



# EMPLOYMENT TRIBUNALS

## Claimant

Mrs G Wardlow

## Respondent

v

The Engage Multi Academy Trust

**Heard at:** Norwich

**Hearing On:** 17 December 2018  
**Submissions On:** 17 January 2019  
(received in writing)

**Before:** Employment Judge Postle

## Appearances

**For the Claimant:** Miss N John, Friend

**For the Respondent:** Miss J Connolly, Counsel

## RESERVED JUDGMENT

1. The claimant was not constructively dismissed.
2. The claimant's claim for breach of contract notice pay is not well founded.
3. The respondents have conceded the claimant is entitled to 8.75 days holiday pay for the 2017 / 2018 holiday year and they have agreed to make payment to the claimant in the sum of £2,241.05 being a gross sum.
4. The claimant's claim for accrued holiday for the holiday year 2011 – 2017 is not well founded.

## RESERVED REASONS

1. The claimant brings three claims to the tribunal, one that she was constructively dismissed on 30 April 2018 from her position as Business Director, two that she is entitled to notice pay although she commenced alternative employment the day after she resigned. There is a further claim for breach of contract which is actually conceded by the respondents in respect of holiday pay for the period only 2017 – 2018 (8:75 days).

2. In this tribunal we have heard evidence from the claimant through a prepared witness statement. For the respondent we heard evidence from Mr Freeman who is the Chair of the respondent's board which is a voluntary position, giving his evidence also through a prepared witness statement.
3. The tribunal also had the benefit of a bundle of documents consisting of 948 pages.
4. As the case was listed for only one day there was insufficient time for closing submissions and it was agreed the parties would submit written submissions by 9 January 2019 and these were presented to the Judge on 17 January 2019.
5. There was an issue in which the claimant appeared to want to adduce evidence at the hearing of pre termination without prejudice negotiations which seemingly occurred between the parties before the claimant's resignation. It appears now to have been agreed between the parties that such documents and correspondence are inadmissible and have been omitted from the bundle or referred to in any witness statement.
6. The Engage Trust appears to operate three educational academies providing education to vulnerable and challenged young people who were excluded from schools in the eastern region of the UK.
7. The claimant was employed by the trust as a Business Director. She was paid approximately £68,000 per annum; her job responsibilities were set out in a job description found at page 61.
8. It would appear those on the board of the trust with the exception of the Chief Executive Officer gave their time voluntarily. In September 2017 the Education and Skills Funding Agency served a notice on the Trust that there was a need to improve their financial wellbeing and if the Trust did not satisfy certain conditions contained in the notice (268a), then the Trust would be stripped of all its delegated authority. That would result in all transactions having to go to the Education and Skills Funding Agency for approval. There was also a possibility that funding could be cancelled. The conditions imposed by the Funding Agency (268c(2)) were that; a requirement that an independent review take place by a body approved by the Funding Agency into the Trust's financial controls. This was the area the claimant was responsible for. The claimant's response with the agreement of the Chief Executive was to propose the claimant's role and the Chief Executive's role were to be made redundant.
9. The Funding Agency approved SBM Services to conduct a financial review. The claimant accepts that each one of the terms of reference (302), required them to consider the adequacy of the claimant's work and that of the claimant's team. The report was received by the Trust on 18 December 2017 (298 – 349). That report showed there were significant

and substantial financial problems to the tune of £1.2 million. The board appeared completely unaware of this financial deficit, the size of it.

10. Mr Winson-Pierce who was a member of the board had regularly met with the claimant to discuss details of the finances of the trust and how they should be submitted in a more readable format. It appears he met the claimant in September 2017 to explain exactly what financial reports were required and on the 31 January 2018 emailed the claimant with some template accounts spreadsheet that he had located and suggested the claimant should use. These are at pages 379 - 385 of the bundle. The SBM report was presented to the Trust Board on 18 December, amongst many things, it identified in addition to the deficit in excess of £1 million that there was inadequate financial information being provided to the board. The claimant accepted that each and every one of the critical findings of the SBM summary was a criticism of the claimant's work (303 – 304). The claimant at the time accepted this. The claimant also accepted that her response to the report (356), was somewhat limited.
11. Given the Trust Board's concern about the report and the claimant's response, there were brief discussions in January to see if any agreement could be reached with the claimant about her ongoing employment. Around the same time the respondents were liaising with the Funding Agency and its auditors who were now undertaking a review to investigate the potential risk of fraud, and the adequacy of monitoring and recording by the Chief Executive and the claimant (617 – 639). Some concern had been expressed about payments being made to terminate the employment of the claimant and / or the Chief Executive in circumstances where the Trust had been found to be failing financially without an investigation into whether those employees had, by their actions contributed to that situation. The Trust decided to appoint Qdos, an independent company to carry out the necessary investigations (400).
12. Around the same time in March a former employee wrote to the Trust expressing her concern that she had been made redundant with the express purpose of recruiting a qualified accountant in her place, but the replacement was not a qualified accountant and that the references provided for her by the claimant and the Chief Executive were contrary to the agreement reached with the Chief Executive that she would receive positive references (436).
13. The claimant was suspended by Mr Harris on 12 March 2018 in order that allegations of serious financial mismanagement and that the processes followed by the claimant to terminate an employee's employment were mismanaged which had resulted in a claim against the respondents were to be investigated. The claimant was suspended on full pay and the terms were set out in a suspension letter (403 – 404). Sometime around the same time the Chief Executive was also suspended.

14. The respondent's discipline and conduct policy confirms that,  
*"The investigation should be concluded within four working weeks unless there are exceptional circumstances".* (411).

It is clear in this case this was an investigation requiring a great deal of time and should not be rushed given the allegations. Indeed, Qdos met with some 11 people including the claimant as part of their investigation.

15. On 21 March 2018 the Funding Agency served a financial notice to improve on the respondent (440 - 444). That notice detailed concerns with regard to the Trust's weak financial position and financial mismanagement, and sets out conditions which the respondents were required to meet.

*"The Business Manager to be replaced by a fully qualified accountant and the Chief Executive Officer to be replaced by an individual with a proven track record in Business Management."*

These were express instructions from the Funding Agency.

16. On 26 March 2018 the claimant attended an investigation meeting with Qdos, (the notes of that meeting are at page 555 – 572). The claimant then had an email exchange with Mr Evans (a Board member) between 3 – 7 April 2018 in which she specifically asked what her reference would say if she were to resign before the outcome of the investigation. Mr Evans confirmed such a reference would be a factual reference, (458).
17. On 6 April 2018 the respondent received a request for a reference for the claimant from Thetford Grammar School (415 – 457) and this was responded to on 17 April confirming the claimant's start date, job title and salary.
18. The claimant was informed by Qdos on 24 April 2018 that their investigations had been concluded and that an investigation report would be passed to the respondents as soon as it was prepared.
19. The respondents received an investigation report from Qdos on 25 April. That report is at 474 – 578. The recommendation of Qdos was that the respondent should proceed to a disciplinary hearing with allegations for potential gross misconduct against the claimant. The report was distributed to the board on 26 April and a resolution was taken to follow the recommendation in the investigation report and proceed to a disciplinary against the claimant.
20. The claimant resigned from her employment on 30 April 2018 with immediate effect, the claimant cited a number of reasons for her resignation, including, that the respondent suspended her and made unfounded allegations, that the respondent failed to conduct the

investigation in a timely manner, and that the respondent failed to notify her of the outcome of the investigation.

21. The claimant relies upon the breach of the implied term of trust and confidence.

## The Law

22. Section 95(1)(c) of the Employment Rights Act 1996, states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as constructive dismissal.

23. In the leading case in this area, Western Excavating (ECC) Ltd. v Sharpe [1978] ICR 221, CA, the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract. As Lord Denning MR put it:

*"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct, he is constructively dismissed".*

24. Therefore, in order to claim constructive dismissal, the employee must establish that:

- That there was a fundamental breach of contract on the part of the employer;
- The employer's breach caused the employee to resign;
- The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

25. The tribunal reminds itself that for a claimant to establish that the respondent has behaved in such a way as to amount to a breach of the implied term of trust and confidence is a high hurdle. For example, behaving without reasonable and proper cause in a manner likely to destroy or seriously damage the mutual relationship of trust and confidence which should exist between employer and employee.

## Conclusions

26. Dealing firstly with the claimant's alleged claim for accrued holiday for the years 2011 – 2017, which the claimant asserts has not been taken. There was no evidence advanced before this Tribunal that the claimant was

contractually entitled to carry over days, nor was there any clear evidence as to how many days were due. The Trust's policy is clear that it is only in exceptional circumstances and by agreement that leave may be carried forward and then this would be limited to five days. The claimant seemed to suggest in cross examination that she was carrying forward holiday from 2011 onwards when employed by Norfolk County Council and alleged this was agreed at the time, although there is no documentary evidence to support this. Clearly, the claimant cannot substantiate this claim on any ground and the claim is therefore dismissed.

27. Turning to the claimant's claim for constructive dismissal. The simple facts are the claimant had not been performing well in her capacity as Business Director, that was clear from the various reports and reviews the Trust had commissioned. The claimant effectively knew the writing was on the wall, she had been properly suspended, pending the investigation for the allegations which the claimant was fully aware of. The claimant must have been aware of the likely outcome if she was to face disciplinary proceedings and to avoid that and possible dismissal on her CV the claimant found alternative employment and resigned once that alternative employment had been found, clearly before the investigation had been completed.
28. Once the shortcomings had been highlighted in the various reports and reviews commissioned, the respondent was clearly entitled to investigate whether the claimant and the Chief Executive were responsible for the Trust's financial predicament. Clearly, the claimant could have stayed in her role and face the disciplinary allegation. However, she chose in effect, to save face.
29. If there was any doubt it would appear that the claimant applied for the position at Thetford Grammar School before in fact she was suspended and it would appear the claimant was offered and accepted the role in early April, (page 521). Again, if there is any doubt, the claimant was seeking to ascertain from the respondent on the 3 April 2019 when she would be able to start further employment and sought a response by lunchtime, (page 450).
30. So far as any alleged delay is concerned over the investigation, it was a highly complex investigation involving the interview of a number of personnel, including the claimant and although the respondent's discipline and conduct policy states the investigation should be concluded within four working weeks, unless there are exceptional circumstances, clearly there were in this case. If the claimant had remained in employment, she would have received the report in early May. That is not an unreasonable period of time when one considers the extent and the detail of the report and the number of people interviewed as part of the investigation.
31. Clearly, the respondent's suspension and the allegation's advanced and the conduct of the investigation, was not an effective cause of the claimant's decision to leave the employment. There was no breach of the

implied term of trust and confidence. The claim for unfair / wrongful dismissal is therefore dismissed.

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Employment Judge Postle

Date: .....17.04.19.....

Sent to the parties on: ....17.04.19...

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For the Tribunal Office