



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Andrew Perry

## Respondent

NR5 Project  
T/a: Future Projects Limited

v

**Heard at:** Norwich (in person)

**On:** 11, 12, 13 and 14 June 2024

**Before:** Employment Judge Postle

## Appearances

**For the Claimant:** In person

**For the Respondent:** Miss L Hatch, Counsel

## JUDGMENT

The Claimant's claim that he was constructively dismissed is not well founded.

## REASONS

### Background

1. The Claimant's claim filed on 19 October 2022 sets out in the ET1 a claim for constructive dismissal. The information is relatively sparse. The Claimant has sufficient continuity of employment to bring such a claim, being employed from 1 September 2017 until his resignation without notice on 30 September 2022. The Claimant was employed as a Maths Teacher at a Special School for Children who had often been excluded from main stream education, having learning difficulties, mental health problems and traumatic histories.
2. The Respondents filed their Response on 23 November 2022, responding to the claim for constructive dismissal. The name of the Respondents being noted as NR5 Project, trading as Future Projects Limited.

3. Following the above, standard Orders were made for the further progress of the case. Sometime much later, the Claimant filed his Schedule of Loss in which he set out the basis of his claim for constructive dismissal identifying six breaches being:-
  - 3.1. “Being subjected to the health effects of inhaling tobacco smoke at work in breach of my employer’s statutory duty to protect me from it;
  - 3.2. Unreasonably and unjustly reporting to the Disclosure and Barring Service in advance of an investigation without evidence or foundation, having been made without my express or implied consent which also constitutes a wilful GDPR data breach [in the Claimant’s opinion];
  - 3.3. Being pressurised into accepting a settlement agreement rather than directly addressing relationship breakdown in a restorative manner with particular pupils and line management;
  - 3.4. Being subjected to disciplinary proceedings which were manifestly unreasonable and disproportionate;
  - 3.5. Being denied training, specifically additional Restorative Justice Training as promised when returning to work on site in 2021; and
  - 3.6. Being subjected to allegations of poor performance which were exaggerated and unfounded.”
4. The Claimant then appears to have added further legal basis of his claim, citing protected disclosures on page 38. These are listed without any detail identifying clearly the actual disclosure qualifying as a protected disclosure, to whom it was made, when and why it was in the public interest. The Claimant made no Application to Amend the claim. In the absence of which the claim proceeded as a claim for constructive dismissal as envisaged by the ET1.

### **The Evidence**

5. In this Tribunal we have heard evidence from the Claimant who called two further Witnesses, a Mrs Bruce and a Mr Dennis who were contracted to provide training which it appears was on an ad hoc basis, neither of which were able to give any direct evidence on the matters which the Claimant asserts other than that pupils regularly smoked at the School. All the Claimant’s Witnesses and the Claimant gave evidence through prepared Witness Statements.
6. For the Respondents, we heard evidence from: Mr A Morter, the Operations Manager and designated Safeguard Lead for the Respondents; Ms J MacLennan, Deputy Head Teacher for the Respondent; Mrs D Edwards, Head Teacher of the Respondent; and Ms D Watson, former Operations Manager at the Respondent. They all gave their evidence through prepared Witness Statements.

7. The Tribunal also had the benefit of a Bundle of documents consisting of 1,045 pages.
8. Finally, the Tribunal also had the benefit of written submissions on behalf of the Respondent from Counsel Miss Hatch and from the Claimant Mr Perry. For these I am grateful as they are in writing, no disrespect is intended, I therefore do not need to rehearse them again.

### **Credibility**

9. I did find the Respondent's Witnesses consistent, reliable and genuine in their responses to questions from the Claimant. The point made by the Claimant that the Respondent's Witness Statements in part had similar paragraphs is not uncommon where there is a commonality in the evidence of uncontroversial facts.
10. Whereas I did find the Claimant evasive on occasions having to be reminded to answer the question put to him, rather than to go off at a tangent. His evidence on one occasion lacked total credibility in the face of the evidence, for example initially maintaining he did not know he could Appeal the findings of a LADO Report. However, when his attention was drawn to the Report showing clearly an Appeal Process, the Claimant admitted he had appealed the findings of LADO.
11. A further example was the suggestion that the Deputy Head would in some way conspire with pupils to encourage complaints against the Claimant, this is frankly absurd.
12. The Claimant's integrity was also questioned when he suggested to one of the Witnesses that they should have vetted the pupils to be interviewed during Ofsted Inspections rather than allow Ofsted to freely select. That would have been quite inappropriate.
13. The Claimant's Witnesses were unable to give any direct evidence on the issues before the Tribunal, particularly the Claimant's alleged breaches by the Respondent other than pupils at the School were often seen smoking. This was a fact readily accepted by the Respondent's Witnesses, despite the School's No Smoking Policy.

