



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs P Wills

**Respondent:** West Grantham Academies Trust

**Heard at:** Nottingham      **On:** Thursday 4 July 2019

**Before:** Employment Judge Blackwell (sitting alone)

## RESERVED JUDGMENT

1. The Claimant's claim pursuant to Section 95(1)(c) of the Employment Rights Act 1996 that she was constructively dismissed succeeds.

## RESERVED REASONS

1. Mrs Wills represented herself and gave evidence on her own behalf. Mr Sangha of Counsel represented the Respondent and called Mr John Matthews, an HR adviser. Both parties produced documents, thus there was no agreed bundle, a matter to which I shall refer in greater detail in dealing with Mr Sangha's application to adjourn. Because there was insufficient time on the day of the hearing I invited the parties to submit written closing submissions which they both did and I am grateful to both Mrs Wills and Mr Sangha for the clarity of their respective submissions. Both parties also commented upon each other's submissions.

### Issues and the Law

2. Mrs Wills brings a single claim of constructive unfair dismissal. The statutory basis for that claim is Section 95(1)(c) of the Employment Rights Act 1996 (the 1996 Act) which reads as follows:-

"95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2):-

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

3. As to case law to which Mr Sangha refers in his written submissions the classic statement is that of Lord Denning MR in **Western Excavating ECC Limited v Sharp** [1978] ICR 221 which reads as follows:

“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.”

4. Put another way, there must be a repudiatory breach of contract; the employee must then resign at least in part as a consequence of that repudiatory breach and must do so without affirming the contract.

5. The express term upon which Mrs Wills relies upon is that she was removed from her post as Pastoral Team Leader on the grade of G9 (see the contract of employment beginning at page 34 of the Respondent’s bundle. And deployed to a different task at a lesser (but still unknown at the time of resignation) salary.

6. The implied term relied upon is that well known term of trust and confidence. Again, as Mr Sangha correctly states, is identified in the well-known case of **Malik**, namely that “employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee”. Put another way the Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly ie objectively is such that the employee cannot be expected to put up with it.

7. If a breach of the implied term of trust and confidence is made out it is always a repudiatory breach.

8. It is common ground that Mrs Wills resigned by letter of 6 September with an effective date of termination of 7 September. Summarising that resignation letter she resigned because:-

a) She had been demoted to a role significantly different from her contractual role without any contractual right to do so; (This appears to be the “last straw” that precipitated Mrs Wills’ resignation).

b) the length and result of a disciplinary process to which she had been subjected;

c) a failure to provide a formal return to work strategy or formal support after being absent on suspension for more than 8 months.

9. The Respondent’s, the Trust, deny that there has been any breach of any express or implied term. They further deny that Mrs Wills resigned as a consequence of any action of the Trust but because she had found alternative work elsewhere. They further assert that she had affirmed the contract by going through the appeal process and turning up to work on 3 September 2018.

## Application to Adjourn

10. Mr Sangha made an application to adjourn which repeated an application already made in writing of 3 May. Briefly the history is that the Respondent made an earlier application to adjourn on 12 March 2019 primarily on the basis that lists of documents had not been exchanged, that there were attempts being made to conciliate and that the hearing is set to occur one week after a transfer to a new employer. Mrs Wills objected to that application and it was refused on 26 April. As I said another application was made on 3 May and it was based upon the following:

“The Respondent is currently undergoing a TUPE transfer which had resulted to changes within the academies. As a result the people who interacted with the Claimant at the time of the alleged breach are currently unavailable. Ms Susan Dench the Executive Head Teacher is currently on sick leave and Ms Cherry Edwards the Chair of the Board of Trustees has resigned from her post. The Respondent currently does not have a witness available to attend the hearing on 8 May.”

11. The application was also based upon the overriding objective set out in Regulation 3 of Schedule 1 of the Employment Tribunals Rules of Procedure Regulations 2013. The application of 3 May was refused on 7 May but Judge Swann indicated that the matter could be renewed at the hearing today 8 May. Mr Sangha submits that there are exceptional circumstances within the meaning of Rule 30, sub-paragraph 2 and he also urges that I take into consideration the over-riding objective set out in Rule 3. He said that Ms Dench the Executive Head Teacher was on long term sickness but he had no medical evidence thereof and no prognosis.

12. I note that whilst Ms Dench is relevant to Mrs Wills’s return to work in August 2018 following reinstatement she was not directly involved in either the decision to dismiss or the decision to reinstate subject to a final written warning.

13. The second matter put forward by Mr Sangha was as I had already noted that the bundle was not in chronological order. He further indicated that it was missing the disciplinary procedure, job descriptions, Mrs Wills’s resignation letter and e-mails that took place between Ms Dench and Mrs Wills. However, all of those matters save for the disciplinary procedure have been rectified by documents produced by Mrs Wills.

14. Mrs Wills also informs me and I accept that she had submitted her list of documents a couple of days later than the relevant order date and that she had submitted her witness statement prior to the compliance date of that order. She objects to the application primarily on the basis that this outstanding litigation is affecting her health and she wishes to put the matter behind her once and for all.

15. I note that Mr Sangha makes no reference to the Chair of Governors and I further note that there are minutes of the disciplinary hearing in the bundle and the outcome letter from the Chair of Governors. In all the circumstances as Mr Sangha candidly submitted the Respondents are the author of their own misfortunes. The only document missing, ie the disciplinary procedure, in that regard the Respondents have long known the breaches of that procedure that Mrs Wills relies on and in all the circumstances I do not believe that there are “exceptional circumstances”. In my view a fair trial can proceed. Therefore, the application is refused.

## Findings of Fact

16. Mrs Wills was employed by the Trust as a consequence of a letter dated 21 June 2016 beginning at page R34 and ending at page 40 which constitutes the contract of employment. Mrs Wills was employed as a Pastoral Team Leader at the St John's site on grade 9. I make no finding as to the period of continuous employment, noting paragraphs 15 and 16 of the contract of employment but also noting on page R40 that the continuous service date is described as 1 August 2003 with a start date with the Trust of 21 March 2016.

17. The Trust operate two school on contiguous sites; St John's which is a Primary School and St Hugh's which is a Secondary School. The Trust employees some 130 people and Mrs Wills was employed to serve at St John's but I note that at page 36 Mrs Wills may be required to work at St Hugh's dependent on changes to the staffing requirements of each academy.

18. Mrs Wills had worked for Lincolnshire County Council since 1992 and had an unblemished record and long service working with vulnerable children prior to January 2018. On 19 January 2018 she was suspended pending a full investigation of the following allegations:-

- “(i) Failure to act appropriately to the safeguarding concern which could have compromised the safety of the children involved.
- (ii) Breach of the safeguarding policy.
- (iii) Breach of the code of conduct.
- (iv) Breach of the national teaching standards.”

19. Putting the jargon aside the conduct complained of amounted to a failure by Mrs Wills to report a child safeguarding issue to Social Services. There followed a thorough investigation but that investigation took a very long time and it was not until 14 June 2018 that the disciplinary hearing took place. That period was undoubtedly affected by the fact that a second charge of misconduct was brought against Mrs Wills in relation to namely that:

“It is alleged that you have failed to discharge your responsibilities as an educational visits coordinator in the following way:-

You have allowed children to undertake educational visits without adequate risk assessments, other essential documentation or appropriate verification via the EVOLVE system.”

20. The minutes of the disciplinary hearing begin at page 47. At page 56 is recorded the outcome as follows:

“Allegation 1 - The panel determined that a final written warning should be the sanction regarding this allegation.

Allegation 2 - In this case the misconduct was deemed to merit a first written warning.

When combined two sanctions equate to dismissal, with notice under the Trust's disciplinary procedure.”

