



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. Michael Mallick

**Respondent:** Central Bedfordshire College

**Heard at:** Watford Tribunal

**On:** 10th and 11th March 2022

**Before:** Employment Judge Shrimplin Representation

**Claimant:** Mr. Michael Mallick

**Respondent:** Central Bedfordshire College  
Represented by Mr Godfrey

## JUDGMENT

1. The claim by Mr. Mallick that he was unfairly dismissed by Central Bedfordshire College is not made out and is dismissed.

## Reasons

### Background

1. The claim made by Mr. Mallick is that he was unfairly dismissed from his employment at Central Bedfordshire College (the College) on 14th February 2020.
2. Mr. Mallick was employed as a Physics lecturer by the College on 11th September 2017.
3. Mr. Mallick's employment ceased on the 14th February 2020 in accordance with a letter dated 12th February 2020 (p285) which confirmed that he would leave the College on the 14th February 2020 and was not required to work a period of three months' notice which would be paid in lieu. In addition, he would be paid a total of 21.75 days for accrued and untaken leave. It was also confirmed that the respondent would not seek to recover the costs associated with Mr. Mallick's PGCE qualification which he had been undertaking.

4. Mr. Mallick asserts that he had been deliberately forced into leaving the College by the threat of capability procedures following unfounded assertions of poor standards of teaching, falling behind with setting and marking student assignments and to reduce the number of teachers at the College.

### **The issues**

5. The key issue is whether Mr Mallick's employment came to an end by mutual agreement or not, following a number of meetings in early 2020 with Ms Bird, the head of HR. If Mr Mallick's employment was terminated by mutual agreement, then his claim must fail.

6. If it was not ended by mutual agreement, the question is whether his termination was a dismissal within the meaning of s95 Employments Rights Act 1996.

7. Where there is doubt as to whether there has been a dismissal, the burden of proof lies with the claimant.

### **Evidence received and heard**

8. The Tribunal hearing was conducted in person. The tribunal was provided with the statements of Mr. Mallick and Ms Bird, the HR director of the College, and a paginated exhibit bundle extending to 384 pages. There were no other witnesses.

9. It was not in dispute that Mr. Mallick commenced his employment as a lecturer in Physics at the College on 11th September 2017 and was contracted to work 37 hours a week, of which 23 hours were assigned to teaching. During the academic year 2018-2019, Mr. Mallick had been unwell with sciatica between 5th November 2018 to 8th March 2019. He had also been absent from 30th May 2019 to 26 June 2019 with depression. At the start of the academic year 2019-2020, Mr. Mallick's teaching hours were reduced to 11 hours a week. Mr. Mallick was an unqualified teacher and the College supported him in gaining a PGCE qualification.

10. Mr Mallick provided a very detailed statement to the Tribunal which set out the history of his work at the College. In that statement, he accepted that the volume of marking had been an issue for him during the academic year 2018-19, especially because the work had built up whilst he was on sick leave. However he said he had kept up to date since then.

11. Mr Mallick also pointed out his considerable efforts to support his students while he was away, running extra lessons.

12. Mr Mallick pointed out a number of inconsistencies within the documents and the evidence from Ms Bird. He also provided background on other members of staff who left the College and others who were, in his words, "earmarked" for jobs.

13. Mr Mallick stated that at a meeting on 6th November 2019 with his line manager, Amberina Ali, she had discussed his performance and complaints from

students. She then said to him that, if there were no improvements, he would have to leave. He reluctantly agreed to go onto capability measures as he had no choice. Ms Bird then came into the meeting and offered Mr Mallick the option of leaving with notice and holiday pay, and support to complete the PGCE course. She said that capability process was a horrible process and that if he failed to improve he “may not get anything she had offered”.

14. Mr Mallick stated that a meeting on 26th November with Ms Bird, which he considered to be part of the capability process, did not take place.

15. Mr Mallick met with Ms Bird on 29th January and she asked him how he was feeling and whether his marking was up to date. He thought it was a “bizarre” meeting as it lasted only 5 minutes and he was confused, but “thought it was part of the capability procedure”.

16. Mr Mallick next met with Ms Bird on 5th February 2020 and she raised issues of not having kept up with marking, the impact he was having on students and his response to Mr Matthews (being too busy to answer questions) and that he was not of an acceptable standard in four teaching observations. He said that the words used by Ms Bird were “a picture is being built”.

17. Mr Mallick highlighted a number of documents where his performance was said to be good. In particular

- assisting with 1-1 progress reviews in November 2019 (P199),
- positive feedback from his students (P12, 139-141, 155, 156)
- positive feedback from Ms Ali and Mr Matthews (p125, 127, 132, 76, 233, 240, 243, 244)
- the additional teaching he did for example for his students on Socrates system, the introduction of whiteboards, and teaching on the College’s wider curriculum

18. Mr Mallick asserted that he had been bullied by the College’s allegation of student complaints (of which they had failed to provide details); by not informing him of the Capability procedures; by not informing him that the meeting of 6th November 2019 was a formal capability meeting; by not informing him that he had a right to have someone with him at that meeting; by unfair teaching assessments and by the lack of time allowed to consider his position in February 2020.

19. Ms Bird provided a written statement which set out the history of the College’s concerns at the start of the academic year 2019-2020. On 30th September 2019 and 3rd October 2019 Mr Mallick received classroom teaching assessments which were below the acceptable level. In cross examination, she confirmed that she had incorrectly cited an assessment completed on 29th April 2019 as below the acceptable standard and confirmed that it related to a PGCE assessment.

20. Ms Bird said that on 6th November Ms Amberina Ali, Mr Mallick’s line manager had requested a meeting with Mr Mallick to discuss his performance and particularly her concerns about the teaching assessments, marking of work and complaints by students. As Mr Mallick did not accept that his performance was below

the standard, Ms Ali asked Ms Bird to join the meeting. Ms Bird agreed to meet with him subsequently.

21. Following a number of email exchanges with Mr Mallick, Ms Bird met with him in November for a catch up meeting to discuss the shortfalls in performance. Again Mr Mallick did not accept there were any issues. In cross examination, Ms Bird confirmed that, as Ms Ali was a new line manager, she wished to conduct her own investigation into the issues raised. Between then and the next meeting with Mr Mallick on 29th January 2020, she made enquiries into the conduct of the teaching assessments with Ms Rachel Jones, the quality manager, Mr Neil Matthews the Learning development lead. She found that the assessments were conducted in accordance with the Ofsted agreed process using criteria such as how the class was introduced and student engagement. Both Ms Jones and Mr Matthews confirmed to her that they considered Mr Mallick's teaching to be inconsistent and sometimes not of the acceptable standard.

22. Ms Bird met with Mr Mallick again in January 2020. Again the concerns on the standard of teaching were raised, as there had been an additional observation on 17th January 2020 by Ms Jones. It was accepted in cross examination by Ms Bird that by this time Mr Mallick had caught up with his marking of assignments. Mr Mallick did not accept that his teaching was below standard and challenged the assessments as being flawed.

23. On 5th February 2020 Ms Bird and Mr Mallick met again and Ms Bird provided copies of the evidence of the assessments, a complaint from Mr Matthews relating to a response received from Mr Mallick to an email and information that one of his cohorts of students was falling behind. In cross examination Ms Bird elaborated on that and explained that, due to lack of assignments being set, there was a risk that students may not have completed sufficient work for the end of year assessments.

24. As Mr Mallick again declined to accept any criticism, Ms Bird considered that they had reached an impasse. It was at this time that she suggested that Mr Mallick leave voluntarily and she had prepared a letter setting out the terms which Mr Mallick could consider. Ms Bird was clear both in her statement and in her evidence that capability procedures had not yet been started and that they could then have constructed an improvement plan.

25. It was agreed that Ms Bird would provide a draft letter. The initial draft stated that the costs of the PGCE course would be recouped and on 13th February Mr Mallick emailed Ms Bird to seek an amendment. An amended letter was agreed by Mr Mallick on 14th February 20.

26. During the following weeks, Mr Mallick corresponded with the College in relation to pension payments which were resolved in the middle of April 20. At no stage did Mr Mallick assert that he had been forced to resign.

## **Findings of fact**

27. Mr Mallick was sincere. He has worked hard for and was supportive of his students. He has a strong work ethic. There were documented instances of positive feedback for his work.

28. The documents also demonstrated that Mr Mallick had received teaching assessments which were below the acceptable standard and he did not, and still does not, accept that these were well founded assessments.

29. The Tribunal does not find any evidence to support the assertions that there were ulterior motives to remove Mr Mallick from the College. The Tribunal recognise that there were some inconsistencies and errors in the documents which Mr Mallick pointed out and indeed the College accepted that the College could have kept better records and handled discussions more sensitively.

30. The Tribunal does not find that Mr Mallick was bullied as suggested or at all between November 2019 and February 2020 when he ceased employment.

31. Considering the evidence of Ms Bird and the documents provided which support her, the Tribunal finds that there were grounds on which the College and Ms Bird could base a reasonable belief that Mr Mallick's performance, especially on marking and teaching assessment, were below standard and inconsistent.

32. Although Mr Malik contends that the meeting on 6th November 2019 was a formal capability meeting, the Tribunal finds that this was not the case on the basis of the evidence from Ms Bird and the emails from Ms Ali. Rather it was an informal meeting in accordance with the College's policy (P34) to discuss the issues and seek improvements. There was therefore no right for Mr Mallick to be accompanied to that meeting

33. Likewise, the Tribunal finds that the subsequent meetings with Ms Bird were also part of the informal process.

34. The Tribunal notes that the template letter used by Ms Bird in the meeting of 5th February at P 263 is headed "Capability Meeting" and has a had written note that "dismissal letter due to capability prepared 5/2". The Tribunal accept Ms Bird's evidence that this letter was prepared in error through the use of an incorrect template.

## **The Law**

35. A dismissal, for unfair dismissal purposes, is defined exclusively by section 95 of the Employment Rights Act 1996 and s1(a) states that occurs if the contract under which he is employed is terminated by the employer (whether with or without notice). The section reads as follows:-

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if)—*
- (a) the contract under which he is employed is terminated by the employer (whether with or without notice),*

- (b) *he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]*
  - (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.*
- (2) *An employee shall be taken to be dismissed by his employer for the purposes of this Part if—*
- (a) *the employer gives notice to the employee to terminate his contract of employment, and*
  - (b) *at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire; and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.*

36. A contract of employment, and therefore an employment relationship, may be terminated by mutual agreement. In order to decide whether there has been such a termination, it is necessary to consider the findings of fact of what actually happened and then apply the law to those facts.

37. The tribunal must be careful to be sure that what actually happened does not in fact amount to a dismissal, for example where an employee has effectively been given a choice to resign on the terms offered or be dismissed. The case of *S L Donovan v Staffordshire County Council* [1981] I.R.L.R. 108 considered that situation and concluded that where there existed a “resign or be dismissed” situation, the Tribunal would “have been perfectly right in law to treat it as a dismissal dressed up as a resignation”.

## **Conclusion**

38. Mr. Mallick's employment ceased on the 14th February 2020 in accordance with a letter dated 12th February 2020 (p285) which set out the terms which had been agreed.

39. Since the College had grounds on which to base a reasonable belief that Mr Mallick's capability was an issue, formal capability proceedings would have been an option for the College to pursue. There was no evidence that they had entered that formal process. If that process had been started, there was no evidence that the outcome of any such process was pre-determined or that Mr Mallick would inevitably fail and be dismissed for capability reasons.

40. Whilst leaving his teaching post at the College was clearly a difficult decision for Mr Mallick to make, the Tribunal finds that there was no ultimatum given. Indeed Mr Mallick himself was closely involved in the discussion of the terms to be agreed, for example, on 7th February he sought confirmation on the terms offered by Ms Bird and continued during April to confirm the basis on which his pension was paid. At no time during those exchanges did he raise the issue of dismissal and he informed the PGCE that he had left on his own terms in April 2020 (P339)

41. There was no “resign or be dismissed” situation in this case. The offer of mutual termination was made, considered and confirmed by Mr Mallick and accepted.

42. It follows that, having found as a fact that the termination was mutually agreed, there was no dismissal.

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Employment Judge Shrimplin

Date: 25<sup>th</sup> May 2022

JUDGMENT SENT TO THE PARTIES ON

26 May 2022

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE