to 6, in respect of the Welsh criterion, and for the Claimant to be awarded a 2, weighted up to 4.

142. The other focus was on a question asked about whether the teacher currently taught in Key Stage 2 (ages 7 to 11). The Claimant had never taught at Key Stage 2, and observed in her entry that, whilst she had been a teaching assistant she had delivered a rapid maths intervention programme to pupils throughout Key Stage 2. An identical question was asked about earlier years in the school where the staff were asked if they currently taught in the Foundation Phase.

143. The position of the Claimant, awarded no points in respect of this Key Stage 2 question, was contrasted with one of her colleagues who received 1 point, weighted up to 3, when her experience of Key Stage 2 had been that of a supply teacher many years previously.

144. However, whilst the SDDC might potentially have awarded the Claimant a mark, which would then have been weighted up to 3, in relation to her experience as a teaching assistant, the question very clearly focussed on teaching at that level. It did not seem to me that the Claimant could realistically compare her time spent delivering a rapid maths intervention programme to pupils with teaching an entire class, even if the experience of teaching that class had arisen many years previously. I certainly did not think that there was any glaring inconsistency in the marks applied.

145. The other concern raised over selection by Ms Fadipe, in her item 7, related to how far back in years teachers were able to go in considering their evidence. Two points were to be allocated where evidence within the last three years was available, and one point was to be given for evidence from over three years earlier, but with no upper limit being applied to that. However, other than the point already addressed in relation to the question of teaching in Key Stage 2 above, no evidence of any material impact on the Claimant was advanced, and it did not seem to me unreasonable for the SDDC to consider evidence going back many years beyond three, provided that it remained relevant.

146. Ms Fadipe also made the point that the Welsh criterion was weighted lower than English and Maths. However, the School is an English medium school where, notwithstanding the importance of developing Welsh language skills,

it did not seem to me unreasonable that the focus would be on English and Maths. Indeed, the School's development plan noted that literacy and numeracy were core priorities.

147. Overall therefore I did not consider that there were any concerns in relation to selection which caused the identification of the Claimant as redundant to fall outside the range of reasonable responses.

Alternative Employment

148. The issue for me to consider here was whether the Respondent had fulfilled its duty to take reasonable steps to find the Claimant alternative employment. As with the other issues I had to consider, I considered this from the perspective of the range of reasonable responses.

149. The First Respondent had provided the Claimant with information, or at least with the ability to obtain information, about several possible vacancies that existed within its area due to commence in September 2022, including that of an HLTA within the School itself. The Claimant did not pursue any such opportunity, and, other than her concerns regarding the possibility of covering for Teacher A, did not put forward any contention that the Respondents had otherwise failed in their obligations regarding alternative employment. Her focus was on Teacher A's role.

150. In that regard, the Respondents' focus, acutely Mr Dennis' focus, was on two matters. The first was the uncertainty surrounding Teacher A's return; around whether she would return in September or not, and, if she did not, how long she would subsequently be absent for. The other revolved around a concern regarding an obligation to give the Claimant notice of termination of employment which expired at the end of a term, which meant that, if she was brought back into the School in September 2022, she would then have had to remain in employment until at least the end of December 2022. That potentially left the School in the position of having to fund two teachers for a term, i.e. if Teacher A had returned at a point where the Claimant's employment could not lawfully be ended until the end of December 2022, at a time when the School's whole approach was to reduce its staffing expenditure.

151. With regard to the first of those matters, whilst there was certainly a degree of uncertainty as to whether Teacher A would return in September, it seemed to me that it was quite clear to Mr Dennis that, certainly by the end of the Summer term in July 2022, that Teacher A was very unlikely to be returning in September. Teacher A's email to Mr Dennis on 9 July 2022 made it clear that she was "*currently in no position*" to make any decision or plans to return to work. Indeed, that led Mr Dennis to refer Teacher A to Occupational Health, where the appointment was not due to take place until

13 September 2022, and also led him to make contact with Ms Lloyd about potentially returning in September.

152. Whilst, as confirmed by Ms Lloyd in her relatively recent email to the Respondents' representative, there was no doubt an element of contingency over her return to the School in September, it appeared, from her message to Teacher A on 31 July 2022, that Ms Lloyd was of the view that she was indeed going to be returning to the School in September to cover for Teacher A. Her wording in her text message was extremely clear, "*I'm covering you until you're feeling better*". The Summer term had already finished by that time, and therefore the cover to be provided can only have been cover in September. If there had been any realistic likelihood that Teacher A was due to return then Ms Lloyd would have qualified her comment in some way, by saying something like, "If you're not well enough to return in September I'm going to be covering you".

153. It seemed to me that, at the very least, there was going to be a short term vacancy arising from Teacher A's absence in September 2022. Mr Dennis was clear enough about that to make arrangements for cover to be available, over and above the short-term supply cover that would be anticipated to be arranged if a teacher called in sick at short notice, and sufficient for Ms Lloyd's Hwb access either not to be terminated as anticipated, or to be reinstated, such that she could access planning materials in the latter part of August 2022.

154. I noted that Mr Dennis confirmed in his evidence that he had made contact with Ms Lloyd before the end of the Summer term in order to discuss with her the prospect of her returning in September. I further noted that that would have been very much at the same time as the discussions with the Claimant about potentially deferring her redundancy to cover for Ms Bevan had been concluded. The Respondents were therefore aware that the Claimant was ready to defer her redundancy, even if it was only by a term, in order to provide temporary cover. In my view therefore there was an alternative position, albeit at the time potentially quite short term, which was at least capable of being discussed with the Claimant.

155. With regard to the second matter, I could understand Mr Dennis' perception that any deferral of the Claimant's redundancy would have to be made up to an anticipated termination date in line with the Teachers' Terms and Conditions, i.e. up to the end of December 2022. However, his understanding of that arose from his discussion with the First Respondent's HR department around the potential deferral of the Claimant's redundancy in order to cover for Ms Bevan at a time where, if the operation had gone ahead, cover would have been needed until the end of December.

156. Mr Dennis did not take any further advice from HR in relation to the appropriateness of discussing the possibility of the Claimant covering for Teacher A in September, and whether or not any flexibility could have been built in to any discussions with the Claimant such that she would not have been required to have been retained until the end of December 2022, but could have been retained on a week by week or month by month basis, as subsequently was Ms Lloyd. Mr Dennis, in answer to a question from me, agreed that, with hindsight, it would have been possible to have had such a discussion.

157. I noted that Ms Banham, in her email to the Claimant on 29 June 2022, in which she raised the prospect of the Claimant's redundancy being deferred to cover for Ms Bevan, had noted that there would be a need for someone to cover the class "*until at least the end of the term in December 2022, and potentially longer*". She also said that if the Claimant accepted the temporary post then it would delay her redundancy, "*until the end of this temporary contract*". Whilst, had the intended cover for Ms Bevan been put in place, it was likely that that would have been until the end of December, that was not put forward by Ms Banham as a certain end date. It may, for example, have been the case that Ms Bevan would have needed slightly longer to recover from her operation, particularly as six months from the scheduled operation date of 13 July 2022 would have taken her up to 13 January 2023. It may well have been the case therefore that the cover for Ms Bevan would have needed to be extended for a few weeks into the Easter term 2023. Ms Banham's email did not suggest that that would have been something that could not have been accommodated

158. I also noted that the particular section within the Williams decision relating to alternative employment indicated that an employer "*will seek to see whether instead of dismissing an employee he could offer him alternative employment*" [my emphasis]. In the circumstances, I considered that a reasonable employer, acting reasonably in the circumstances that prevailed, would have sought to see whether, instead of dismissing the Claimant, they could have offered her alternative employment in the form of temporary cover for Teacher A, no matter how short that cover might have been. The discussions with the Claimant, no doubt involving her representatives, could have addressed what Mr Dennis perceived to be the problem of the Claimant needing to be employed until the end of a term, by reaching a specific agreement, in the circumstances that prevailed, such that the Claimant's employment would continue into September 2022 subject to minimal notice and that, as and when that notice fell to be given, on Teacher A's return, the Claimant's entitlement to a redundancy payment would have kicked in.

159. In the way the events transpired, the Claimant's position became even more stark, in that, had she been kept on in September 2022 to cover for Teacher

A, then, by the end of October 2022, her position would have been confirmed and her employment would have been preserved on an ongoing basis. It would also incidentally have saved the cost of a redundancy payment.

160. I did not consider that the Respondents' other contention regarding suitability, i.e. that the Claimant had no Key Stage 2 experience, carried any particular weight. She was a fully trained primary teacher, and thus was fully capable of teaching in Key Stage 2. I did not consider that the Respondents could reasonably have said that they could withhold an offer of employment in Key Stage 2 due to the Claimant's lack of experience.

161. Overall therefore I considered that the Respondent failed in its duty to take reasonable steps to find alternative employment for the Claimant. That therefore meant that her dismissal was unfair, and her claim of unfair dismissal succeeded.

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Employment Judge S Jenkins
Dated: 8 January 2024

JUDGMENT SENT TO THE PARTIES ON 10 January 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche