EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Anna Davis		Broomfield House School

Before: Employment Judge Downs

Hearing held at: London South Employment Tribunal

Hearing on 3rd January 2017

Representation	**Claimant:**	Mr Nikolas Clarke (Counsel)
	Respondent:	Ms Lisa Hatch (Counsel)

RESERVED JUDGMENT

IT IS THE JUDGMENT OF THE TRIBUNAL that the Claim for unfair dismissal is well founded

REASONS

Issues

1. This is a claim for unfair dismissal.

2. The Respondent says that the reason for dismissal was redundancy and, failing that, some other substantial reason – namely, a business reorganisation. In addition, it was said to be at issue whether the belief of the employer was genuinely held. Further, there are issues of fairness in that the Claimant complains of being given insufficient notice. The Claimant would say that little consideration was given to any alternatives to redundancy. It is a complicating feature that the appeal determined that this was not a situation of redundancy but was essentially a dismissal on the grounds of a business reorganisation i.e. some other substantial reason.

3. The Respondent would rely on *Polkey*. The Tribunal stated that it would initially hear evidence and argument on liability only with discussion of quantum to be heard on a subsequent day. An additional piece of evidence was introduced very late in the hearing which generated some correspondence. The significance of this is dealt with below.

4. This Judgment on liability has been delayed because of pressure of work for which many apologies.

The Evidence

5. The Tribunal had the benefit of an agreed bundle of written evidence. Additionally it was provided with witness evidence of: The Claimant; Mr Andrew Norton York – the school proprietor; Ms Amanda Hill – the School's Early Years co-ordinator; Mr Mathew Adshead – who undertook the appeal; Ms Andreea Ungureanu; Ms Wanda Dusznska; and Ms Maxine Coles.

Relevant facts

6. Broomfield House School is a private school in Kew. It is run through a Company, Broomfield House School Ltd. The proprietor of the school is Mr Norton York. It is a medium sized institution with all that connotes as to the administrative resources available to it.

7. Mr York's own witness statement summarised the background admirably. He was responsible for leading education at the school both strategically and operationally, hiring all the staff, safeguarding children and operating the school so it was a success commercially and economically. Mr York had the benefit of two deputy heads and a senior leadership and management team. However, most significant decisions were made by Mr York. Mr York took over the running of the school from his mother in the early 2000s.

8. The Claimant had been made redundant from her employment in the Montessori School in Kew and applied for and was appointed to the post of classroom assistant in the early years department of the Respondent's establishment starting at the beginning of the academic year on 2nd September 2013. The Claimant's contract of employment provided for a full term's notice on either side.

9. In the Summer term of the academic year 2013/2014, the Claimant acted up as the pre-kindergarten class teacher on a temporary basis because of the resignation of a class teacher. She continued in this post on a permanent basis from September 2014. She was much lauded until the period with which this Tribunal is now concerned. At about the same time, Mrs Amanda Hill commenced work as Early Years' Coordinator (she also worked as a kindergarten class teacher). Ms Hill was interested in moving towards an approach more closest aligned with the Early Years Foundation Stage (EYFS) – which was her background. The relationship between the Claimant and Ms Hill was harmonious (initially).

10. The written evidence of Mr York is that he seeks to bring about continuous improvements by way of a planning process with the aim of effecting change for the coming academic year. This starts as far back as the Autumn term in the previous year during which he discusses plans with senior staff and others who may be affected. He told the Tribunal that this had become more formalised since joining the Independent Schools Association and by way of departmental/key stage development plans and reflection on the results of annual teacher observations and subsequent performance management meetings.

11. Mr York's case is that in the Autumn of 2015 he determined that different and more highly qualified staff were needed for early years to support the move to EYFS and in preference to the long-established pre-kindergarten curriculum which had evolved under staff qualified through Montessori.

12. He said that he concluded that the most effective method was to change the level of qualification required for the staff leading the two classrooms in the early year department. To that end he believed they would benefit from a further staff member in addition to Mrs Hill who held QTS with early years specialism.

13. At this point, I think it is necessary to say that the tribunal accept that Mr York is entitled to align the curriculum at Broomfield House School so it is closer to the EYFS approach. He put before the Tribunal arguments based on consistency and commerce and cost management that had logic.

14. Mr York said that in the process of the Autumn term he worked on a plan with his two deputy Head Teachers and Ms Hill to have a new structure requiring a QTS EY Co-ordinator to lead and directly manage all staff in the department, supported by a Deputy EYCO with comparable qualifications. In support of these two QTS teachers, he planned to have a team of four assistants working across both classrooms. This meant a unified team of six.

15. Mr York illustrated his proposals by way of a set of charts and explanatory documents that were produced in the bundle. These were said to be dated December 2015 in the index to the bundle and, on their face, they say that they were re-drafted in January 2016. The document is headed "Change to the Structure of Early Years Department September 2016" Despite this heading, within this document is reference to the possibility of these changes being brought in as early as the Summer of 2016. It is not clear whether this is a later addition. It is said that "Any staff whose position may change as a result of this strategy will be informed in good time." The Claimant was not provided with proper documentary rationale for the changes for a further two months.

16. The chart by contrast implies that the new organisation would be brought into force in Summer 2016. The chart covering the existing arrangements conceded that the EYFS co-ordinator did not (at that time) oversee plans for pre-kindergarten work.
Mr York said that he prepared a document "summarising" his thoughts on this process. The impression given in his witness statement is that this was written even before the redundancy process was begun. The document was headed, "Change Analysis to Staff Qualifications" and purports to be dated December 2015. It is, in fact, from 1st February 2016. Even this envisaged that full implementation would not be until September 2016. This document said that the role of the pre-kindergarten class teacher with Montessori (level 4) qualification was at risk of redundancy.

17. Mr York met with the Claimant on Tuesday 8th December 2015. She did not know what this meeting was about in advance. He prepared a "script" which informed the Claimant that her post was at risk of redundancy and why. Further she was told that she would be provided with a confirmatory letter on Wednesday 9th December and there would be a consultation period lasting until Monday 14th December 2016. i.e.

covering four working days. It provided a series of boxes for the responses of the Claimant.

18. The Claimant is recorded as being surprised. Not surprisingly she put stress on the quality of the teaching that she provided rather than any particular qualification and emphasised that she would have had three years to gain the required qualification if she had known (in advance). She was also bewildered as no hint of these changes had been given at the meetings at the beginning of the academic year.

19. In the fuller note of her interview on 8th December 2015, it is apparent that the Clamant notified the Respondent that her university qualification from Poland gave her QTS. She stressed that she had no particular attachment to Montessori and had been content to work in a mainstream school. The Claimant suspected strongly that the reorganisation was a sham and that it was a ruse to obtain her dismissal. The conversation was left that the Claimant could talk to the necessary people about obtaining QTS. The Claimant was asked what she had to do to obtain QTS qualifications and was told that this was for her to investigate over the next few days. The Claimant was sent the formal confirmation as promised on 9th December to her home address. This included a clause to the effect that the respondent would consider alternative employment, The letter made no reference to her Polish qualifications. It notified the Claimant that her post might be considered redundant from 18th March (the end of term).

20. The Respondents concede that the Claimant was very upset about the notification. The Claimant was dismayed at the short period of consultation and had concluded that the Respondent was determined to dismiss her. The Claimant took to her bed on 14th December. The Respondent sought to have the meeting the following day and then postponed the meeting until 4th January 2016.

21. Mr York complained that the Claimant was emotional and combative in the meeting that took place on 4th January 2016. The note of the meeting would tend to show that she was challenging. In particular she sought to know why she had not been told of the impending redundancy before to which she was not given an answer beyond a concession that the timescale was short and, "…the process has happened. The answer is that we made a decision at the moment we made it." The Claimant said that she had made enquiries about the QTS (qualified teacher status) process, that they should contact her in a month and that the process will take no longer than four months. In fact the Claimant had sought QTS and had been informed by the NCTL that they take up to four months to make a decision. This information was provided to the respondent at their request.

22. It is apparent from the notes that the Claimant was very suspicious that the true motive of the Respondent had been to replace the Claimant with a recent recruit (as an assistant), Miss Antonia Baird. This suspicion only grew in successive weeks as criticisms were made of the Claimant's teaching for the first time.

23. The Claimant was then given a letter of 4th January 2016 informing her that no alternative posts had been identified and that she would be made redundant as of

18th March 2016. This constituted one term's notice. The Claimant was informed that the school proposed to put interim arrangements in place for the summer term with the full reorganisation taking place at the beginning of the academic year. The letter added, "if any further suitable employment opportunities arise at Broomfield in the meantime I will keep you appraised of them." The Claimant told Mr York that she proposed to appeal. He was displeased and told her that he had expensive lawyers and deep pockets amongst other comments.

24. The Respondent sent the Claimant a follow-up letter on 7th January 2016 informing her that the school did not envisage recruiting any additional teachers in the remainder of the academic year but also asking for evidence of her QTS application.

25. The Claimant appealed by way of a letter dated 10th January 2016. The letter was quite succinct. It queried whether this really was a redundancy as there was no diminished requirement for employees to do work of a particular kind and argued that the purported reason for dismissal was false and that the real reason was so as to employ Miss Baird (despite the fact that Mr York had previously said the school did not employ newly qualified teachers). The Claimant also argued that the consultation period was suspiciously short. The Claimant then asserted that she had all the necessary requirements for QTS (which she listed) and argued that this should be certified by the beginning of the summer term – 19th April. She was very concerned about her future employability because of her age.

26. Mr York asked the Claimant about progress from QTS on 1st February 2016 and the Claimant said that they are due to get back to her but alluded to difficulties arising because of the passage of time since she was trained in Poland. In a document produced for the appeal, Mr York made clear that he had made the assumptions that he had made about the Claimant's qualifications based on their age and most especially that they pre-dated Poland's accession to the EU. Mr York also made criticisms about the Claimant in the classroom and her resistance to adapting to the needs to EYFS over three paragraphs in his document.

27. The Tribunal finds that it was only really after the Claimant had been dismissed that Mr York had started to address his mind to the potential strengths of the Claimant's arguments based on her pre-existing qualifications. It is apparent that he just assumed that the reorganisation would mean that the Claimant would be dismissed in the shortest possible timescale.

28. There was a disagreement as to who should hear the appeal. Eventually the Respondent obtained the services of Mr Matthew Adshead who was nominated by the ISA. The Appeal hearing took place on 23rd February 2016.

29. Mr York had previously insisted on a different choice of appeal chair and had held a meeting with him on 19th January 2016 which had been minuted. This revealed that Mr York did not actually know what qualifications the Claimant had. Mr York also told the then chair of the appeal that the rationale for his decision to dismiss had been preparation for the next academic year.

30. Mr Adshead met the Claimant on 23rd February 2016. It is apparent from his evidence that it was only really in the appeal that an attempt was made to come to grips with the issue of what qualifications the Claimant actually had. He found it difficult to establish facts in his interview with the Claimant as she was so upset. He found that the Claimant believed that what was happening was an attack on her competence. The Claimant was entitled to be somewhat confused as the Respondent had started to criticise her competence and she could not make sense of the supposed rationale of the decision to dismiss her – redundancy.

31. On 1st March, Matthew Adshead wrote to the Claimant to inform her of the outcome of the appeal. His letter conceded that the Respondent had complicated the matter by referring to the dismissal as being on grounds of redundancy and not, redundancy. The appeal found that the Claimant was dismissed because she was not qualified to work in the new structure. The Appeal decision did not analyse the implications for fairness to the Claimant that arose from not properly explaining the reason for dismissal to the Claimant.

32. It adopted the rationale of Mr York that consultation did not start earlier than December as the decision was not made then and the period of consultation was truncated to allow the Claimant to be dismissed at the end of the Easter term.

33. However, it did establish that Mr York was prepared to await the outcome of the NCTL process provided it took no longer than four months from 18th December. The decision on appeal therefore was that the period of notice was extended by a month until 18th April (the beginning of term) to allow the Claimant to hear back from the NCTL. If NCTL recognised the Claimant's qualification, she would remain in post – otherwise she would stand dismissed from 18th April.

34. On 7th March, the Respondent altered her date of dismissal so it was now to be 18th April. On 9th March the Claimant notified the Respondent that she had received an email on 15th February, notifying her of an email from NCTL informing the Claimant that she was not eligible for QTS as she would appear to have been an early years teacher in Poland and not a classroom/subject teacher (which is what she was seeking). At the same time the Claimant forwarded emails showing that she was seeking to acquire QTS through Kingston University via the Assessment Only Route. The response of the school by way of a letter of 11th March, was to reverse the decision of the appeal and revert to a termination date of 18th March 2016. The Claimant was diagnosed with an adjustment order at that time and acquired stress-related shingles. This compromised her ability to explore options for QTS/AOR as did the fact that a school that she had worked in previously no longer existed.

35. The Claimant was eventually replaced by Ms Baird. The Respondent made interim arrangements for the summer term but these did include removal of Montessori resources and a reorganisation of the teaching space (and new paintwork). It involved Ms Hill in a substantial amount of preparatory work.

36. Mr York said that many of his teachers left at various times during the academic year. When this was explored, it transpired that this was by reason of maternity leave. The tribunal accepted the evidence of the Claimant that responsible teachers

would only want to move at the end/before the beginning of an academic year. It follows that the education providers would plan accordingly (this is apparent from the evidence of Mr York that planning was based around an academic year). The Tribunal accepts that the Claimant – once she knew that QTS was complicated - would have sought to obtain qualification through AOR. The Claimant would have been content to pay for this but would have required the support of the Respondent. The tenor of the conversations with the Claimant was such that the Tribunal accept the evidence of the Claimant that she did not know she had the right to make counter-proposals to that made by the Claimant.

37. Mr York told the Tribunal about a letter signed by 17 parents (out of a class of 20) protesting the treatment of the Claimant. He stressed that the majority of those parents kept they children in the school by reference to the academic year.

Evidence about alternative posts

38. During the course of the Tribunal hearing, Counsel for the Claimant indicated in open Court that he had been instructed that Kew and Sunflower Montessori had advertised positions for teachers in the Spring of 2016 to start in September of that year. These instructions arose out of the evidence of Mr York when he was cross-examined that he had considered whether there were any vacancies in those schools and discovered there were none.

39. Counsel for the Claimant sought to argue after lunch that he should be able to adduce evidence of another post with the Respondent Company that should have come vacant at a time when the Claimant was still employed by the Respondent. This proposal would have involved recalling Mr York. At that time the Tribunal had been anxious to avoid new evidence being admitted as it was concerned that finality implied some restriction being placed on new evidence being filed. In addition, it did not prove possible to produce the same.

40. The Solicitor acting for the Claimant indicated that they made enquiries on that day (the email chain produced indicated that the enquiries were followed up in the lunch adjournment on 3rd January but that the Montessori organisation only responded by the following morning, 4th January 2017. They sought the permission of the Respondent to admit the material in evidence. This consisted of an advertisement for experienced Montessori teachers for the Nursery School in Twickenham and the Kew Montessori to start in September 2016. It was said that the closing date was 5th May 2016. There was also a job description. This set out that the Kew and Montessori Schools are nursery schools owned and run by Broomfield House School and that the Kew Montessori is a few minutes' walk away from Broomfield and Sunflower is in Twickenham. The advertisements sought teachers who were available five mornings a week. The accompanying email chain disclosed that the advertisement went live on 31 March 2016 (for three months).

41. By letter of 9th January 2017 the Tribunal directed the Claimant to set out in seven days why this evidence should be admitted and that the Respondent had 14 days thereafter to set out any objections to the admission of the same (i.e. by the end of January 2017). The Tribunal said that any response should include submission as to how the evidence should be treated if it were to be admitted.

42. The tribunal received an email from the solicitors acting for the Respondent on 9th January 2017. This set out their contention that it was unusual to seek to adduce such evidence after evidence had closed but before Judgment. In any event, they maintained that the evidence was irrelevant as the Claimant had left the employ of the Respondent on 18th March 2016 but that the adverts were not placed until 28th March 2016 – after the Claimant's departure. They asserted that Mr York, in his evidence, had said that during the course of the Claimant's employment, there were no vacancies.

43. On 11th January 2017, Counsel for the Claimant made written submissions to the Tribunal. These were to the effect that the Tribunal should admit evidence that Kew and Sunflower Montessori Schools advertised for teaching positions at the schools from 31st March 2016 for positions starting in September 2016, that these schools are owned by the Respondent and that the Claimant was eminently suitable and qualified for those jobs. Counsel noted that the Claimant gave real evidence that she had seen the advertisements.

44. The Claimant contended that it was apparent that the Respondent considered that the advertisements were relevant to the question of mitigation of loss (the Claimant had not applied for the posts) but they had not disclosed these vacancies as part of that process. Counsel for the Claimant did not agree that Mr York had added the phrase, "during the course of the Claimant's employment" when he gave evidence.

45. The Claimant argued that (i) redundancy is not the real reason for the Claimant's dismissal and alternatively, the Claimant avers that whatever the reason for the dismissal it was unfair of the Claimant was not considered for alternative roles within the same group and that such a duty was continuing. Counsel contended that the balance of prejudice would favour admitting these documents.

<u>The arguments of the parties</u>

46. The Respondent made a series of arguments in writing and orally. Some of these contentions were ambitions. Examples included: (i) the assertion by the Respondent that they had followed a reasonable procedure was supported by "contemporaneous" documents. In fact the Tribunal accepts the evidence of the Claimant that the provenance of the documents is profoundly uncertain and it is more likely than not that they were newer than asserted; (ii) that the Claimant was given sufficient time for the purposes of the consultation – in fact, the time allowed in the original timetable was so short that it must lead to doubts as to how genuine the whole exercise was; and (iii) that the Respondent could rely on the conduct and result of the appeal – when the Appeal determined that this dismissal was not a redundancy but a business reorganisation and that the Claimant's notice should be extended to 18th April – in circumstances where the Respondent have sought to ignore the finding about the reason for dismissal before this Tribunal (it was still their case that this was either a case of redundancy or some other substantial reason and they revoked the offer of the extended notice period).

47. The Respondent's better arguments were based on their assertion that the reason for the reorganisation was a business reorganisation (a potentially fair reason) and the fact that the Claimant may have known at a reasonably early stage that the NCTL were not going to award her QTS.

48. Twice during the hearing, the Tribunal discussed with the parties whether there was any point in analysing the arguments based on redundancy when the case of business reorganisation seemed so much stronger (the Tribunal drew the case law to the attention of the parties). Nevertheless the Respondent still maintained that there was diminishing need for a Montessori teacher at the school as a result of developments since 2014 and that whereas the school had been hybrid, this was no longer to continue as a result of a change of a. change of direction at the school.

49. However, the Respondent mounted an argument based on business reorganisation and supported by *Hollister v NFU* and *Scott & Co v Richardson.*

50. Very sensibly, the Respondent cautioned the Tribunal against substitution and stressed the range of reasonable responses test generally. The Respondent told the Tribunal that it was dangerous for a tribunal to comment on the length of a restructure and on the relevance of term time and ultimately it is the Department of Education who decide whether map her on to equivalent of QTS

51. It was also commented, in passing, that the original complaint was the that the notice of dismissal was too short but that, as things transpired, the time frame was not actually rushed and that most of the complaints are *ex post facto*.

52. Lastly, the Respondent mounted an argument based on *Polkey*. It was said that the suggestion that the Claimant's employment should continue until the end of the Summer term was of no consequence as there was no evidence that the Claimant would have achieved QTS.

53. The Claimant concedes that pursuant to *Ellis v Brighton co-operative society* [1976] IRLR 419, a properly consulted reorganisation may constitute some other substantial reason but that "there has to be a sound business reason." By reference to the case law set out in *Harvey* and the IDS Guide, Counsel argued that there had not be a proper balancing of needs by the Respondent when considering the Claimant and the wider business. The very pace and manner in which the Respondents had gone about the process has also made matters worse in that it had made the Claimant ill and made it that much more difficult for her to participate in the process going forward and make the necessary enquiries.

54. On behalf of the Claimant it is said that this case is a curiosity as there was no prior consultation with parents and the extant (i.e. pre-reorganisation arrangements) would appear to have achieved substantial recognition for the Respondent by way of commendations/inspection results etc... Additionally, a reorganisation that takes effect in the course of an academic year is particularly curious given that it has potential to disrupt planning and, as it relates to the children, they will lose the continuity of tuition.

55. Claimant's counsel argued that the interests of employees can't be ignored and, in this case, the Claimant had been left to her own devices. The potential reorganisation was a matter that should have been raised much sooner. Indeed the Claimant had considered getting QTS before but had never been encouraged to do so nor been told that it was likely to become essential. More generally, there was no consideration as to whether the Claimant could have qualified with assistance.

56. So far as the Respondent still relied on arguments based on redundancy, the Claimant's Counsel asked (rhetorically), "was there a change/reduction in work?" This was especially as the School had hitherto used a hybrid model of tuition and the Claimant was not even a pure Montessori teacher.

Relevant Law

60. The Tribunal had regard to Employment Rights Act 1996 section 94 (1) which states, "An employee has the right not to be unfairly dismissed by his employer." Section 98 provides,

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

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

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

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

…

(c) is that the employee was redundant,

(3) In subsection (2)(a)—

…

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

…

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

61. Section 139 of the Act provides,

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.

62, As concerns the case law, the EAT in *Ellis v Brighton Co-operative Society [1976] IRLR 419* suggested that there must be a pressing business need in order for dismissal of this nature to be justified but subsequently, the Court of Appeal held that the threshold for justifying such dismissals is not so high. In *Hollister v National Farmers' Union [1979] IRLR 238*, *[1979] ICR 542*, a reorganisation was introduced at the instance of, and for the benefit of, the employees. But Mr Hollister refused to accept it because although it improved his remuneration, it diminished his previous rights. The Court of Appeal held that he was fairly dismissed (and that a failure to consult him over the reorganisation did not render the dismissal unfair). Lord Denning MR, in a judgment concurred in by Eveleigh LJ and Sir Stanley Rees, approved the stance of Arnold J that it may be justified where there was some sound, good business reason for the reorganisation.

63 The authors of Harvey would say that this gave management substantial latitude but that this was subject to important caveats [1863] – two of which are particularly relevant here: "the employer must demonstrate that it has discernible advantages to the business (*Kerry Foods Ltd v Lynch [2005] IRLR 680, EAT*)." As was said in *Banerjee v City and East London Area Health Authority [1979] IRLR 147* - mere assertion is not enough.

64. The second relevant caveat is described as follows *[1864],*

" the interests of employees cannot be ignored when a tribunal is determining whether the employee has a 'sound, good business reason' for the dismissal. Whether the employer has acted properly in all the circumstances in seeking to impose the change will depend at least in part on whether the employee acted reasonably in refusing the change, though (as pointed out at para [1930]) it is of course possible that both parties may have been acting reasonably in their own terms and, while the employer should take the employee's view into account, ultimately the scales will tend to come down on the employer's side."

65. The case law on business reorganisations iterates that what is crucial is the balancing of advantage and disadvantage for both parties (see Harvey's at [1930]).

66. There was discussion in the course of argument about the passage in Harvey [887 –] and two cases concerning unqualified teachers. The Tribunal read the first instance Judgments in *Wren v Wiltshire County Council (*1969) *4 ITR 251*, IT; and *Kleboe v Ayr County Council (1971)* 7 ITR 201*, IT*). This would tend to imply that a case such as this could not be one of redundancy. The Respondent made no satisfactory response as to the potential implication of these cases. An argument might be made on their behalf that the actual work that was to be done here was different (i.e. Montessori methods were being phased out). On the fact of this case,

the Claimant was a hybrid teacher. Nobody suggested she couldn't perform an EY teaching function – rather the problem was her qualification. As far as the Respondent was concerned if the NCTL awarded the Claimant QTS, that appeared to be sufficient and she could remain in post.

Application of the fact to the Law

67. The Tribunal concurs with the decision made at appeal that this is not a redundancy. This conclusion receives some support from the first instance decisions in *Wren v Wiltshire County Council (*1969) *4 ITR 251*, IT; and *Kleboe v Ayr County Council (1971)* 7 ITR 201*, IT*) and the commentary thereon in Harvey.

68. The Claimant was employed as a pre-kindergarten class teacher. The necessity for this remained after her dismissal. It would be a distortion of the law to try and shoehorn the facts of this case into the category of redundancy. Apart from anything else there is quite some complexity as the Claimant's teaching – like that of the school generally - was of a hybrid methodology. The Respondents would have maintained her employment if she had acquired recognition for her past education.

69. This decision is not a knockout blow to the Respondents as it was just a fallback position so far as they were concerned. If it had any significance – it caused confusion for the Claimant (as it was the reason asserted for her dismissal at the time of the original consultation) as she couldn't understand why she was being made redundant and she therefore struggled to respond to the consultation. This disadvantage was not taken into consideration by the Respondent.

70. Was this a business reorganisation? The Tribunal concludes that the Respondent was influenced by Ms Hill to adopt an approach more closely aligned with the Early Years Foundation Stage (EYFS) – which was her background. As the Tribunal found above, there was both educational and business logic to this (the latter by way of marketing and also as to restricting the costs of teachers i.e. the ratio of staff to children).

71. This means that there was a genuine business reorganisation in the offing. It was part of the process of development that began in the 2015 – 2016 academic year. However, the Tribunal does not accept that that was the reason for the Claimant's dismissal as of January 2016. The Respondents advanced little if any evidence of contemporaneous discussion papers, emails, minutes of management meetings and all the usual accoutrements of a business reorganisation that one would expect of a sophisticated school group of this kind (with a senior management team etc…). It is of concern that what was produced seemed to be written and edited at just the time that the Claimant was challenging the decision to dismiss her.

72. Another aspect of this is that the Tribunal was just not convinced by the evidence of Mr York that the decision to reorganise teaching mid-year was a normal part of business planning. This was an exceptional situation, the departure of the Claimant involved considerable disruption to the school, a loss of continuity of teaching for the children and an increase in the workload for Ms Hill. This was not a product of the normal cycle of annual business planning. It was more akin to a *hand break turn*. This was inexplicable.

73, The Tribunal draws an inference that it was because the Respondent had decided to dismiss the Claimant as soon as possible. The real reason for dismissal with such urgency is just unknown. This is not a situation in which the Respondent was acting within a band of reasonable responses. It is not reasonable to withhold the true reason for dismissal from an employee.

74. Needless to say this has ramifications for any analysis as to procedural fairness. Given the Tribunal was not able to discern the reason why the Respondent wished to dismiss the Claimant, it means that any process of consultation was ultimately without meaning.

75. It is worth considering the counterfactual. What if the true reason for dismissal in January 2016 was the business reorganisation? The Tribunal is of the view that the process of dismissal was unreasonable even on that premise. The pace of the consultation was so rapid as to be positively disrespectful of the Claimant. It sent a message to the Claimant that there was little if anything that she could say that would make any difference to the decision they had already arrived at. The somewhat high-handed attitude of the Respondent was reinforced by the remarks by Mr York (in response to being told that the Claimant proposed to appeal) that he had expensive lawyers and deep pockets.

76. The Claimant was not provided with a proper written rationale for the reorganisation in December 2016 which would have assisted her. The approach of the Respondent was also completely passive i.e. once they had identified (courtesy of the Claimant) that there might be a QTS route by which she could remain, she was left – entirely unsupported – to pursue this. It is appreciated that the Claimant was in possession of all the relevant information but the School could still have offered to support her through the process. It is very striking that Mr York conceded his ignorance about the Claimant's educational background when either this should have been available to him as part of the original application process or he could have just asked the Claimant. He demonstrated a striking lack of curiosity.

77. Similarly the school showed no interest in exploring other ways in which the Claimant could remain as a teacher in the school – obtain recognition for her experience etc…

78. At the heart of the problem was the pace that Mr York dictated. The Respondent says that it is within the band of reasonable responses to introduce a business reorganisation mid-way through the academic year. This ignores that fact, in business reorganisations, a balance has to be struck between the interest of the employee and the school. Given the fact that undertaking such changes half-way through the academic year actually caused some difficulty for the Respondent, would not have permitted them time to market the school's change of educational method and rushed the process of consultation, the approach of the School was outwith the band of reasonable responses.

79. The pace and manner in which the reorganisation was pursued might be described as high-handed. It made the Claimant ill. This made it that much more

difficult for her to investigate methods by which she might be able to stay working in the school.

80. The School's best argument is that on appeal, it was determined that this was a dismissal on the grounds of a business reorganisation and that the Claimant should be given some additional time to see whether she could acquire QTS. They would say that in the event the Claimant knew by mid-February that she would not obtain QTS recognition.

81. This ignores the fact that the Claimant had also sought to acquire QTS through the Assessment Only Route [AOR]. A reasonable employer, seeking a balance between the interests of the school and the employee would have assisted the Claimant in securing all necessary information about routes by which she might secure QTS – including by AOR. This means that even on this counterfactual, the respondents have behaved outwith the band of reasonable responses and dismissed the Claimant unfairly.

82. This is not the end of the case however. As mentioned above, the Tribunal accepts that the school were proposing to bring about a reorganisation based on proposals made by Ms Hill. The argument arises, would the Claimant have been dismissed (soon) in any event?

83. The School would still have to effect a balance between their own business (and educational) interests and that of the Claimant but there were re sound business reasons for the changes Mr York sought to bring about.

84. The logic of the evidence above is that the school had an annual planning process and that it would have been reasonable for them to have introduced the EY system from the beginning of the academic year. The question that leaves open is whether the Claimant would have been dismissed in any event at the end of the current academic year or at the beginning of the new academic year. It would be safest to leave this issue to be determined at the Remedy hearing.

85. It would also seem fair to consider at that point any evidence that the Claimant could advance that she could have been offered alternative employment by the Respondent in the period after 4th January 2016. It would not appear that this would cause any real disadvantage to the Respondent. If that evidence were not allowed to be heard at the adjourned hearing there would appear to be the real possibility that the Claimant would be prejudiced by not being allowed to advance a significant argument which might show that the Respondent had alternative posts available at the relevant time (the Tribunal would not want to pre-judge this issue).

Conclusion

86. In summary, the Tribunal concludes that the Claimant was unfairly dismissed.

87. The issue of remedy is to be determined at a hearing which has already been set down. The tribunal shall consider additionally at that hearing whether there was alternative employment within the respondent's group of schools available at the

relevant time and whether the Claimant would have been dismissed in any event at the end of the current academic year or at the beginning of the new academic year.

Employment Judge Downs

08 MAY 2017