EMPLOYMENT TRIBUNALS

Claimant: **Ms N Abdool Ryman**

Respondent: **Step Academy Trust**

Heard at: **Croydon by cloud video platform**

On: **2 March 2022**

Before: **Employment Judge Nash**

Representation
Claimant: **In person**
Respondent: **Mr Leonhardt of counsel**

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant presented her claim to the tribunal on 20 November 2020.

2. At this hearing the Tribunal heard from the claimant as her only witness. On behalf of the respondent, it heard from Ms Daly, the headteacher, and Mr Blanks, the Assistant Head. The Tribunal had sight of an agreed bundle and all references are to this unless otherwise stated.

The Claims

3. The claims before the Tribunal were as follows:-

   a) Constructive unfair dismissal under sections 95 and 98 Employment Rights Act;

   b) Wrongful dismissal - breach of contract for failure to pay complete notice pay; and

   c) Unauthorised deduction from wages for a failure to pay for work done during the Easter holidays.

The Issues

4. At the beginning of the hearing, with the parties, the Tribunal identified the

issues as follows.

Unfair dismissal

5. The first issue was whether there was a fundamental breach of contract. The claimant relied on a breach of the duty of mutual trust and confidence or in the alternative on a contractual right to be paid for work done during the Easter holidays. The acts on which she relied for a breach of trust and confidence claim were
    a. The email sent by the Assistant Head on 30 April 2020 in the context of the events leading up to this.
    b. Further, or in the alternative, events surrounding a sickness absence meeting scheduled for 9 September 2020.

6. The first issue was whether any such events amounted to a fundamental breach of contract.

7. The second issue was did the claimant waive any such breach?

8. The third issue was did the claimant resign because of any such breach?

9. If so, then it was accepted that the claimant was constructively dismissed and was unfairly dismissed. The respondent did not rely on Polkey or contribution.

Breach of contract

10. If the claimant was dismissed, it was accepted that she was entitled to notice pay.

Unauthorised deduction from wages

11. The issue was whether the claimant was entitled to be paid for work done when on holiday. To put it another way, had she not received her full entitlement to holiday pay because she was working during annual leave.

The Facts

12. The claimant started work on 3 September 2014 for the respondent, is a trust that runs primary schools. She was a full-time primary school teacher and at the time of her resignation was a year one teacher and global citizenship leader.

13. At the time of events material to the claim, the claimant had two children aged twelve and thirteen. She lived with her husband who was not working and her elderly disabled mother-in-law. She was the sole breadwinner in the household.

14. The events of this claim relate to Covid and Lockdown. On 17 March 2020 the respondent emailed all its staff concerning possible school closures. In the event, the school premises remained open for key-worker and vulnerable children. The respondent operated a bubble system with two separate bubbles and a rota, together with remote learning for other

children.

15. Teachers' work patterns changed. They had to attend school premises to teach. In addition, there was higher level planning to do and, whilst there was no remote teaching as such, remote lessons had to be prepared for parents to work through with their children.

16. When the claimant was on the school premises, she had fewer breaks than usual. Otherwise, she had six hours a day available when she was not doing lessons which she might devote to her other duties.

17. The Tribunal bore in mind throughout this case that Covid and Lockdown was an unprecedented event. Particularly at the start of the Pandemic and Lockdown in March and April 2020, the situation was fast-moving, confusing, worrying, and at times for some people, frightening. Covid at that time was less understood and familiar than it was by the time of the hearing. Schools and teachers were working in extremely difficult conditions. In effect, everyone was learning how to manage the situation as they went along.

18. The school premises, as a result of Covid, stayed open during the Easter two-week break for key-worker children. The school put together a rota for staff to cover this.

19. The claimant wanted to have the two weeks off at Easter to spend with her family. She was also concerned about going into work with a vulnerable family. She did not raise this with the respondent who did not enquire.

20. The claimant was therefore unhappy when she was asked to work one of the two Easter holiday weeks. The claimant was rota'd to part-cover a week because a colleague had to isolate. There were a number of other staff members who had restrictions, for instance, they were in the early stages of pregnancy or had younger children.

21. One of the claimant's duties was remote learning planning. There was some confusion over this, for instance the claimant was originally mis-assigned work. The claimant believed that she was doing more work than her colleagues. On one occasion a deadline was suddenly brought forward because of a respondent IT problem. The claimant missed the new deadline by two or three hours. A fellow teacher sent her a short sharp email saying that the work was, 'unfortunately incredibly late'.

22. The claimant informed the respondent on 14 April 2020 that her husband had Covid symptoms. At this stage in the Pandemic, it was very difficult to source Covid tests to confirm if someone had contracted Covid. At the time the claimant was on leave, but she was catching up on work. The Head took over the claimant's planning responsibilities for that week and the claimant was released to isolate, in line with medical advice. It was agreed that the Claimant could work the following week.

23. The claimant emailed the respondent an isolation note on 23 April 2020. At around this time her daughter too started to show Covid symptoms. The claimant was concerned because her daughter was asthmatic.

24. The respondent told the claimant, in effect, that she could work full-time from home. The claimant was distressed because she understood that the 111 telephone service had told her that she did not have to work. She had to try to keep her husband and children apart, care for the children, and ensure the safety of her elderly relative.

25. The respondent told the claimant incorrectly, it turned out, that she had by this point run out of carer's leave. The claimant was not entitled to sick leave because she was not ill and she felt that she had no alternative but to continue working, otherwise she would be unpaid and she was the sole breadwinner.

26. The Tribunal accepted that at this time the claimant was having to prepare lessons and general plans for the upcoming school year.

27. At this point the respondent changed its monitoring system so that the Head became line manager for all staff. The claimant was unhappy, because she had not been told in advance.

28. The Assistant Head Mr Nathan Blanks took over management of some of the Claimant's planning work. In effect, he reviewed the claimant's work and approved it, subject to some amendments. The work was then passed to the Head who raised wider concerns.

29. The claimant re-submitted her work to Mr Blanks and he sent her an email on 30 April 2020 which she contended was, or was part of, a fundamental breach of contract. Mr Blanks told the claimant that she had not made the amendments to her work as instructed. He told her to do so. He said more than once that it was "concerning" (which word was in red) that she had failed to do so. Although he did not say so in terms, he passed on criticism from the Head that, when writing lessons in the new format, the claimant had not sufficiently followed the school's approach to teaching. An example was that the last task in a lesson did not sufficiently relate to the content of the lesson. Mr Blanks said that he had had to spend more time on, in effect, fixing the claimant's work than he had had to do, for instance, with an unqualified teacher.

30. The claimant was instructed to update the work by 9.00am the next day. The respondent's case was this was a thirty minute task.

31. The respondent before the tribunal accepted that this email was strongly critical and might be viewed as harsh.

32. There was a dispute as to whether or not the claimant had in fact made the amendments requested by Mr Blanks, (for instance, lesson 2, slide 7, 9 and 11). The claimant said that, contrary to Mr Blanks's allegations in his email on 30 April, she had made the amendments.

33. The claimant was extremely upset by the 30 April email. Her husband contacted the respondent to say that she was overwhelmed with stress. The respondent told him to pass on the message, 'stop work and get better'.

34. The claimant was signed off work sick from the 30 April 2020 and, as it turned out, was never to return to work.

35. The claimant attended the Maudsley Accident and Emergency Department on 8 May 2020 due to her husband's concerns. She presented as anxious and in low mood and was prescribed Diazepam. She recorded as having fleeting suicidal thoughts. She was advised not to read work emails**.**

36. The claimant spoke to a telephone triage talking therapist service on 27 June 2020 who scored her with severe symptoms in respect of both anxiety and depression.

37. The respondent sent the claimant emails inviting her to an Occupational Health (OH) meeting on 19 May and 21 May. They desisted following union intervention.

38. The claimant attended Occupational Health by telephone on 30 June 2020. OH provided a report on 6 July as follows. The Claimant reported no previous mental health problems and her symptoms were extremely debilitating. She had lost a considerable amount of weight and was not leaving the house. Although she was obtaining counselling, she was not at all well enough to work and was unlikely to return that school year. She was keen to get well and get back to work but it was too soon to consider any adjustments. There would be a review in two months.

39. The claimant duly returned to Occupational Health on 20 August 2020. It was reported that she was still unable to leave the house and remained unfit to work. Her condition was described as long-term. However, she had improved. It was hoped that she would be capable of a phased return in four weeks. OH stated that she was fit for a return to work meeting, which would be required because she would need adjustments and a phased return.

40. While the documentary and oral evidence was not entirely clear, the tribunal found on the balance of probabilities that, after receipt of the OH report the respondent received another fit note stating that the claimant was not fit for work although not necessarily unfit for meetings.

41. The respondent hand delivered a letter to the claimant on 1 September. It invited her to what was described as a formal meeting under the sickness absence procedure, scheduled for 9 September.

42. On 3 September, the claimant's union wrote to the respondent that her GP had advised delaying the meeting due to the claimant's fragility. This was consistent with a GP letter written much later. The respondent received no medical evidence at the time. The union suggested a four-week delay.

43. The Head replied on 4 September that, according to the Occupational Health report, the claimant was fit to attend the meeting. She stated that failure to attend meetings including Occupational Health could lead to withholding of sick pay; the claimant must attend the sickness meeting.

44. The claimant resigned on 9 September by way of a lengthy and detailed letter. This set out her concerns in detail about how the respondent had treated her, concentrating on the first two months of the Pandemic. She finished her letter that stating that the direction to attend the meeting, had started to worsen her health because it brought back what she described as the bullying, harassment and the inhumane treatment. "*I have therefore decided to resign with immediate effect."*

45. The claimant's evidence, which the Tribunal accepted, was that until she was invited to the sickness meeting, she had not intended to resign.

46. The effective date of termination was 9 September 2020.

47. The claimant was paid up to 30 September 2020. The Head wrote back to the claimant on 10 September offering to discuss her concerns and to ensure that she had not resigned in haste. She claimant was invited to a meeting on 18 September. The claimant did not respond.

The Law

48. The law on constructive dismissal is found at section 95 Employment Rights Act 1996 as follows:-

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), only if)—

…

(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.

49. The law in respect of unauthorised deductions of wages is found at section 13 of the Employment Rights Act as follows:-

Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion…

Submissions

50. The respondent Counsel made brief legal submissions. The claimant replied very briefly. All submissions were oral.

Applying the Law to the Facts

51. The Tribunal directed itself in line with the Court of Appeal's ruling in *Western Excavating (ECC) Limited v Sharp 1978 CA*

> '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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.'

52. The breach may be the last of a series of breaches, which taken together form sufficiently serious conduct by the employer (known as the "last straw" concept — see *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, CA).

53. The Tribunal reminded itself that conduct that is unreasonable is not in itself sufficient to amount to a fundamental breach. See *Western Excavating (ECC) Ltd v Sharp* [1978] I.R.L.R. 27 and *Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA*.

54. It is not necessary for an employer to intend to breach the fundamental term. If the effect is a breach of a fundamental term, this is sufficient to found a constructive dismissal. See *Leeds Dental Team Ltd v Rose 2014 ICR 94, EAT.*

55. The Tribunal firstly considered the contention that the failure to pay the claimant for work done during the Easter holidays amounted to a fundamental breach of contract. In effect, the tribunal understood the claimant to be contending that because she was working whilst on annual leave, these days should have been treated as workdays, rather than holiday. Therefore, she had not been paid all annual leave.

56. The Tribunal did not accept that this was a breach of any term of the contract for the following reasons. The Tribunal accepted, in effect, the respondent's submissions that this was a matter of the claimant arranging her own workload, albeit in very difficult circumstances. The claimant did not rely on an express term of the contract and did not provide a written copy of her contract. The tribunal understood her to rely on an implied term that she was

entitled to pay for work during the holidays or, in the alternative, if she worked whilst on annual leave, this would not count towards her annual leave entitlement.

57. The tribunal could find no basis for implying a term into the claimant's contract that, if there was too much work during term and a teacher found themselves having to work in the holidays to, in effect, catch up, they were entitled to be paid for that work or it did not count towards their holiday entitlement.

58. There was no evidence that there was any such express term.

59. It is trite law that a term may not be implied into a contract of employment because a tribunal thinks such a term is reasonable. A tribunal can only imply a term in limited circumstances. It must be able to presume that it would have been the intention of the parties to include the term when they entered into the contract. Briefly, a tribunal must find that one of the following applies - the term is necessary to give the contract business efficacy, such a term is normal custom and practice in such contracts, the way the parties perform the contract shows that they intended to include the term, or it is obvious that the parties must have intended it. The claimant did not submit that any of these applied. Nevertheless, as she was unrepresented, the tribunal considered what if any evidence was relevant.

60. There was no evidence that such a term would give the claimant's contract business efficacy or make it workable. The contract worked without such a term. There was no evidence that such a term was normal custom and practice. In any event it is custom and practice for teachers to have written contracts and there was no evidence that such a clause was included. The fact that the respondent paid the claimant holiday pay when she worked during the Easter holiday pointed to the respondent not having intended to include any such term. Finally, there was no evidence that such a term was obvious or went without saying.

61. The second potential fundamental breach was of the implied term of mutual trust and confidence, that, without reasonable and proper cause, a party will not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties, see *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL*. According to *Morrow v Safeway Stores plc 2002* [IRLR 9 EAT], any breach of this term is a fundamental breach.

62. The Tribunal understood the claimant's case to be that the fundamental breaches were the email from Mr Blanks on 30 April and the events leading up to it and, or further or in the alternative, the respondent's conduct in respect of the sickness absences in September 2020.

63. In considering the 30 April 2020 email and its context, the Tribunal reminded itself of the unusual circumstances in which the parties found themselves. It took into account that this was an extremely stressful situation for the claimant and for all the respondent employees.

64. The Tribunal reminded itself that we know much more about Covid at the

date of this hearing in March 2022 than we did in 2020. Covid in early 2020 was, in general terms, a more serious disease than the later Omicron variant which was predominant at the time of the hearing. Accordingly, the Tribunal took care to bear in mind the very different circumstances in early Lockdown.

65. The Tribunal found that the respondent's treatment of the claimant leading up to the email of 30 April was not ideal, but this was predictable when the school was facing unprecedented pressure. For instance, the Tribunal accepted the respondent's plausible and detailed evidence that the claimant was not able to take two weeks consecutive weeks off at Easter because it had to balance the competing needs of different employees. Unfortunately, the claimant came slightly lower down its list of priorities than other teachers. The respondent had to ensure that teachers were available to fill the Easter rota, which was a direct result of the Pandemic. In the circumstances of Lockdown such decisions had to be made and, perhaps inevitably, some staff would feel hard done by.

66. The tribunal accepted that in such circumstance some teachers including the claimant might well sometimes have received an unfair allocation of work compared to other teachers. This happened when, in effect, everyone was trying very quickly to work in an entirely new way, and deal with unprecedented and sometimes frightening factors. The tribunal found it entirely plausible that some teachers ended up with more work than others on occasion.

67. Whilst on the school premises the claimant was, in effect, working full-time with vulnerable and key-worker children. The Tribunal accepted her evidence that whilst at school she had less downtime, i.e., non-contact time, with pupils than would normally be the case. Further, there were more pressures - extra work such as long-term planning and the new ways of learning, i.e., converting existing lessons into a remote format. This was a pressure the tribunal accepted affected all members of staff, especially in the early days of lockdown.

68. The Tribunal went on to consider the email of 30 April. The respondent before the tribunal accepted that the email was strongly critical and could be seen as harsh. The tribunal found that at least in parts the email was unfair and would lead to a justified sense of grievance. This was the case despite the unprecedented circumstances in which the parties found themselves.

69. The Tribunal accepted on the balance of probabilities the respondent's evidence that the claimant had not, in effect, carried out the amendments Mr Blanks had requested for the following reasons. The contemporaneous evidence, although limited, was consistent with his version of events. In addition, the claimant accepted that she was under considerable stress at the time. She felt that she was working when she should not be required to do so. She had to care for sick members of her household and protect vulnerable others. In these circumstances, it was understandable and plausible that she may have overlooked the amendments.

70. However, the Tribunal accepted her case that both the nature and the

expression of the other criticisms in the email were not justified. It was unfortunate, in effect, that Mr Blanks had not originally identified problems with the work which meant that the claimant was asked to re-do her work and then re-do it again following the Head's input. What made the email particularly upsetting for the Claimant was references to Mr Blanks having to spend more time on her work than that of a student teacher and the use of red text for emphasis.

71. In the view of the Tribunal, Mr Blanks let his understandable frustrations with the Covid situation boil over in an email to a subordinate. The respondent should have made Mr Blanks aware, as he was directly manging the claimant's work, of her difficult personal circumstances, having a husband and a disabled child with Covid symptoms.

72. The respondent should have made clear the claimant's entitlement to carer's leave, rather than the claimant's feeling she had no choice but to work. The tribunal accepted that neither the Head nor Mr Blanks were aware or responsible, for this.

73. Despite these serious shortcomings, the Tribunal did not find that either in and of itself or in the context of earlier events that the email amounted to a fundamental breach of the duty of trust and confidence. The email and its context did not go to the fundamentals of the relationship between employer and employee. The email, although strongly critical of the claimant's quality of work, was not simply abusive – Mr Blanks set out the facts as he saw them. He set out in clear terms the respondent's criticisms of the claimant's performance and explained in clear terms what she was expected to do to amend this. His criticism of the claimant was trenchant, for instance that it took longer to deal with than a student's work, but in the view of the tribunal, whilst this could have been much better expressed, it was legitimate feedback.

74. The Tribunal also accepted the respondent's evidence that the work the claimant was expected to do following the email was far from onerous. The respondent estimated about thirty minutes, so even if the claimant was handicapped by her unfortunate home circumstances, it was unlikely to take more than an hour. Other work arising out of the email was given to other members of staff. This was not a situation where the claimant was ordered to carry out a heavy burden of work. In fact, the respondent took steps to mitigate her burden by bringing in colleagues.

75. The tribunal went on to consider the respondent's treatment of the claimant over the sickness procedure and in particular its insistence that she attend a meeting on 9 September. The Tribunal considered this both in light of the shortcomings of the email of 30 April and as a free standing matter.

76. The Tribunal accepted that the medical evidence showed that the claimant became very seriously ill after 30 April and by the time she saw Occupational Health in June, she was assessed as being severely depressed and severely anxious.

77. The Occupational Health letter on which the respondent based its decision was not entirely consistent. The respondent was correct in contending that

the letter stated in terms that the claimant was fit to attend the meeting. The type of meeting referred to in the Occupational Health letter appeared to be more of a return to work meeting - looking at potential reasonable adjustments on a phased return. This is not the same as a sickness management meeting. An invitation to a sickness management meeting can form part of a disciplinary or capability process. An invitation might lead an employee to believe that her employment might be in jeopardy. Nonetheless, the Tribunal accepted the respondent's submission that staff may be able to attend a sickness absence management meeting when not fit for work. The very fact of sickness management meetings is premised on this.

78. The Tribunal considered the Occupational Health report carefully. It stated that the claimant did not feel, as of 20 August, that she was fit to return to work because she was still unable to leave the house. However, over the next four weeks she was hoping to start leaving the house and that within four weeks, OH were hopeful that she would be able to commence a phased return to work. This would require a discussion about perceived workplace issues which amounted to a barrier to her return.

79. The tribunal had also found that, after receipt of the OH report, the respondent received another fit note stating that the claimant was not fit for work although not necessarily unfit for meetings.

80. The Tribunal carefully considered whether the respondent's refusal to postpone the sickness management meeting in circumstances where the claimant's union had stated that her doctors had advised against it, amounted to a fundamental breach, particularly in light of the shortcomings of the email of 30 April. Further, the respondent informed the claimant in its email of 4 September that policy was that failure to attend the meeting could lead to sick pay being withheld.

81. The Tribunal accepted that an employer must be able to manage sickness absence, particularly long term absence. The claimant had been sick for three months (although this included the summer holidays). The school had to provide education to its pupils and long-term sickness absence had to be managed to facilitate this.

82. The Tribunal had serious concerns about the way the employer managed the claimant's sickness absence in this regard. In the view of the Tribunal, based on its experience in such cases, this employer might be well advised to reconsider how it approaches long-term sickness absence management. It may wish in particular to review how it manages sickness management procedure and/or a return to work meeting with an employee who is recovering from a significant mental illness.

83. Nevertheless, the Tribunal could not find that the refusal to postpone the sickness management meeting in light of Occupational Health advice that the claimant was fit to attend at least some meetings in respect of her health, amounted to a fundamental breach of the duty of mutual trust and confidence. The employee had been sick for three months and a new school year was starting. The claimant did not provide any medical evidence, for instance a letter from her GP which might have cast doubt on the OH advice.

The fit note received after the OH report was not inconsistent with the claimant being able to attend meetings.

84. The respondent needed to take steps to plan for the future. Had the Occupational Health advice been different, or had the claimant provided medical evidence that she was unfit to come to a meeting, it was possible that the Tribunal would have come to a different decision.

85. However, the respondent acted within the OH guidance and it received no medical evidence to the contrary. Accordingly, it did not breach the duty of mutual trust and confidence.

86. As the Tribunal did not find that either the letter of the 30 April, or the respondent's conduct around the sickness management meeting, or a combination of the two, amounted to a fundamental breach of contract there could be no constructive dismissal. Accordingly, the claimant was not dismissed. Her unfair and wrongful dismissal claims must therefore fail.

87. The tribunal finally considered the unauthorised deductions from wages claim. The tribunal had found that there was no contractual right to be paid for work done in the Easter holidays or a right that if an employee worked during annual leave, this resulted in that day not counting toward their annual leave entitlement. Accordingly, there was no unauthorised deduction from wages and the claim was dismissed.

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Employment Judge Nash
Date: 26 May 2022

Sent to the parties on
Date: 26 May 2022