



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Matthew White

v

## Respondents

(1) Hertfordshire County Council  
(2) Governing Body of Mill Mead Primary School

**Heard at:** Bury St Edmunds (by CVP)

**On:** 12 & 13 April 2021

**Before:** Employment Judge M Warren

## Appearances

**For the Claimant:** Mr S Thakerar (Counsel).

**For the Respondents:** Ms R Davies (Counsel).

## COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

## RESERVED JUDGMENT

The claimant's claims fail and are dismissed.

## REASONS

### Background

1. Mr White was employed as a teacher at the Mill Mead Primary School in Hertfordshire. His employment commenced on 1 September 2014. The respondent's position is that his employment ended by mutual agreement on 31 December 2019 and that is the date given in the ET1 by Mr White as the date his employment ended. Although in the evidence there is some suggestion that Mr White's position was that his employment

continued beyond 31 December 2019 until 30 April 2020, that is not the position taken in closing submissions.

2. After early conciliation between 4 February and 19 February 2020, these proceedings claiming unfair and wrongful dismissal were issued on 11 March 2020.

### **The Issues**

3. The key question in this case is how Mr White's employment came to an end? Did it end by mutual agreement at a meeting between Mr White and the respondent's head teacher, Mrs Nesbitt-Larking, (hereinafter referred to, at her suggestion, as Mrs Nesbitt) on 10 December 2019? Did Mr White resign at that same meeting? Or, did the respondent dismiss Mr White by sending him a P45 stating that his employment ended on 31 December 2019 and providing him with no teaching duties during the Spring Term of 2020?
4. If Mr White's employment terminated either by mutual agreement or on his resignation, his claims will fail.
5. If Mr White was dismissed, the question will arise whether he was fairly dismissed. The respondent relies upon the potentially fair reason of some other substantial reason, namely his indicating that he wished his employment to end on 31 December 2019. If so, I will then have to consider whether the respondent acted within the range of reasonable responses in accordance with the test set out at s.98(4) of the Employment Rights Act 1996 in treating that as a reason for dismissal.
6. If Mr White was dismissed, was he entitled to notice to 3 April 2020?
7. Further, if I find that Mr White was dismissed unfairly, the respondent will argue that he would fairly have been dismissed in due course in any event and his compensation should be limited accordingly. In particular, by reference to a text message he sent to an ex-pupil on the evening of 31 December 2019.
8. The foregoing was agreed with the representatives at the outset of the hearing.

### **Evidence**

9. This hearing was conducted remotely by Cloud Video Platform (CVP). I did not have the tribunal file. I had before me a bundle of documents prepared by the respondent in pdf format, for which I am grateful. I had witness statements from Mr White and his Trade Union Representative, Mr Rose. For the respondent, I had a witness statement from Mrs Nesbitt.
10. Prior to starting the hearing, I read the witness statements and the documents referred to in the bundle.

11. Whilst we finished the evidence at 11.30 am on the morning of day 2, for personal health reasons I was unable to continue with the hearing. With the agreement of the representatives I have received written submissions and their replies to each other's submissions.

### **The Law**

12. A dismissal occurs when a contract of employment is terminated by the employer. (It may also occur where a fixed term contract expires or an employee resigns because of the way he or she has been treated by the employer, but neither of those apply in this case.)
13. If there is doubt as to whether there has been a dismissal, the burden of proof lies with the employee.
14. It is possible that without there being an express dismissal in terms of words used, dismissal can be inferred from the actions of the parties. An example includes where an employee is issued with a P45 – see Kelly v Riveroak Associates Limited EAT/0290/05.
15. A contract of employment, and therefore an employment relationship, may be terminated by mutual agreement. There are two aspects to deciding whether or not there has been termination by mutual agreement: (1) A finding on the facts of what actually happened and (2) The application of the law to those facts – see Martin v Glynwed Distribution Ltd [1983] ICR 511 CA and Birch & Anor v University of Liverpool [1985] ICR 470 CA. I must consider the facts as I find them carefully and be sure that in reality, what has happened does not in fact amount to a dismissal, see Hart v British Veterinary Association EAT/145/78. One needs to consider the intention of the parties; if there is no threat of dismissal, the parties are agreed and the employee acts voluntarily, termination will be by agreement.
16. Finally, a contract of employment may be terminated on resignation by the employee. This requires the employee to communicate his resignation to the employer by words or conduct, but does not require the resignation to be expressed in a formal way; it may be inferred from the employee's conduct and the surrounding circumstances.
17. Wrongful dismissal is where an employer has dismissed an employee without giving a period of notice to which the employee is contractually entitled.

### **Credibility of the claimant**

18. I am afraid to say that I did not find Mr White a credible witness.
19. In his witness statement, Mr White sought to portray Mrs Nesbitt in an unfavourable light in a number of ways. For example, he suggested that

she was dismissive of complaints made by difficult parents and criticised him for looking at emails from parents after 5 o'clock in the evening. Mrs Nesbitt's account of trying to support Mr White in dealing with those difficult parents and encouraging him not to look at emails in the evenings, was much more credible.

20. Mr White's portrayal of Mrs Nesbitt as being uncaring is not borne out by the tone of the text messages at page 42.
21. Mr White had a mental breakdown in Mrs Nesbitt's office on 4 December. He sought to portray her unfavourably, referring to her, "marching" him off the school premises and not speaking to him in the car as she took him home. In cross examination it was clear to me that this was a wholly unfair picture of the way that Mrs Nesbitt behaved towards him that day.
22. There was a conflict of evidence between Mrs Nesbitt and Mr White over whether or not she had instructed him to collect his belongings from the school during the important meeting which they had on 11 December. Mrs Nesbitt said that Mr White had initiated that he wanted to collect his belongings. With the Christmas holidays approaching, it was clear there was no particular rush for his belongings to be removed. Mrs Nesbitt had been prepared to allow him access to keys to the school to let himself in to collect his belongings out of hours. Mr White's case on this point is not corroborated by the text messages at page 67. Again, I had the impression that Mr White was seeking to tarnish Mrs Nesbitt.
23. Similarly, Mr White suggested that in the meeting on 11 December, Mrs Nesbitt instructed him to draft a communique for the parents. Mrs Nesbitt's evidence was that she had said that she would do it, although she invited him to have a think about it too. In cross examination, Mr White insisted that he was, "instructed" to prepare the communique. He was being disparaging of her and seeking to cast her in a poor light, as a person who was dictatorial and not collaborative. However, Mr White's version is not corroborated by the emails at page 73, in particular the opening line of her email at 7.30 pm, in which she responds to his draft, *"thanks for that – you beat me to it! I had similar thoughts ..."*.
24. With regard to the disputed account of what was discussed at the meeting between Mrs Nesbitt and Mr White on 10 December, Mrs Nesbitt's version is corroborated by:
  - 24.1 The content of her email at page 73 referred to above, which is not disputed by Mr White in his subsequent replies;
  - 24.2 Mr White being so keen to collect his belongings quickly;
  - 24.3 Mr White being happy for Mrs Nesbitt to inform staff of his pending departure, and
  - 24.4 Mr White wanted to arrange to say goodbye to the children;

**Facts**

25. Mr White commenced employment with the second respondent as a teacher on 1 September 2014. His terms of employment incorporate the conditions of service for school teachers in England and Wales, otherwise known as the Burgundy Book. Section 3, paragraph 2 of the Burgundy Book provides, in summary, that teachers are required to give at least 2 months' notice to terminate their employment, which must expire on either 31 August, 31 December or 30 April. Paragraph 6 provides:

“In the event of a teacher exhausting in part or full his/her entitlements under paragraph 2.1 above and being given notice of the termination of his/her contract without returning to work on the ground of permanent incapacity or for some other reason related to the sickness absence, he/she shall be paid full salary for the notice period with normal deductions only.”
26. In other words, when serving notice, a teacher is entitled to be paid in full, even though they may be absent through ill health and on reduced or zero pay because they have exhausted their entitlement to full pay.
27. In 2018 Mr White was subject to disciplinary action and issued with a warning. I was not given details and do not need them. I mention it as background to Mr White's anxiety.
28. At the start of the academic year 2018/2019, Mr White had anxieties because the new class he was due to teach had a couple of difficult children in it and there were some particular parents who were known as serial complainers. On the first day of term, Mr White faced issues raised by those parents.
29. On 4 October 2019, Mr White was certified not fit to work by his GP for a period of one month. That day, he went to see Mrs Nesbitt and broke down in her office, explaining how he was feeling. She was sympathetic and drove him home.
30. During his subsequent period of absence, Mrs Nesbitt did not contact Mr White. Aware that he was away from work ill due to anxiety, she did not wish to add to his anxiety and was concerned not to be accused of harassing him. She did however make contact with him to wish him a Happy Birthday on 12 October.
31. On 4 December 2019 Mrs Nesbitt made contact with Mr White to arrange a meeting, *“To catch up if you're up to it. Just let me know.”*. They subsequently arranged to meet on 10 December 2019. Mrs Nesbitt's intention had been to explore the possibility of making an occupational health referral.
32. In the meantime, on 6 December 2019 Mr Mark Rose of the NASUWT trade union, whose job title is, “Peripatetic Casework Official” wrote to Mrs Nesbitt:

“I am informed by Matt that he has sadly concluded that the school is not the correct environment for him long term & that his recuperation will be significantly improved by leaving your employment as soon as practicably possible.

I have therefore been instructed by Matt to seek an exit from the school & I am happy to have a discussion with you about this matter at your early convenience.”

33. Mr Rose and Mrs Nesbitt spoke on the telephone on 9 December 2019.
34. Mr Rose’s evidence about this conversation is that Mrs Nesbitt had said that she was also concerned about Mr White’s welfare and that she was therefore inclined to agree a settlement agreement. He, “took it as read” that she understood that Mr White was entitled to pay to the end of April, even if he resigned. He says that Mrs Nesbitt said that she already had a meeting with Mr White planned to discuss his health and that she would speak to him personally, before reverting to Mr Rose to discuss terms of settlement. His oral evidence was that the suggestion of a termination date of 31 December 2019 came from Mrs Nesbitt and not from him.
35. In contrast, Mrs Nesbitt says there was no mention of a settlement agreement or notice pay. She says that she told Mr Rose that so far as she was concerned, she could agree to Mr White leaving the next day, Mr Rose suggested in response the 31 December, with which she was prepared to agree. She says that Mr Rose said that as she was scheduled to meet Mr White the next day, she should ask him if he was happy with a 31 December leaving date.
36. Mr Rose has provided in the bundle a corroborative typed attendance note which has as its subject heading, “Settlement Agreement query” which reads:

“Tel. Call from HT(SNL) regarding – settlement agreement query.

SNL confirmed was similarly concerned for members health & welfare & therefore was inclined to consent to SA for his welfare.

SNL explained has plan to meet with member for a coffee tomorrow & therefore will revert back to me after meeting with him directly.”
37. Mrs Nesbitt’s version of events is corroborated by her handwritten note on the copy of Mr Rose’s letter, “*I rang and offered immediate release from contract and he suggested 31 December to which I agreed. Went to meet Matt next day.*”. Mrs Nesbitt acknowledges that she did not write that note at the time she was speaking to Mr Rose nor the same day. However, her evidence was that she wrote the note within a few days, when she was forwarding copy documents to Human Resources in order to seek advice. I further note that as we shall see shortly, on 11 December 2019 Mrs Nesbitt wrote by email to Mr White and made reference to the suggestion of 31 December coming from Mr Rose and that suggestion was not subsequently contradicted by Mr Rose.

38. On the balance of probability, I prefer Mrs Nesbitt's account of the telephone conversation between Mr Rose and her on 9 December 2019.
39. Mr White and Mrs Nesbitt met at a pub at lunchtime on 10 December 2019. Mr White arrived early and had lunch before Mrs Nesbitt arrived. He was relaxed. There is a conflict of evidence over what was said during the meeting. For reasons I have already explained, I did not find Mr White a credible witness. Mrs Nesbitt was in my view a credible witness. On the balance of probability, I prefer Mrs Nesbitt's evidence and I find that what occurred during this meeting is as set out in the paragraphs below.
40. Mrs Nesbitt observed that Mr White was an experienced union representative, as he had been the year before. She informed him that she could release him on 31 December 2019 as had been suggested by Mr Rose. Mr White said that he was happy with that and that she could proceed with the necessary paperwork. She asked Mr White how he would cope financially and he responded that he would pick up bar work. They agreed that Mrs Nesbitt would draft some wording to inform the parents of his departure and invited Mr White to email her if he had any thoughts on that himself. They would then agree on the wording.
41. Shortly after that meeting, (13:46) Mr White emailed Mrs Nesbitt as follows:

“Hi Sue, here's my thoughts on wording.

Dear parents/carers,

As some of you are aware, Mr White has been on extended absence due to illness. Unfortunately the recovery time is going to be longer than expected and as such, Mr White has decided that it is best that he resigns his post at Mill Mead. This decision has not been an easy one for him or for the school and we wish him all the best for a speedy recovery.”

42. Mrs Nesbitt replied at 7.30 pm:

“Hi Matt, thanks for that – you beat me to it! I had similar thoughts and I will add something along the lines of

Of course we can't predict what might happen but it is possible that Mr White might work again at Mill Mead in the future.

Let me know what you think.

I was going to email wording and a summary of what we agreed which included liaising to collect your bits which we have now done by text. Hope you've managed that this evening. We also said that we'd liaise about any future visit for closure, a reference when required and that I had agreed that to release you from contract from 31<sup>st</sup> December as Mark, your union worker, suggested was reasonable. You agreed to this.

I do hope moving forward with your recovery will be helped by your decision and I am sure this will be the case.”

43. There were further short emails through the next half hour in which Mr White asked whether he might attend a function called, “carols by candle light”, he wrote, “*possibly not*” and, “*If not then if staff/children want to see me then something another time could work. Happy to be flexible about it.*” To which Mrs Nesbitt replied that was probably not appropriate, but they could arrange something in the future.
44. Mr White and Mrs Nesbitt also exchanged text messages on 10 December. At 18:41 Mr White sent a text to Mrs Nesbitt which read:

“Hi Sue, was good to see you today [smiley face] I wondered if I could grab my bits and pieces tomorrow evening as Hanora has said she is free and able to help me with it?”

Mrs Nesbitt replied:

“Hi Matt. It was good to see you too – I’ve been worried about you. Yes tomorrow eve is fine. I won’t be around as in hospital but Hanora can take the keys. I won’t tell all the staff till Monday of next week but I know some will know. Take care x”

To which Mr White replied, “*Ok, thank you. Be in touch x*”.

45. The following morning on arriving at school, Mrs Nesbitt gave instructions to the school administrator to put in hand the necessary arrangements for the termination of Mr White’s employment, including the preparation of his P45 with a leaving date of 31 December 2019.
46. Mrs Nesbitt’s evidence is that on the morning of 11 December she spoke to Mr Rose on the telephone, confirmed to him that Mr White agreed the leaving date of 31 December and Mr Rose expressed that he was content with that. Mr Rose says that no such telephone conversation took place. I note that Mr Rose opens an email at 12:28 that day to Mrs Nesbitt with the words, “*Thank you for our earlier dialogue*”. It seems to me likely that is an acknowledgement of a conversation earlier that day, rather than of the conversation that took place on 9 December, as Mr Rose suggests. I prefer the evidence of Mrs Nesbitt and accept that such a conversation took place.
47. Turning to Mr Rose’s email at 12:28 on 11 December, he went on to write:

“Now had a call from Matt who sadly has confirmed that following your informal meeting yesterday he suffered an anxiety attack not because of what was said but the realisation that he might not be in a position to return to work any time soon & therefore faces the prospect of having no income until he is well enough to do.

I have therefore suggested to Matt that I would get back to you to discuss further options that might be on “the table”. Needless to say, Matt is concerned to



preserve not just his physical & mental wellbeing but also his financial one too & therefore I have suggested to him that he might wish to consider whether it's appropriate to terminate his employment, at this stage, on the terms you have suggested.

It might be beneficial to have a further "without prejudice" discussion on this matter therefore at your earliest convenience."

48. It seems to me, that email corroborates that an agreement to terminate forthwith had been reached the previous day and that Mr White was not having second thoughts. Mr Rose appears to be attempting to re-open negotiations after an agreement has already been reached.

49. Mr Rose wrote again on 12 December at 16:07:

"I have now had a further opportunity to speak to Matt who has confirmed that the content of me (sic) message attached is consistent with his position. [The message attached is the above mentioned email of 11 December] Although he has re-iterated his desire to leave the school's employment asap to aid in his recovery & the 31/12 seems like a sensible date he has further confirmed that financially he is not able to consent to this date unless the school is able to come to an agreement to recognise his contractual service/notice.

...

I would therefore ask that we have a further dialogue about an agreement to facilitate his exit from school but that in some manner respects his contractual service & notice."

50. Mrs Nesbitt replied at 17:03 (page 76). Her position was that the question of financial settlement had never been raised. Mr White had sought early release from his contract and after discussing with him how he would cope financially, they agreed he would be released as of 31 December 2019. The possibility of some financial settlement was being raised after the event. She indicated that she would be seeking further advice from Human Resources.

51. Mrs Nesbitt thereafter tried to call Mr Rose over each of the following days, on Monday 16 to Thursday 19 December. He did not answer or return her calls.

52. On 19 December 2019 Mr White applied for a job at another school, the advert for which called for applicants who could start as soon as possible.

53. On 20 December 2019, Mr White received his P45 which stated that his end date was 31 December 2019.

54. On 31 December 2019 Mr White entered into text correspondence with a former pupil, (aged 12) during which he told the pupil that he was no longer a teacher. There were elements of this correspondence which the respondent regarded as inappropriate and because at that point, (before midnight) he was still an employee, he was in due course subjected to a

disciplinary process in his absence, which resulted in a decision that had he remained in the employment of the respondent, he would have been dismissed summarily for gross misconduct. In cross examination, Mr White agreed that his conduct in this text messaging had been inappropriate, which is why he did not appeal that decision.

55. On 2 January 2020 Mr Rose wrote by email to Mrs Nesbitt protesting that Mr White had received his P45, that there had been no further discussion between them and that they had not yet reached an agreement to facilitate his departure from the school's employment. He invited her to contact him as a matter of urgency.
56. Mrs Nesbitt replied to say that she had tried telephoning Mr Rose several times on the Monday, Tuesday, Wednesday and Thursday before Christmas, leaving messages and that none of her calls had been returned. She stated that her position was that she had responded to a request and an agreement that Mr White's employment be terminated on 31 December 2019, pointing out that he had corresponded with her on appropriate wording to inform parents and that he had collected his belongings from the school.
57. Further correspondence ensued in which both parties repeat their respective positions.

### **Conclusions**

58. I find that there was an agreement between Mrs Nesbitt and Mr White in their meeting at lunchtime on 10 December 2019, that by mutual consent, Mr White's employment would come to an end on 31 December 2019. He was not dismissed.
59. On the facts, I find that there was no mention of financial settlement in the discussions between Mr Rose and Mrs Nesbitt before that meeting. The topic of conversation was simply whether or not the school would release Mr White earlier than it was otherwise obliged to.
60. For Mr White, it is argued that there is no sense in his agreeing to this, because he could simply have resigned and sat out his notice to the 30 April whilst off sick. There are a number of reasons why I do not accept that. The first is that it is quite apparent that in order to aid his recovery, his recuperation as Mr Rose put it, he felt he needed to leave the respondent's employment as soon as possible, so that he could get that off his mind. I find that he had in mind that he would find bar work in the time leading up to Christmas and New Year. I find that he had in mind finding other employment as quickly as possible, possibly as soon as the beginning of the Spring Term, evidenced by his job application on 19 December, which was before he received the P45. That the ending of his employment was by mutual consent is evidenced by the fact that he drew up wording for a communique to parents, he made swift arrangements for removal of his belongings from the school and he was

anxious to attend a school social event in order to say his goodbyes. It might equally be said that it would not make sense for the respondent to release Mr White on the 31 December, but pay him until 30 April, when there was no need for it to do so.

61. I have had regard to the fact that Mr White was mentally unwell at the time, but I find that he was aware of what he was doing on 10 December.
62. I find that there was remorse after agreement had been reached and that Mr White had second thoughts after a concluded agreement had been reached.
63. The claimant has made much of the suggestion that Mrs Nesbitt in cross examination said that she would have discussed matters further with Mr Rose when he called her on the morning of 11 December, if he had mentioned that Mr White wanted a financial settlement. There was ambiguity as to whether Mrs Nesbitt was being asked about her first conversation with Mr Rose on 9 December, or the conversation with him on the morning of 11 December. On reviewing my notes of evidence and having regard to Mrs Nesbitt's response to questions, I am satisfied that the position was that she would have been willing to discuss finances had they been raised on the 9<sup>th</sup>, although it would have been a short conversation, in her words. If a financial settlement had been proposed on the morning of 11 December, Mrs Nesbitt would have said there was no question of any financial settlement and that agreement had already been reached that Mr White's employment would be terminated by mutual consent with effect from 31 December.
64. As Mr White's employment was terminated by mutual consent, there was no dismissal and therefore his claim for unfair dismissal and for notice pay fails.
65. Because the claims have failed, I have not had to resolve the question of who is the correct respondent. However, it is my understanding that the Board of Governors is invariably the correct respondent for cases involving state schools.

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Employment Judge M Warren

Date: 21 May 2021

Sent to the parties on:

19 October 2021

For the Tribunal Office