

Appeal No. UKEAT/0223/12/ZT

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal  
On 6 November 2012

**Before**

**HIS HONOUR JUDGE BIRTLES**

**(SITTING ALONE)**

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EDUCATIONAL WORLD LIMITED (T/A WINSTON HOUSE  
PREPARATORY SCHOOL)

APPELLANT

MISS H WHARTON

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MS S SHARMA  
(Representative)

For the Respondent

MISS H WHARTON  
(The Respondent in Person)

## **SUMMARY**

### **CONTRACT OF EMPLOYMENT – Implied term/variation/construction of term**

The Employment Judge was wrong to construe a teacher's contract of employment by importing practice from public sector teachers' contracts when the relevant contractual terms were clear that the School term ended on 8 July 2011 and not (as the Claimant contended) 31 August 2011. Neither could the contractual provisions about holiday pay assist in finding the end of term date.

## **HIS HONOUR JUDGE BIRTLES**

### **Introduction**

1. This is an appeal from the Judgment and order of an Employment Judge sitting at the East London hearing centre on 6 December 2011. The Judgment and reasons were sent to the parties on 13 January 2012. The Employment Judge was Employment Judge Haynes, and his Judgment was that (1) it was declared that the Respondent had made an unauthorised deduction from the Claimant's wages and (2) the Respondent was ordered to pay the Claimant the sum of £3,775.34 gross less any relevant deductions for income tax and National Insurance. The claim was brought as a claim for unpaid wages.

2. Before turning to the background, I think it is important to say something about documents. The original appeal bundle was defective, in that it missed the relevant contractual documents. I requested that Ms Sharma, acting for the Appellant, to bring to the Tribunal this morning the relevant contractual documentation that I specified. She has done so and brought a copy for me and a copy for Miss Wharton, who appears in person. In addition, I have been provided with the index to the documents before the Employment Judge, and it is clear that he did not have certain documents that I have in front of him, including the staff handbook. However, he did have the relevant contractual document and the correspondence leading to Miss Wharton's resignation.

### **The factual background**

3. The Appellant, Educational World Ltd, trading as Winston House Preparatory School, is a small preparatory school with children approximately in the age range of three to eight. There are normally only about 20 to 25 pupils, and the classes are very small, of perhaps 5 or 6 pupils. There is, of course, because of the age also a nursery school. Each class is looked after

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full-time by a teacher, and of course there are nursery nurses. Miss Wharton is a qualified teacher with teaching experience.

4. By a letter dated 9 September 2010 Miss Wharton was employed on a full-time basis by Winston House Preparatory School. The letter of appointment says this:

**“Dear Miss Wharton**

**Following your recent application and interview we are pleased to inform you that we are able to offer you the full-time position of KS1/2 teacher at Winston House Preparatory School.**

**As discussed, the start date will be 10 September 2010 and the salary will be £26,000 per annum. This offer will be subject to a probationary period of six months (over school terms), satisfactory references and Criminal Records Bureau certificate.**

**Full details of your terms and conditions of employment are contained in the statement of employment particulars and staff handbook, copies of which will be provided to you within two months of your start date.**

**We would like to take this opportunity to welcome you to Winston House Preparatory School.”**

5. Miss Wharton started her employment on 10 September 2010 and successfully completed her probation period. However, for personal reasons she was not able to stay in full-time employment at the school. By letter dated 26 April 2011 she wrote to Ms Sharma in the following terms:

**“Dear Shirmila**

**As required by my contract of employment, please accept this letter as my terms notice of my intention to leave my current position of full-time classroom teacher (KS1/KS2) effective at the end of the third term, 31 August 2011.**

**Thank you for the opportunity you’ve given me this year to be a part of the Winston House team and to work with the incredible students here.”**

6. It will be immediately seen that Miss Wharton was under the impression that the notice required by her contract of employment to give one full term’s notice expired on 31 August 2011. On 28 April 2011 Ms Sharma wrote back:

**“Dear Miss Wharton**

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I am in receipt of your letter dated 26 April 2011 and I am sorry to learn you will be leaving Winston House Preparatory School and Kindergarten at the end of this term.

As per your Terms and Conditions of Employment and the published term dates, I can confirm that your last date of employment will be Friday 8<sup>th</sup> July 2011.”

7. By letter dated 4 May 2011 Miss Wharton wrote to Ms Sharma and said this:

“I am confused by your letter confirming my last date of employment for July 8<sup>th</sup>. My understanding of my employment contract is that I had to give a full term’s notice for my termination. Requiring me to give notice by the first day of term in order to terminate my employment on August 31. If that was not the case and I could have given later notice in order to terminate my employment on August 31<sup>st</sup>, I would have taken the extra time before making my decision.

Can you please let me know which section of the terms and conditions of employment you are referring to when you confirm my last day of employment as July 8.

Additionally, my understanding is that my yearly salary of £26,000 was payable over 12 months, so can you please clarify me [sic] how the July and August portions of this salary will be paid out.”

8. By letter dated 5 May 2011 Ms Sharma replied to Miss Wharton’s letter:

“I am in receipt of your letter dated today, the contents of which have been noted. I am as confused as much as you are why you think your employment will end on 31<sup>st</sup> August rather than 8<sup>th</sup> July 2011.

We are going by our documentation that you have received. Your attention is drawn to section 1.5 of your individual terms and conditions of employment, which states:

‘Subject to earlier termination as provided in this agreement, either party may terminate this agreement on giving to the other prior to the first teaching day of any term a full term’s notice in writing to expire at the end of the term.’

I then refer to the enclosed document and the details of the term dates, importantly the last date of term being identified as 8<sup>th</sup> July 2011. If you are able to provide me with evidence that the last date of term should be 31<sup>st</sup> August 2011, then I will gladly review this.”

9. Those letters crystallise the issue that was before the Employment Judge: did a full term’s notice mean expiry on 31 August 2011, as contended for by Miss Wharton, or did it mean expiry on 8 July 2011, as contended for by the Appellant?

10. I turn to the contractual documentation. The terms and conditions of employment are in the Appellant’s bundle B at pages 38-42. The document is unsigned, and there appears to be a

dispute as to whether it was ever signed by Miss Wharton or indeed Ms Sharma, but that does not matter, because it is quite clear to me that these are the agreed terms and conditions under which Miss Wharton worked at the school for the 2010-2011 school year. The agreement is dated, or said to be made, on 10 September 2010. It begins with a section headed “Appointment and Duration”. At paragraph 1:

**“The school shall employ the KS1/KS2 teacher and the teacher shall serve the school in the post of full-time teacher at the premises of Winston House Preparatory School and Kindergarten with effect from 10 September 2010 upon the terms of this agreement.**

**The employment shall continue until terminated in accordance with this agreement.”**

11. I suggested, and Miss Wharton accepted, that this is a continuing, rolling contract; it is not a contract for one year or any other period. The section continues:

**“1.2 The teacher shall hold the appointment subject to confirmation by the directors on behalf of the school within the first two terms of appointment.**

**1.3 During the third school term the appointment of the teacher may be confirmed, but the school reserves the right in its absolute discretion, and by giving notice in writing before the end of the third school term, to defer confirmation until the end of the fifth term of the teacher’s employment at the school. When the appointment is confirmed, such confirmation shall be signified by completion of the confirmation of appointment.**

**1.4 If the appointment is not to be confirmed, the director shall give to the teacher notice in accordance with clause 1.5 hereof.**

**1.5 Subject to earlier termination as provided in this agreement, either party may terminate this agreement on giving to the other prior to the first teaching day of any term a full term’s notice in writing, to expire at the end of the term.”**

12. 1.6 deals with termination at the age of 65, retirement age; 1.7 deals with an extension of the retirement age. There is then a subheading in respect of references, a subheading in respect of continuity of employment, and then a subheading “Duties and Responsibilities”. This says this:

**“The teacher agrees during the employment—**

**3.1 to work all school hours while the school is in session during term time and at any other time, including school holidays, at weekends and before and after the school’s normal starting and finishing times, as may be necessary in the reasonable opinion of the directors for the proper performance of the teacher’s duties under this agreement;**

**3.2 to perform such duties and undertake such responsibilities as may from time to time be reasonably required by the directors according to the normal practice of the school;**

**3.3 to encourage in accordance with any written statement of general principles provided by the directors good order and discipline at all times among the pupils when they are present and on the school premises and whenever the pupils are engaged in authorised school activities whether on school premises or elsewhere; [...].”**

13. There is then a section, which I do not need to read, in respect of loyalty to the school.

There is then a subheading “Holidays”:

**“Subject to clause 3.1, the teacher shall be entitled to take normal school holidays as holidays with pay and during such times shall not be required to perform any duties other than those normally performed by the teacher during such holidays. In addition, you are allowed the statutory public/bank holidays each year.”**

14. There is a subheading “Remuneration”:

**“The teacher shall receive a salary of £26,000 per annum. The salary will be payable by 12 monthly instalments in arrears on such date in each month and by such method as the directors may from time to time determine.”**

15. There are then a number of other provisions relating to sickness absence, sick-pay entitlement, medical examination, maternity leave, confidentiality, grievance procedure and suspension, and a section in relation to attendance during notice period, summary termination, health and safety and so on. I have referred to the fact that there is a reference in that document to the employee handbook, but it would appear that the handbook was not in fact in front of the Employment Judge. The employee handbook begins by talking about the school year and says that the school year is divided into three terms: autumn term, September to December; spring term, January to March; and summer term, April to July.

16. Much more detail is provided in a separate document, which is headed “Exhibit B5” and which was before the Employment Judge. Those are the school holiday dates for three separate school years, 2009-2010, 2010-2011 and 2011-2012. I am of course concerned with the school  
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year 2010-2011, because that was the year that Miss Wharton was employed by the Appellant. The document is at bundle B, page 47. It is headed “Term Dates 2010-2011”. It has a heading “Autumn Term 2010”, which sets out specific dates – Wednesday, 8 September to Friday, 12 December, with half-term dates – “Spring Term 2011” – Monday, 10 January to Friday, 1 April, with half-term dates – and “Summer Term 2011” – Wednesday, 27 April to Friday, 8 July, “Bank Holiday Monday, 2 May, school closed” and “Half-term, Monday, 30 May to Friday, 3 June”.

17. It will of course be noted that the summer term for 2011 began on 28 April 2011. Miss Wharton’s letter of resignation is dated 26 April 2011, the day before the term began.

#### **The Employment Judge’s reasons**

18. The Employment Judge begins by summarising the facts, reading the provision as to notice in the terms and conditions and in relation to holidays; he sets out the part of the resignation provisions I have read and refers to what the dispute between the parties is. He takes the view that both have some justification in their arguments and says, “It is for me to interpret as a matter of law what is meant in the contract by the term ‘end of the term’”. He refers to the fact that he has been shown as part of the evidence some terms and conditions that have been agreed between the teaching unions and local and national authorities for teachers employed in the public sector. I have not been shown those documents, but I accept, obviously, what the Employment Judge found them to say. He refers to the fact that for the summer term the term is said to be from 1 May to 31 August inclusive, I think the point being that the school terms run not only through the teaching term but also through the holiday period, and the holiday period is included as part of the term for the purposes of those contractual provisions. The Employment Judge rightly says that those terms are not expressly incorporated into the UKEAT/0223/12/ZT

Claimant's contract and she cannot therefore rely on them as express terms, but he says that they are of importance in relation to interpretation.

19. He then goes through the arguments and reaches his conclusions in paragraphs 10 and 11 of his Judgment. He says this:

“10. Having considered all of these matters I have decided that the phrase ‘end of the term’ in clause 15 means the end of the holiday period immediately following the last term worked. I decide this, firstly, because I interpret the provisions as to the holiday pay and the contract as requiring that the teacher under this contract be paid for that subsequent holiday. Secondly, I find there is a general custom and practice among teachers to be paid in this way. I note that the Respondent says that she has not paid other teachers for the period of the summer holidays after their resignation, but I do not consider that this needs to upset my previous conclusion. The arrangements are entirely fair and reasonable for teachers because of their special situations regarding holidays. The evidence for my conclusion is both the custom and practice and contractual arrangements among teachers and because it is reflected in the Claimant's contract. The fact that the Respondent has not complied with this general position does not entitle her to a finding that it does not apply to her business.

11. Thirdly, I notice that the Claimant's notice to the Respondent was until 31 August. That is the point at which her resignation became effective. The Respondent has unilaterally decided to treat this as notice until 8 July. As a matter of contract law I do not find that she is entitled to do so. She might, perhaps, have served a counter notice terminating the Claimant's employment as at 8 July but I do not read the subsequent correspondence as her having done so. There is merely a dispute as to the dates. For these three reasons I find that the Claimant is entitled to be paid for the period between 8 July and 31 August and that there has been unauthorised deduction of that proportion of her salary.”

20. He goes on to refer to the fact that the calculation has been agreed.

### **Analysis**

21. I am concerned, as was the Employment Judge, with the construction of this particular contract of employment. The task of construing a written agreement has often been said to be that of ascertaining the common intention of the parties to the agreement, but this may to some extent be misleading, since it is clear that the agreement must be interpreted objectively. The question is not whether one or other of the parties meant or understood by the words used but something else. In **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896 at page 912 Hoffmann LJ said this:

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**“Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”**

22. I take that passage from *Chitty on Contracts Volume 1: 31<sup>st</sup> Edition* at paragraph 12-043. In the **West Bromwich** case Hoffmann LJ set out the principles upon which one should interpret the contractual document. As I say, it is the particular contractual document that I have to construe, as did the Employment Judge.

23. I turn therefore to consider the three reasons given by the Employment Judge in reaching his conclusion that the phrase “end of term” meant the end of the holiday period immediately following the last term worked; that is, 31 August 2011. I should add that where the Employment Judge has referred in paragraph 10 to “clause 15” he of course means clause 1.5. I read clause 1.5 again:

**“Subject to earlier termination as provided in this agreement, either party may terminate this agreement on giving to the other prior to the first teaching day of any term a full term’s notice in writing, to expire at the end of the term.”**

24. The first reason given by the Employment Judge was that he interpreted the provisions as to the holiday pay and the contract as requiring that the teacher under this contract be paid for that subsequent holiday. With respect to the Employment Judge that seems to me to be a non-sequitur. The provisions in relation to holiday pay are separate from the provisions as to termination and the meaning of a full term’s notice.

25. His second reason was that he found there is a general custom and practice among teachers to be paid in this way. So far as I can see, reading his reasons with care, the only evidence before him was in relation to some terms and conditions that had been agreed between

the teaching unions and local and national authorities for teachers employed in the public sector. With the best will in the world, I cannot see how those terms and conditions in the public sector can be imported into the private sector let alone provide part of the background to the construction of this particular contract. That is particularly so because the term dates document that I have referred to, "Exhibit B5", makes it quite clear that the teaching terms are of limited and specified duration. The summer term itself is defined as Wednesday, 27 April to Friday, 8 July. I am afraid that the Employment Judge made an error of law when he says that one can import a term from some public-sector contracts into this contract so that the Wednesday, 27 April to Friday, 8 July, which is specific for the school year 2010-2011, can be read to mean 1 May to 31 August inclusive. The Employment Judge was wrong to introduce as background material practice in the public sector into the specific contract of Miss Wharton.

26. The Employment Judge's third reason is that the Claimant's notice to the Respondent was until 31 August, and he goes on to say that that is the point at which her resignation became effective. Again, I am afraid that I do not think that the Employment Judge was right about that. The letter from Miss Wharton, as is clear from the correspondence, the resignation letter of 26 April 2011, was quite clearly based upon her belief that she was complying with clause 1.5 of her terms and conditions of employment. Equally it is the case that Ms Sharma's letter of 28 April 2011 makes it clear that she believed that the terms and conditions of employment and the published term dates made it clear that the term ended on 8 July 2011. As is clear from the passage I have read from *Chitty on Contracts*, what each party believes the contract to mean is not a factor that the Court takes into account in deciding whether or not one view or another is relevant. The correct way to approach the interpretation of a contractual term is to look at it from the viewpoint of an objective outsider with all of the knowledge of the background that the parties have. I go back to clause 1.5:

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**“Subject to earlier termination as provided in this agreement [that does not apply here], either party may terminate this agreement on giving to the other prior to the first teaching day of any term a full term’s notice in writing, to expire at the end of the term.”**

27. It is noteworthy that the notice must be given prior to the first teaching day of any term – that, of course, in this case is 27 April 2011, and notice was properly given on 26 April 2011 – and a full term’s notice in writing to expire at the end of the term can only in my view be viewed by looking at the terms of the school and the published term end date is 8 July 2011.

### **Conclusion**

28. It follows, for the reasons I have given, that the Employment Judge was wrong in law in construing clause 1.5 of the contract of employment in the way that he did, and it must also therefore follow that the appeal is allowed and the order that the Appellant pay the Respondent £3,375.34 gross is quashed.