



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs K Price

**Respondents:** 1. Mundy Church of England VC Junior School  
2. Derbyshire County Council

**Heard at:** Nottingham

**On:** 23 November 2021

**Before:** Employment Judge Victoria Butler (sitting alone)

**Representation**

**Claimant:** In person

**Respondents:** Ms E Hodgetts, Counsel

## RESERVED JUDGMENT

1. The Claimant's claim that she was automatically unfairly dismissed for asserting a statutory right fails and is dismissed.

## REASONS

### Background

1. The Claimant was employed by the Second Respondent as a Teacher based at the First Respondent ("the School") from 1 September 2020 until her resignation with effect from 31 August 2021. In her originating claim, she explains that she was "*misinformed*" about her entitlement to sick pay which resulted in her resignation in order to ensure that she continued to receive full pay.
2. On 11 October 2021, the Tribunal wrote to the Claimant giving her until 18 October 2021 to give reasons in writing why her complaint of unfair dismissal should not be struck out given that she was not employed for two years or more.
3. She replied on 17 October 2021 and explained that she was claiming automatically unfair dismissal, namely that she was dismissed for asserting a statutory right not to suffer unauthorised deductions from her wages in respect

of her entitlement to sick pay.

### **The issues**

4. There was not an agreed list of issues presented at the hearing, but the issues for determination are:
  - 4.1. Did the Claimant assert a statutory right?
  - 4.2. Was that assertion made in good faith?
  - 4.3. Did the Respondent commit a fundamental breach of the Claimant's contract?
  - 4.4. If yes, was that breach committed because the Claimant asserted a statutory right?
  - 4.5. Did the Claimant resign in response to that breach?

### **The hearing**

5. The case was heard on 23 November 2021. There was insufficient time after the conclusion of witness evidence and submissions for me to deliberate and give judgment, so my judgment was reserved.
6. At the hearing, the parties presented an agreed bundle of documents, a brief supplementary bundle of documents and witness statements. The Respondents also prepared a skeleton argument.
7. References to page numbers in this judgment are references to the page numbers in the bundles ("SB" is the supplementary bundle).
8. During the course of the hearing, the Claimant became visibly upset on two occasions and conceded that there was no evidence that she had asserted an infringement of a statutory right and said she wanted to withdraw her claim. On both occasions I gave her an opportunity to reflect and she confirmed that she wished to proceed.

### **The evidence**

9. I heard evidence from the Claimant and Ms Leonie George, Senior Leader and School Business Services Manager at the First Respondent.
10. I found both witnesses to be honest, albeit on balance, I preferred the evidence of Ms George, which was supported by contemporaneous documents where they exist. It became apparent that the Claimant's interpretation/recollection of events was confused and there was no evidence whatsoever that the Respondents agreed to enter into a 'deal' with her to bring her employment to an end on full pay (which I address below). I do not doubt that the Claimant somehow believed this to be the case though.

### **The facts**

11. The Claimant was employed by the Second Respondent as a Teacher at the School. She was issued with a contract of employment on 31 August 2020 and commenced employment on 1 September 2020 (pages 74 – 85). The contract confirmed that her continuous employment for statutory employment rights commenced on 1 September 2020, but any previous service with an organisation covered by the Redundancy Payments (Continuity of Employment in Local Government etc) (modification) Order 1999 would be included in calculating her entitlement to sickness and maternity benefits, annual leave and notice period. The contract also explained her entitlement to sick pay was “25 working days at full pay and (after four months’ service) 50 working days at half pay”.
12. Ms George is the School’s Senior Leader and School Business Services Manager. Mr Kelvin Gibbs is the Headteacher and Ms Dot Adair the Deputy Headteacher. Together they form the Senior Leadership Team (“SLT”).
13. The Claimant started teaching years three and four in the first Autumn term since the start of the covid pandemic. The School had a bubble system in place and the Claimant was allocated as a teacher in the ‘yellow’ bubble.
14. Prior to commencing employment, the Claimant suffered a stroke. In the early part of school year, she told Ms George that she had attended for a scan which had revealed some anomalies. There was also a suggestion of seizures, which would account for her fatigue, headaches and dizziness (page 5SB). The Claimant told Ms George that her GP had recommended that she take two weeks off work, but she chose not to, explaining that it would not do her any good to be at home.
15. Around the same time, the SLT received concerns from some parents about the Claimant’s teaching, in particular that she had changed seating arrangements and seemed to be overly strict. The SLT noticed that more concerns were being raised about the Claimant than any other teacher.
16. At the outset of her employment, the Claimant indicated to Mr Gibbs that she would like to complete a leadership course which she had started at a previous school. However, Mr Gibbs took the view that given her doctor’s advice (paragraph 14) and the concerns raised by parents, it was not in her best interests to pursue it at that time. Mr Gibbs advised the Claimant of the same on 22 September 2020 and she reacted badly.
17. The Claimant emailed Ms George that afternoon and said that she was really upset about the conversation. She disagreed with Mr Gibbs’ view that her class was not happy and said: “*I am sorry you think I am not doing my job properly*” (page 1SB).
18. Mr Gibbs replied the following morning explaining that his conversation with her came: “*from a place of both concern and support ... I am happy for us to have a professional dialogue about all the issues raised but let us ensure that there is a calm and considered appraisal of the situation*” (pages 3SB and 1SB).
19. The Claimant replied and apologised for coming across as “*a little bolshy*” and

- explained that her defensive response was due to poor treatment by her previous employer and, therefore, she took criticism badly. She said this was something she was aware of and dealing with outside School (page 3SB).
20. On 6 November 2020, the Claimant's bubble had to close following a positive covid case. The Claimant worked from home for the ten-day isolation period, during which time the SLT and staff remained in communication.
  21. On 19 November 2020, the Claimant was witnessed shouting at pupils and making them cry. Mr Gibbs and Ms George addressed this with her, but she reacted angrily and walked out of the office before the discussion was concluded. Thereafter, an exchange of e-mails between Mr Gibbs and the Claimant followed and ultimately, the Claimant was offered and accepted informal support, including weekly supervision meetings with Ms Adair (p.109-112, 115-116 & 117)
  22. At the start of the school year, the SLT had taken the decision to send a written report to parents to replace parent evenings. The Claimant was involved in producing the report format and attended staff meetings where it was discussed. The Claimant provided a sample of her reports to the SLT prior to them being sent to parents. However, her samples were not completed to an acceptable standard and she was provided with assistance to enable her to make any necessary amendments (pages 204 – 206).
  23. On 14 January 2021, the Claimant notified Ms Adair that she had made further errors in her reports and had assessed some children as reaching 'Greater depth' in their learning when this was not possible in the Autumn term (p.125 – 127). By this time the reports had already been distributed to the parents. On her own initiative, the Claimant drafted a letter for parents for agreement by the SLT (page 203).
  24. Ultimately, the SLT took the view that a telephone call would be a better method of communicating the error and the Claimant confirmed that she would like to make the calls, albeit they were ultimately undertaken by the SLT due to the Claimant's absence (below).
  25. In the same period, the Claimant started to have migraines which resulted in two periods of short-term absence in January 2021. She explained that she was suffering from stress due to concerns about her health more generally and issues with memory loss. She was also experiencing dizziness.
  26. From 2 February 2021, the Claimant worked from home supporting the year three and four team, during which time she received full pay.
  27. On 8 February 2021, the Claimant e-mailed Ms George and said that she would be returning to work on 22 February 2021 to carry out her full-time normal duties (page 128). The SLT was concerned about the Claimant's welfare and the potential impact of her conditions and Ms George set up a meeting with her on 10 February 2021 to discuss '*next steps*' (page 128).
  28. At the meeting, Ms George explained that the School required further medical

- clarity from her consultant and Occupational Health before she could return to normal duties. More particularly, the School wanted to ascertain if its concerns about her more generally were due to a medical issue or competency and the Claimant acknowledged that her behaviour and conduct had been erratic. The Claimant asked what this meant for her future at the School and Ms George explained that they would need to establish the facts first. It was agreed that the Claimant would continue to submit fit notes but given that she was working from home, her salary would continue to be paid as normal (page 129).
29. On 11 February 2021, Ms Adair e-mailed the minutes of the meeting to the Claimant. On 12 February 2021, the Claimant responded to Ms Adair and said that her doctor was confused why she needed a fit note if she was working from home. She also asked what was meant by references to her behaviour and conduct (page 130).
30. Ms Adair responded in detail on 15 February 2021. In respect of the fit notes, she explained that they were required because there was a significant difference between working from home supporting remote learning and being physically in school. The School was concerned that allowing her to return prematurely might not be in her best interests. In respect of the Claimant's behaviour, she explained the incidents of concern clearly and said: *'to clarify some of the concerns raised since you joined us in September, please find examples below. All of which have been previously discussed and acknowledged with/by you. It is worrying Kelly that you don't appear to recall these .....*' (pages 198-199).
31. On 16 February 2021, the Claimant e-mailed HR Services to clarify her entitlement to sick pay. She was advised that her entitlement to full pay would be 100 days (page 131). This was contrary to the advice received by Ms George who was told by HR Services that the Claimant was on the "*sliding scale*" in accordance with her contract of employment because it had no record of any previous continuous service. However, Ms George did not challenge the Claimant or suggest, either expressly or impliedly, that she would not be paid her correct entitlement to sick pay. It was irrelevant at this stage in any event because the Claimant was not being recorded as sick.
32. On 16 March 2021, the Claimant had a telephone assessment with Occupational Health. The subsequent report recommended that the Claimant could return to work with adjustments and advised a phased return to work (pages 95 – 98).
33. On 30 March 2021, the Claimant met with Ms George and Ms Adair to discuss the Occupational Health Report and her return to work. During this meeting, they agreed a phased return commencing on 19 April 2021. They also discussed a number of concerns that they had about the Claimant's performance and she enquired whether the School would be prepared to *'buy her out'* of her contract. Ms Adair emailed the Claimant later that day to clarify what had been discussed. In respect of the concerns raised, she said (page 134(a)):

" ...

*Without at this point detailing again every incident which is well-documented via our email trail with you since September, we have expressed concerns on a number of occasions. If you remember before Christmas, you had questioned whether we would be choosing to go down the competency route. At that point, we did not want to, as we said at the time, we have a vested interest in your success. Unfortunately, subsequent events and the significant problem with your report writing leads us to review your performance since September. We have been as supportive as we possibly could have been but by any objective measure, competency appears to be, reluctantly, the appropriate course of action.*

*To clarify, we would not be looking at competency immediately upon your return on 19<sup>th</sup> of April. We would want to provide you with an opportunity to return to full teaching responsibilities first. You have indicated on the phone to Leonie that you would be looking to continue on sick pay from the 19<sup>th</sup> of April. Following on from the Occupational Health Report, which you said you agreed with, could you explain why you would be doing this? As detailed above, competency procedures would not commence immediately upon your return.*

*You also referred to us as 'buying you out of your contract'. What do you actually mean by this?*

*..."*

34. On 1 April 2021, the Claimant sent a text message to Ms George saying that her sick pay entitlement was 100 days full pay. Ms George replied saying "*that sounds right to me I will have to double check but it sounds correct and I looked on your record today and that mirrors what you are saying*" (page 16SB). Accordingly, Ms George made further enquiries with HR Services who advised her again that the Claimant was only entitled to full sick pay for 25 days and half pay for 50 days.
35. The Claimant submitted fit notes with effect from 19 April 2021 and was officially off sick, as opposed to working from home. On 29 April 2021, she texted Ms George out of the blue saying that she wanted to come into the School and collect items from her classroom "*before they go missing if that's ok*" (page 7SB).
36. Ms George met with the Claimant and they went into the classroom where she retrieved a few personal items. They chatted about the Claimant's health and she then told Ms George that she would not be coming back and was considering whether to return to accountancy or continue teaching. However, she said either way, she was not returning to the School. The Claimant mentioned being bought out of her contract again and Ms George asked her what she meant by that. The Claimant did not elaborate but said she was sure that there was something the School could do. Ms George took it to be a '*glib*' comment and said that she would take advice but by no means entered into any form of agreement with the Claimant. Ms George made a note of their conversation and recorded the Claimant's comments that she would not be coming back and, further:

*“She talked about that she has talked to her union and was wondering about tribunal but didn’t want to go that way or wasn’t sure about going that way she had been there before ... I said that we would always see her supported to 31<sup>st</sup> August if she decided that she wanted to go” (page 8SB).*

37. Thereafter, Ms George took advice from HR who confirmed that it did not enter into such arrangements. Accordingly, Ms George ensured that any correspondence with the Claimant was limited to statements of fact and avoided reference to any ‘*deal*’.
38. On 12 May 2021, the Claimant requested a meeting with the SLT and her trade union representative *“to discuss Kelly’s absence and her future at Mundy Junior school”* (page 10SB). During this meeting, the Claimant’s representative was supportive of the School’s proposed phased return plan for the Claimant and confirmed that it was a matter for the School whether it moved to a competency process. The Claimant had a discussion with her representative about her choice of a phased return to work or resigning from her post. At no point was the possibility of a ‘*deal*’ discussed.
39. By 1 June 2021, the Claimant had taken the decision to resign rather than face a competency process on her return. She texted Ms George at 8.15am asking *“does your offer of full pay till August 31<sup>st</sup> still stand if I offer my resignation?”* (page 161). Ms George responded by e-mail setting out the position on pay as follows:
- “...  
Based on a submission of your resignation letter by 4pm today 1<sup>st</sup> June 2021 (emailed to this address): Your Statement of Fitness for Work finishes on 18.06.2021, assuming you are not in receipt of a further Fitness for Work note, your pay will revert to full pay on 19<sup>th</sup> June 2021 and will be paid until your date of resignation on 31<sup>st</sup> August 2021.  
...”*
40. The Claimant responded by saying: *“Due to the confusion about sickness pay being 100 days, if you could agree to pay me in full from 25/05/21 to 31/08/21 I will send you my resignation before 4pm”* (page 160).
41. In response, Ms George explained that the Claimant’s latest medical certificate expired on 6 June so she could either return to work on a full-time (and full pay) or phased basis (which would incorporate an element of SSP) or, if she remained signed off sick, she would continue for 24 days at 50% pay, after which time her entitlement to sick pay would cease. She asked the Claimant to let her know how she wanted to proceed (page 159).
42. The Claimant replied stating that her understanding from previous discussions was that if she resigned to leave on 31 August 2021 she would be placed on *“gardening leave”* and would be on full pay. She asked: *“Is that now not the case?”* (page 159).

43. Ms George replied, albeit failed to respond to the Claimant's question about gardening leave. As above, she had taken the view that she was simply sticking to the facts and not engaging with the Claimant on a potential "deal". Accordingly, she explained that a resignation for closure on 31 August 2021 had to be submitted by 31 May 2021, but the Governors may agree to accept her resignation even though it had missed the deadline (page 158).
44. In response, the Claimant said:
- "... I thought we could mutually agree my leaving as previously discussed. As I am not wanting to hand my notice in as I don't have other employment I will continue as planned. Just for clarification on sick days, I have 50 days at 50% pay not 25!"* (page 158).
45. Ms George replied setting out her understanding of the Claimant's sick pay entitlement. Based on her discussions with HR, she explained that the Claimant was only entitled to 24 more days sick leave at 50% pay (page 162).
46. The Claimant replied as follows:
- "Yes I understand that. I was talking about the conversation where we discussed you buying me out and you said that the best you could offer was full pay till 31<sup>st</sup> August in exchange for my resignation."* (page 163)
47. Shortly thereafter she texted Ms George saying *"Hi, I have sent you an offer for termination"* (page 163).
48. The 'offer' was e-mailed to Ms George as follows:
- "
- As per our conversation, I would like to offer my resignation for 31<sup>st</sup> August if a termination package can be mutually agreed.*
- I would like full pay (including pension contribution) from 25<sup>th</sup> May to 31<sup>st</sup> August in exchange for no further action being taken for the way I have been treated in accordance with the Equality Act 2010.*
- ..." (page 155).
49. Ms George acknowledged receipt said she would forward the Claimant's resignation to the Chair of Governors (page 156).
50. On 2 June 2021, Ms George spoke with the Governors and thereafter emailed the Claimant confirming that her resignation had been accepted based on one of two options. The first being that the Claimant could get her existing fit note (which expired on 18 June) to be amended to 31 May 2021, which would allow her to receive full pay from 1 June 2021 until the termination date of 31 August 2021. She would be expected to work remotely during that period. Alternatively, if it was more appropriate for her to remain off sick then she would be paid in accordance with the sick pay scheme and her trigger for 50%



pay came into effect on 25 May 2021 (page 165).

51. On 3 June 2021, the Claimant contacted HR Services again querying her entitlement to sick pay. Within a chain of emails, she said (page 172):

“... ”

*I have been forced to resign in order to get full pay. If I had been informed correctly I would not have resigned.*

“... ”

52. Ultimately, HR Services advised the Claimant that she was entitled to 100 days full pay and 100 days half pay.
53. Thereafter, the Claimant submitted an amended Fitness to Work Certificate ending on 31 May 2021 and her employment terminated with effect from 31 August 2021.

### **The law**

#### *Unfair dismissal*

54. Section 104(1) Employment Rights Act 1996 (“ERA”) provides:

#### **“104 Assertion of statutory right.**

- (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
- (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
  - (b) alleged that the employer had infringed a right of his which is a relevant statutory right.”

55. Section 95 ERA provides:

#### **“95 Circumstances in which an employee is dismissed.**

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

56. In order to succeed in a claim that the Claimant was automatically unfairly constructively dismissed, she must show that she resigned in response to a repudiatory breach of contract on the part of the Respondent/s and that such breach was committed because the Claimant issued proceedings or asserted a statutory right under s.104 ERA.

*Burden of proof*

57. Given that the Claimant lacks the requisite length of service to bring a claim for ordinary unfair dismissal, she has the burden of proving, on the balance of probabilities, that she was dismissed for asserting a statutory right. If she can establish a prima facie case that she was dismissed for asserting a statutory right, it is up to the Respondents to adduce evidence to the contrary.

**Conclusions**

58. Firstly, I must be satisfied that the Claimant asserted a statutory right. In this case, the Claimant alleges that she was dismissed for alleging that the Respondent/s infringed her right to be paid, more particularly her right to be paid sick pay.
59. However, during the hearing she acknowledged that there was no documentary evidence that she alleged an infringement of a statutory right. She explained that she was constantly asking for clarification of her sick pay which was done by way of a series of conversations.
60. Notably, in the Claimant's witness statement she does not say that she asserted an infringement of her right to be paid – even verbally. Rather, at

paragraph 30 she says:

*“30. During this long period of absence, I had become increasingly concerned about my pay and had contacted HR for clarification. I was advised that as I pay into the teachers pension scheme I was entitled to 100 days full pay and 100 days half pay ...”*

This is simply a clarification of her entitlement.

61. At paragraph 37, she explains that Ms George advised her that she would be paid 25 days at 100%, 50 days at 50% and the 50% trigger was 25 May 2021. She goes on to say:

*“Having been given this information I panicked; they had previously made a verbal offer to pay me in full until the end of the academic year, if I resigned. I enquired if this was still an option as it would give me some time to pay bills and seek alternative employment. They verbally agreed.”*

62. Ultimately, at paragraph 39 she says:

*“... I was misinformed which resulted in my resignation in order to continue on full pay and they refused to retract the resignation when it was brought to their attention.”*

63. Nowhere in her statement does the Claimant refer to a series of conversations where she alleged that she had not been paid (or would not be paid). Such evidence was not provided in cross-examination either.

64. Turning to the documents in the bundle, the evidence shows that the Claimant simply sought clarification of her entitlement to sick pay but, as she conceded, there is no evidence of an assertion that her right to be paid had been infringed.

65. Given the absence of any evidence whatsoever that the Claimant asserted that she was not paid (or was not going to be paid) I am entirely satisfied that the Claimant did not assert a statutory right in the first instance. Accordingly, her claim fails at the first hurdle.

66. For completeness, even if I had found that the Claimant had asserted a statutory right, I am satisfied that the Respondent/s did not commit a fundamental breach of contract. The Claimant asserts that she was misinformed about her entitlement to sick pay, and this forced her to resign to secure full pay.

67. There was clearly some confusion about the Claimant's entitlement to sick pay, but the position was clarified to her by HR as early as 16 February 2021. It is not clear why she simply did not tell the school that HR had clarified the position and send on the e-mail when it became apparent that Ms George understood differently. Ms George's understanding was based on information received from HR and was simply a case of her receiving the incorrect information which on these facts, does not amount to a fundamental breach of

contract.

68. However, I am satisfied that the Claimant did not resign in response to matters relating to her sick pay. Rather, she took the decision to resign rather than face a competency process on her return.
69. Both prior to and during the Claimant's sick leave, the School had discussed concerns about her behaviour and advised her that once she had settled back into her teaching duties, they would look at competency. The Claimant told Ms George as early as 29 April 2021 that she would not be returning to school and was thinking about a Tribunal case. She also openly discussed resigning with her union rep at the meeting on 12 May 2021.
70. Thereafter, she sought a way to ensure she was in receipt of full pay until her notice period ended on 31 August 2021.
71. Somehow, the Claimant was of the view that the School entered into an agreement with her to ensure that she would receive full pay until the end of August if she resigned. However, there is simply no evidence whatsoever that such an agreement was reached, and it is wholly unclear how the Claimant arrived at that conclusion in the first place. Indeed, when she resigned, her letter said: "*I would like to offer my resignation for 31<sup>st</sup> August **if** [my emphasis] a termination package can be mutually agreed*". She said she wanted full pay in exchange for no further action being taken for the way she alleged she had been treated in accordance with the Equality Act 2010, although she did not state what that alleged treatment was.
72. This letter demonstrates that there was no agreement. The Claimant was keen to secure full pay during her notice period and resorted to the threat of legal proceedings to ensure the same. This is further evidenced by her earlier references to Ms George and Ms Adair about being brought out of her contract. It would have assisted the Claimant if Ms George had put the record straight and explained that no offer had been made to avoid any further misunderstanding, but I accept her evidence that she wanted to reply to the Claimant's correspondence with the facts and avoid getting drawn into such conversations (having understood that the Respondent/s would not support and deal).
73. To conclude, the Claimant has not asserted an infringement of any statutory right and her claim must fail. It is, therefore, dismissed.

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Employment Judge Victoria Butler

Date: 20 January 2022

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