21. That decision was confirmed by letter of 20 June 2018.
22. As recorded both at the actual disciplinary hearing and in the dismissal letter Mrs Wills was reminded of her right to appeal which she did by letter of 18 June ie before having seen the dismissal letter itself.
23. In that letter Mrs Wills complained of breaches of both the Trust's disciplinary procedure and of the ACAS code. She complained also that dismissal was too harsh a penalty given the fact that she had worked for Lincolnshire County Council since 1992 with an unblemished record further confirmed by the Executive Headteacher's comments that prior to the January allegations she had no concerns with her competency.
24. The appeal hearing was held on 16 July before a different panel. They confirmed the disciplinary panel's finding as to the first allegation and confirmed the final written warning to remain live for 18 months from the date of the original hearing of 14 June. However in relation to the second allegation they found that the sanction of a first warning was too severe and downgraded it to "management advice". They concluded therefore that the sanction of dismissal in relation to the two allegations was too severe and they therefore rescinded the notice of dismissal, the clear effect being Mrs Wills reinstatement.
25. The letter of 18 July 2018 at pages 61/62 went on however as follows:
- "The panel recommends that your roles and responsibilities are reviewed by the Senior Leadership Team during the summer break and that a meeting is convened prior to the beginning of the autumn term to inform you of the outcome of that review.
- In the event that you are redeployed to an alternative role which attracts a lower salary, it will be at the discretion of the Executive Headteacher to decide on how/whether your salary will be reduced to the grade applicable to that new post."
26. Mr Matthews in his evidence said that there was a draft job description prepared which is document 17 of the Claimant's bundle. Further that he was asked to recommend a grade for that role which he did on 24 August 2018 at grade 8 ie one grade below the contractual entitlement set out in June 2016. The job description also states that there would be no management of people and no supervision of people. I accept that in the role from which she was suspended Mrs Wills did both manage and supervise staff.
27. I also accept Mrs Wills's evidence that in her old role she was a member of the Senior Leadership Team but in the new role she ceased to have that function. She was also to teach pupils of secondary school age, something she had never done before.
28. On 20 July Mrs Wills visited the Trust's office in order to collect some personal items and I accept her evidence that she was informed that she could not return to her desk or enter the St John's site to collect her belongings even though she had been reinstated.

29. I also accept Mrs Wills's evidence that she became concerned that no meeting had taken place pursuant to the appeal outcome letter so she e-mailed Mrs Dench on 24 August which we see at page 15 together with Mrs Dench's response. It is clear that Mrs Dench had intended that a meeting should take place with Mrs Wills on 22 August but I accept Mrs Wills's evidence that she had no notification of such a meeting. There was a further exchange of e-mails which culminated in Mrs Dench indicating that a meeting could not take place until Inset day (ie 3 September) and that the meeting needed to be with her. She went on:

“Your role will still be of a pastoral nature and we will make sure you are fully supported through your transition back to work.”

I note that even had the meeting taken place, the job description had not yet been drafted.

30. Thus, no meeting took place until 3 September. The meeting was brief and Mrs Wills was handed the job description to which I have referred ie her document 17. I accept Mrs Wills's evidence that she asked what the paygrade would be but no definitive answer was given. It is common ground that up to the date of resignation the Trust had not specified the paygrade or actual salary. Though it was not in her witness statement, Mrs Wills in cross examination said that she was told at that meeting that the salary would be lower. Mr Sangha challenged the truth of that statement given that it was not contained within the witness statement. However I note that in her letter of resignation she says as follows:

“I have been told that my salary will be reduced, but not what it will be reduced to. For the avoidance of doubt, I do not agree to any demotion or reduction to my salary.”

31. I found Mrs Wills to be a straightforward and truthful witness and I accept her evidence on that point namely that before her resignation she was told that her salary would be lower. Indeed that accords with Mr Matthews's evidence.

## **Conclusions**

### The disciplinary process and its outcome

32. The first and least serious of Mrs Wills's complaint are breaches of both the Respondent's disciplinary code and of the ACAS code. In my view even taking cumulatively they are of a minor nature and in my view did not affect the outcome.