### **The Law**

14. Section 95(1) of the Employment Rights Act 1996 sets out that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. Commonly referred to as constructive dismissal.
15. There is well trodden Law in this area known as Weston Excavating (ECC) Limited v Sharp [1978] IRLR 27, in the Court of Appeal which ruled that for an employer's conduct to give rise to a constructive dismissal it must

involve a repudiatory breach of contract. As Lord Denning, Master of the Rolls, put it in that case,

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows 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 he or she discharged from any further performance. If he or she does so, then he or she terminates the contract by reason of the employer’s conduct, then he or she is constructively dismissed.”

16. Therefore in order to claim constructive dismissal the employee must establish that there was a fundamental breach of contract whether express or implied on the part of the employer, that the employer’s breach caused the employee to resign, the employee did not delay too long before resigning and thus affirming the contract.
17. As in this case the Claimant is asserting a breach of the implied term of trust and confidence, the Claimant must show that the employer has without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them.
18. Broken down, the duty is what was the conduct complained of and did the employer have reasonable and proper cause for its conduct? If not, was the conduct complained of calculated or likely to destroy or seriously damage the employer and employee relationship of trust and confidence?

### **The Facts**

19. The Respondent is a Special School which caters for students with a diverse number of problems, for example social, emotional and mental health, with associated challenging behaviours. It is clear a number of students at the School aged between 13 and 16 years have nicotine addictions, possibly even before joining the School.
20. The Respondent employs approximately 31 people in the School and a number of self-employed Tutors and Therapists providing a wide range of learning skills.
21. The Claimant was a Maths Teacher employed from 1 September 2017 until his resignation without notice on 30 September 2022. The Claimant underwent a significant amount of training whilst employed by the Respondents relevant to the School and pupils.
22. The circumstances leading up to the Claimant’s resignation was in relation to a number of incidents the Claimant was involved in with students / Teachers, beginning in October 2020. All of which it was appropriate to carry out an investigation into the alleged incidents, clearly failure to investigate incidents / allegations made by a pupil or a Teacher would have been a failure on the part of the School / Respondents in their

safeguarding duties of such vulnerable children. They had a clear duty to investigate when allegations were raised, some of which would result in no case to answer, but nevertheless they needed to be investigated. It is clear pupils on site smoke, as to be expected of pupils of that age as would be seen often in mainstream schools. The School had a clear Smoke Free Policy (page 406) and the risks were set out in the Respondent's Health and Safety Risk Assessment (page 689). Both the Head and Deputy Head Teachers were clear on NICE Guidelines and Department Education Guidelines, even if they could not recite them word for word. They were aware of the generality of the Guidelines. It is also clear that when pupils were caught smoking they were spoken to, Reports made and we have seen examples of them in the Bundle (pages 538 – 539, 443, 555, 548 and 549). Where appropriate smoking paraphernalia would be confiscated but within the boundaries of staff and their own health and safety, this would have to be undertaken in a non-confrontational way. Clearly it would be impossible to stamp out smoking completely, it would appear the Claimant was in any event, an occasional / social smoker (page 208) although there is of course no suggestion that he breached the Smoking Policy at work.

23. It should be noted that the Claimant never made an issue to either Mrs Edwards the Head Teacher or Ms MacLennan the Deputy Head, in writing that in some way he was being exposed to inhaling smoke at work.
24. It is true over a three year period between September 2019 and September 2022, the Claimant was subjected to a number of complaints whether from pupils or staff. It is accepted that some resulted in no action. However, I repeat, where an allegation is made against a Teacher by a pupil, or indeed a member of staff, it needs to be investigated for no other reason than the Respondent's safeguarding responsibilities. It simply cannot be ignored.
25. In September 2019 a referral to LADO was made as a result of an allegation that a group of pupils were at the side of the class whereupon the Claimant requested a pupil to put a stone down, the Claimant then placed his arm across the pupil's upper body and neck, as a result of which other staff had to intervene, (pages 88 – 92). The case was closed after advice was given to the Claimant (page 95) about future de-escalation and moving forward.
26. In February 2020 there was a complaint by a member of staff against the Claimant, ultimately this led to no further action being taken.
27. In March 2020 there was a referral to LADO following an Ofsted Inspection, the referral being made by Ofsted, the result of a pupil indicating they did not feel safe in the Claimant's classroom.
28. On 5 October 2020 there was an incident with a pupil which was reported to LADO on 8 October 2020 (page 157) where it was alleged the Claimant forcibly moved one of the pupils out of the classroom and another student had his chair pulled and grabbed him by the waist and shoved him across

the classroom, throwing his coat out of the classroom, accepting it was a challenging situation with pupils being unruly.

29. On 12 October 2020, a further incident involving the Claimant and a pupil was referred to LADO, (page 175) after the pupil had thrown sanitiser at the Claimant. The Claimant pushed the pupil out of the classroom shouting, "get out". It is accepted the pupil was out of order and was excluded for a day. Again, the Claimant's behaviour towards the student in challenging circumstances was nevertheless brought into question.
30. On 21 September 2020, a pupil who was in an agitated state left the classroom whereupon the Claimant uttered the words, "*she should be and needs to be in a hospital*" by clearly referencing her mental health, whatever the Claimant might say.
31. On 7 December 2020 and 8 December 2020, a member of staff alleged that the Claimant allowed verbal and racist remarks about her to go unchallenged, despite attention being drawn to the event.
32. On 1 December 2021, a pupil complained that the Claimant had removed them from the classroom and issued them with a ripped up work sheet from a previous lesson.
33. On 7 December 2021, a pupil alleged that during a lesson in front of other pupils, the Claimant referred to the pupil being in Year 11 or practically Year 11, apparently said in a demeaning manner which caused the pupil some distress affecting his self-esteem.
34. On 10 June 2022, an allegation that the Claimant had said the pupil could not keep using as an excuse that he was struggling to see the white board because of his eyes, the Claimant responding saying he'd heard it all before and didn't want to hear about it.
35. In the case of serious complaints the procedures to be adopted were, amongst other things, a duty to refer to LADO as outlined in the Respondent's Safeguarding Policy, which also is part of Local Protocols.
36. The procedure was for the Respondent, usually Ms Maclennan, to seek advice in the first from the Local Authority over the telephone as to whether on the face of the facts a formal reference was required.
37. It should be noted there was, as a result of some of the allegations, three larger disciplinary investigations.
38. In particular, Mr Morter's first investigation into complaints of 5 October and 12 October, is set out in his first Investigation Report in March 2021 (page 312). It is clearly a detailed and thorough Report. In respect of the first allegation he decided after considering mitigation, there was a case to answer despite the use of force and physical intervention being justified, each having been used and failure to adequately report was sufficient breach of School Policies and Safeguarding.

39. In regard of the second allegation, he concluded there was insufficient evidence to either prove or disprove these claims. However, the investigation did uncover Safeguarding issues, namely whether the Claimant correctly deployed the physical intervention he describes and again failing to adequately report them in a timely manner. The incident was referred to a disciplinary procedure.
40. As a result, the appropriate referrals were made to LADO and the DBS. On 19 April 2021 the Claimant was sent a letter setting out the requirements of the Claimant's future conduct, warning that the incidents could lead to further disciplinary action and / or dismissal, (page 401).
41. There was then the second Investigation by Mr Morter of a complaint on 21 September 2021 and detailed in his Report of 5 November 2021, (page 749) which resulted in a case to answer. As a result of this the Claimant was issued and accepted a First Written Warning. This was confirmed to him in a letter dated 28 April 2022.
42. There was then the Mrs Watson Investigation for complaints of 7 December, 8 December and 1 December 2021 (page 578). She concluded there was no case to answer, there being insufficient evidence to ascertain any wrong doing or breach of Policy. She did recommend the Claimant attend refresher Equality and Diversity Training and to re-visit the Behaviour Policy of the School (page 582).
43. The outcomes of the Disciplinary Proceedings and Investigation Reports were clearly reasonable and proportionate, complaints were addressed and with the first cases no action was taken whatsoever.
44. The LADO referral was reasonable and proportionate and managed the process with multi-agency personnel such as Social Workers, Police and the like. In effect they take over control following referrals from Schools which I have no doubt Ms Maclennan was instructed by the Chair of LADO Claire Osborn to refer the Claimant's behaviour to the DBS pending the outcome of the Investigation of the allegations. That Referral was made by the Respondents on 6 November 2020 via email and attached a completed Referral Form confirming the County Council were involved in the case and she had been advised to report the matter.
45. That Referral Form confirmed (page 189) that the Claimant had been informed of his Referral to the DBS (page 189) and it seems likely that Ms Maclennan told the Claimant prior to 6 November 2020 she was going to make the Referral, (page 728). In fact the Claimant admitted he had been told by Ms Maclennan that LADO had specifically requested he be made a Referral to DBS.
46. As regards the Claimant's experience and training, he was an experienced practitioner prior to joining the Respondent, having worked in similar schools with pupils having a variety of needs, backgrounds and conditions.

It is also clear, whatever the Claimant maintains, he received training as confirmed by his Training Record, (pages 842 – 845). Training in Educare, online and in person training with Norfolk Steps which provides training to promote positive behaviour and early intervention and prevention. The Norfolk Steps training is broken into two steps, “Step On” promoting positive behaviour strategies and “Step Up” training on safe and effective use of physical intervention within legislative frameworks.

47. The Claimant was originally a Trainer on Norfolk Steps providing training to other staff and not surprisingly following the incident of 5 October 2020, on 12 October 2020 the Claimant was removed from the list of Trainers.
48. Given the Claimant’s absence in early 2021, returning some time in either June or July 2021, originally the plan was for the Claimant to have further Restorative Justice training which is a process by which relationships with students that have broken down might be found a way in which to repair. However, it is clear that only works if both sides agree, students and the Claimant, unfortunately the students told Ms Maclennan that they did not wish to engage in restorative conversations with the Claimant as they did not feel comfortable. Therefore, little could be advanced with this further training in those circumstances. Furthermore, there is no evidence that the Claimant thereafter requested or chased for this further training.
49. In October 2021, there was concern about the Claimant’s capability. Mrs Edwards puts in place a Support Plan which includes Mrs Edwards observing the Claimant’s lessons, explaining the outcome of the lesson observations and what improvements were necessary.
50. However, by March 2022 the Head was now receiving an increasing amount of complaints from parents and students about the Claimant’s manner which led to students refusing to go to his lessons. These were publicly discussing students’ medication in front of the class, inciting anxiety in a student with particular SEND needs around literal interpretation and the way in which the Claimant spoke to students not taking account of their SEND needs, (pages 616 – 617).
51. It appears as a result of these and other issues, a decision was taken to progress formal disciplinary procedures. A meeting was arranged for 26 April 2022, conducted by Mrs Edwards. The Claimant was accompanied by his Trade Union Representative and accepted that at that stage a First Written Warning for his conduct was made, (pages 639 – 640).
52. Given the above the Support Plan that had been in place was put on hold pending these other disciplinary matters. The Support Plan resumed in June 2022. The Claimant was invited to a formal Capability Meeting (page 104). As a result of that meeting the Claimant was issued with the First Written Warning in relation to capability on 27 June 2022. It is accepted the Claimant Appealed that decision which ultimately led to the Claimant’s Trade Union Representative approaching the Respondents for ‘without prejudice’ conversations. The Capability Process was therefore paused.

The Claimant was then absent from work from 13 July 2022, clearing his desk and surmising as a result of the Settlement Agreement not being to the satisfaction of the Claimant, the Claimant resigned without notice in September 2022.

53. When the Claimant resigned by letter, (page 711) it is surprising the succinctness of that letter in that there is no reference at all to the events he now asserts lead to his resigning, it is completely silent. Furthermore, during the Claimant's employment despite on one occasion being sent the Grievance Policy, there is no evidence the Claimant ever raised any Grievance in relation to the issues the Claimant now asserts as amounting to a fundamental breach of the implied term of trust and confidence.

## **Conclusions**

### *Allegation 1:*

#### *Being exposed to excessive tobacco smoke*

54. The first point to make is that clearly smoking did take place on site, the School endeavoured through their staff with the aid of a No Smoking Policy to stop the students smoking. This would have been difficult given the pupils and their age. However, what is clear on the balance of probability it is unlikely the Claimant inhaled significant amounts of tobacco smoke from students and certainly not on a regular basis. When the students were found smoking they were in outdoor locations, Incident Reports were made and there was no suggestion the Claimant was in fact inhaling the students' smoke. In any event, on the balance of probabilities, the Claimant is an occasional smoker himself.
55. In those circumstances there is insufficient evidence to show that the Respondents breached the implied term of trust and confidence, as alleged, at all.
56. Even if there was, it is arguable the Claimant waived the breach given the fact that if what he says is true, he worked in an environment for the best part of five years accepting the situation.

### *Allegation 2:*

#### *Being unreasonably and unjustly reported to the Disclosure and Barring Service*

57. What is clear is the Claimant had a background of issues arising with students, they were potentially safeguarding issues. They were quite rightly brought to the attention on occasions of the LADO after Ms Maclennan taking advice on the Advice Line. The Chair of LADO, Claire Osborn instructed Ms Maclennan to make the Referral pending the outcome of the Investigations into allegations of 5 October and 12 October 2020. The Respondents had a clear duty where there were safeguarding risks, where it was believed the Claimant posed a risk to the children in his

classes. It is neither unreasonable or unjust, it was not without foundation and I have seen no evidence that it requires the express or implied consent from the Claimant to make such a Referral. The Referral was in line with Government Guidance (page 888), namely employees make a Referral if acting on the advice of a Safeguarding Professional. Therefore, in the circumstances, there has been no breach of the implied term of trust and confidence.

58. Even if that was wrong, if that was such a serious breach the events took place some two years' ago and again it could be argued that the Claimant waived the breach in any event.

Allegation 3:

*Being pressurised into accepting a Settlement Agreement rather than directly addressing relationship breakdown*

59. This relates to 'without prejudice' discussions between the Claimant and the Respondents. The actual specifics of those communications are not admissible. In any event, it would appear that the Claimant instructed his Trade Union Representative to negotiate a way out in July 2022 and when that was not to his satisfaction he resigned in September without giving notice. This cannot be a breach of the implied term of trust and confidence.

Allegation 4:

*Being subjected to disciplinary proceedings that were manifestly unreasonable and disproportionate*

60. It is clear the Claimant was subject to a pattern of complaints by pupils in relation to his conduct towards them. They also included the Claimant's conduct towards staff. Clearly, when those allegations are made the Respondents have a duty to investigate them and whatever the Claimant may think it is part of the Respondent's safeguarding responsibilities. Not investigating allegations would be a failing in their duties. Over a three year period between September 2019 and September 2022 when the Claimant resigned, there were in excess of 10 complaints. Some of which were about the Claimant's physical intervention with students, despite the Claimant being formally a Trainer and therefore knowing de-escalation techniques, on occasion he stepped over the line. The result of the investigations, some with a finding of no further action being taken other than advice and on other occasions quite rightly a written warning was given.
61. Given the nature of the Respondent's responsibilities, particularly safeguarding, it cannot be unreasonable or a breach of the implied term of trust and confidence to investigate and where appropriate proceed with disciplinary proceedings.

Allegation 5:

*Being denied training specifically additional Restorative Justice Training as promised on return to work in 2021*

62. What appears to have happened here is that the type of training referred to only works if pupils and the Teacher agree. Apparently when discussed with the pupils, the pupils were not comfortable with Restorative Justice Meetings with the Claimant and therefore such training would not have been helpful in those circumstances. It is likely that that training would have been offered had the students been willing to participate in it with the Claimant. They were not. The Claimant notably did not make any further requests after June / July 2021 for Restorative Justice Training, therefore the lack of that training cannot amount to a breach of the implied term of trust and confidence in the circumstances.

Allegation 6:

*Being subjected to allegations of poor performance which were exaggerated and unfounded*

63. It was clear that Mrs Edwards had concerns about the Claimant's performance, they were not exaggerated. Mrs Edwards had indeed observed the Claimant's lesson and she gave guidance as to how the Claimant might improve. They were legitimate concerns and therefore it was entirely reasonable for her to suggest a Support Plan. Particularly in the light of the continued absence of a number of students from the Claimant's classes.
64. Mrs Edwards' decision to pause the support measures during a period when the Claimant was again under investigation, was entirely reasonable.
65. It was then reasonable for Mrs Edwards to resume the Support Plan measures in June 2022 when the disciplinary process had concluded. Given the issues involved in the Claimant's capability, it was not unreasonable for the First Written Warning to be issued on 27 June 2022 and it was that, that led to the Claimant's Trade Union Representative approaching the Respondents for 'without prejudice' conversations, as a result of which capability proceedings were paused.
66. The Tribunal are satisfied that the Respondent's concerns about the Claimant's performance were genuine, they were not in breach of any implied term of trust and confidence and they were entirely reasonable.
67. For finality, taking all the matters together and individually, the actions of the Respondents were clearly for reasonable and proper cause. The Claimant, in many ways, was an author of his own misfortune.

68. The Claimant's claim that he was constructively dismissed is therefore not well founded.

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Employment Judge Postle

Date: 14 August 2024

Sent to the parties on: 28 October 2024

For the Tribunal Office.

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