33. The second criticism and much more significant is that the process took too long. It began on 19 January 2018 and concluded with reinstatement on 16 July. Mr Sangha submits that there were two allegations to be investigated and that both were to a degree complex involving a number of witnesses. I accept that that is so. However, Mrs Wills was suspended for the whole period and was not permitted to attend the school other than for the disciplinary process or to contact anyone other than the Bursar Mr Matthews or a supporter/trade union representative. Thus for 6 months Mrs Wills was effectively isolated from her place of work and colleagues. There is no evidence that the suspension was reviewed having regard to the length of time that the process was taking.

34. On balance I find that the Trust did not act with reasonable or proper cause in taking as long as it did to determine the disciplinary outcome.

35. The third matter which Mrs Wills complains of is the outcome namely the final written warning in respect of the first allegation which was to remain in effect for 18 months from 14 June 2018. I accept that any allegation concerning the safety of children is a serious matter and is to be treated accordingly. It is clear that Mrs Wills did not report the matter to Social Services and she accepted that was so and she accepted that she should have done so. Further there was clear evidence that she had been reminded by her Line Manager of the requirement to notify Social Services.

36. On the other hand Mrs Wills had informed the Police and had put in place with the Police a safeguarding plan. That had been achieved on the afternoon and evening of 16 January. On 17 January she had conducted the children at risk to school, though one preschool child remained with the mother. Further Mrs Wills had an unblemished record going back to 1992 and the Executive Headteacher. I note the candid responses that Mrs Wills gave to the disciplinary panel, see pages 50 and 51 of the Respondent's bundle. Thus, the question was the sanction of a final written warning extending for 18 months a reasonable and proper sanction balancing the above factors? In my view it is not an appropriate sanction applying that test. It is too harsh.

#### Post reinstatement

37. It is common ground that no meeting pursuant to the reinstatement letter took place until 3 September. I accept Mrs Dench had intended there to be a meeting on 22 August but that meeting did not take place for reasons that were not the fault of Mrs Wills. Thus, it was not until 3 September that Mrs Wills was aware of the nature of the job to which she was to return. As to its salary she knew that it was to be "lower" and I have identified in paragraphs 26 & 27 above the significant differences between the two roles.

38. There was no effective return to work discussion. As Mrs Wills says she was left to turn up on her own to St Hugh's having had access to St John's barred. There was no induction process. Mrs Wills had been forgotten.

39. She was being asked to undertake what appears on comparison of the two job descriptions to be a very different role involving children of a different age.

40. It is clear beyond doubt that the Trust were in breach of the express terms of her contract of employment in requiring her to work at a different role, at a lower salary. That breach, the nature of which did not become clear until 3 September, is, in my view, on its own sufficient to entitle Mrs Wills to resign.

41. Taking a view overall of the events post 19 January 2018 I find in addition that the Trust were in breach of the implied term of trust and confidence. Thus there have been two repudiatory breaches.

#### Did Mrs Wills resign as a consequence

42. Mr Sangha spent some time cross examining Mrs Wills in relation to a job that she had secured in August 2018. I accept Mrs Wills's evidence however in

cross examination that she had accepted that role pending her decision on whether to resign from the Trust. The potential employer was content to leave the job open until such time as Mrs Wills made her decision.

43. It is settled law that the repudiatory breach or breaches need not be the only reason for the resignation. I am satisfied that the repudiatory breaches played a very significant role in Mrs Wills's decision to resign.

Did Mrs Wills affirm the contract

44. Given that it was not until the meeting of 3 September that it was clear what Mrs Wills was going to be expected to do and that it was in that meeting that she was informed that her salary would be lower, I conclude that Mrs Wills did not affirm the contract. She resigned only 3 days later.

45. It therefore follows that Mrs Wills's claim of constructive unfair dismissal is upheld.

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Employment Judge Blackwell

Date: 16 July 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE