EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Ahlers**
Respondent: **Lex Leisure Ltd**

Heard at: **Ashford** **On:** **29 October 2018**

Before: **EMPLOYMENT JUDGE CORRIGAN**

Representation
Claimant: In Person
Respondent: Mr J Middleton, Solicitor

RESERVED JUDGMENT

1. The correct Respondent is Lex Leisure Ltd and the title of the proceedings is amended accordingly.

2. The Claimant was constructively unfairly dismissed from her position as Group Exercise Class Coordinator.

3. The Claimant was constructively unfairly dismissed from her position of class instructor.

4. The Claimant is awarded compensation of to be paid by the Respondent to the Claimant is £16,959.33. This consists of:

   £11,999.33 for the Group Exercise Coordinator Role, based on the basic award of £4,590, loss of statutory rights of £680 and £6,729.33 loss of earnings and pension.

   £4960 for the class instructor role, based on the basic award of £2,160, loss of statutory rights of £480, and £2,320 loss of earnings and gym membership.

5. Recoupment does not apply to this award.

REASONS

1. By her complaint dated 19 February 2018 the Claimant brings a complaint of constructive unfair dismissal from her position as Group Exercise Class Coordinator.

2. By her complaint dated 22 May 2018 the Claimant brings a claim of constructive unfair dismissal from her position of class instructor.

3. The Claimant confirmed she did not claim wrongful dismissal.

Issues

4. The issues were discussed with the parties and were agreed to be:

Group Exercise Class Coordinator

4.1 Did the Respondent fundamentally breach the contract of employment?

4.2 In particular did the following occur:

4.2.1 a personal attack by a manager?

4.2.2 imposing a change of hours that the Claimant could not do?

4.2.3 giving two weeks notice and saying that although an alternative could be considered it could not involve the Claimant's current hours;

4.2.4 threatening to physically remove the Claimant from the premises if she attended at her normal hours;

4.3 By the above conduct did the Respondent, without reasonable and proper cause act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and Claimant?

4.4 Did the Claimant resign in response?

4.5 No issue was taken by the Respondent in respect of whether the Claimant affirmed the contract.

4.6 If the Claimant was constructively dismissed was the reason for dismissal some other substantial reason?

4.7 Was the dismissal reasonable in all the circumstances?

4.8 Was there any blameworthy conduct by the Claimant that caused or contributed to her dismissal?

4.9 If the claim is successful, what is the appropriate remedy? Did the Claimant reasonably mitigate her loss?

Instructor

5. Did the events in box 8.2 occur? In particular:

5.1 an inappropriate change to the name of the Claimant's class;

5.2 "harassing" the Claimant whilst she was on sick leave and upon her return to work with accusations she had not followed the absence reporting procedure and the threat formal action; and

5.3 falsely accusing the Claimant of four counts of gross misconduct.

6. Did they amount to the Respondent, without reasonable and proper cause acting in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and Claimant?

7. It is accepted the Claimant resigned in response.

8. The Respondent takes no point in relation to affirmation, nor does it assert a potentially fair reason for dismissal.

9. How long should the Claimant be compensated?

Hearing

10. I heard evidence from the Claimant on her own behalf. She also provided written statements by Ms Julia Arnold and Ms Jane Percival.

11. On behalf of the Respondent I heard evidence from Mr Kevin Carter (General Manager), Mr Matthew James (Centre Manager) and Mr Ian King (Area Manager). I did not hear evidence from those responsible for the conduct alleged to be a fundamental breach of contract as they were not called as witnesses by the Respondent. The two principal witnesses for the Respondent were those who dealt with the Claimant's grievances and upheld them, at least in part. I have omitted the full names of those who did not attend as witnesses as they have not participated in the proceedings and this will be a public document available online.

12. There was an agreed bundle.

13. Based on the evidence heard and the documents before me I found the following facts.

The Facts

14. The Claimant worked for the Respondent at Erith Leisure Centre from 20 May 1991. By the relevant time she worked as a Group Exercise Class Coordinator (17 hours a week) and as a Group Exercise Instructor (4 hours a week) on two different employment contracts.

15. The hours which she had worked for many years were 06.30-13.30 Monday, Wednesday and Friday (p109). Her classes were held within those hours.

16. Terms and conditions for the Group Exercise Coordinator Role signed in February 2016 state "hours of work, starting times and finishing times are determined locally by your Managers and may be varied due to operational requirements". The Claimant accepted that that was the contract in place at the relevant time.

17. There were discussions about changing the Claimant's hours for the Coordinator role in January 2017. The Claimant says she did not receive the letter dated 12 January 2017, attaching a proposed rota from the then Centre Manager (p90). However she did receive the proposed rota change, written the then Senior Duty Manager, who I will refer to as CW.

18. The letter which she did not receive (p90) suggests the reason for the proposed change was that the management rota did not reflect peak and busy times.

19. The Claimant went to discuss the matter with the Centre Manager and explained why her hours were effective for the role. The Claimant's hours were left as they were at that time.

20. In the bundle there is a further letter proposing consultation for a proposed rota in June 2017 written by CW which the Claimant again says she did not receive. However it is evidence that CW remained committed to changing the rota throughout 2017.

21. CW's grievance interview suggests that the hours had only remained the same as a trial and there had been more consultation with the Claimant. However the trial is not supported by documentation and I have not heard from CW herself. I have heard from the Claimant and accept her account in respect of the consultation about hours, or lack of, prior to the letter of 18 October 2017 mentioned below.

22. The context of the events leading up to the Claimant's resignation was that the Respondent company had taken over running the Leisure Centre and some long term staff were unhappy and some had left, as confirmed by Mr King in his evidence. It was a time of upheaval as the Centre Manager had left, and CW became Acting Centre Manager. There is evidence that the Claimant and CW,

though friends in the past, were not getting on well. The Centre was not performing as well as the Respondent wanted. The Respondent believed there were a number of successful classes and a number not performing.

23. The Claimant received the letter from CW dated 18 October 2017 (received 23 October 2017) proposing a change in hours (p92). That letter is not drafted with the same wording as the previous letters. It did not mention consultation nor did it describe the rota as a proposed rota. It gave no reason for the rota. Instead it simply said "Please see attached a copy of the management rota which includes the shifts which you are required to work over a rolling two week period". It said that she would like the rota to commence 6 November 2017 and that if the Claimant had any questions she should contact CW before 31 October 2017. It did not say that any queries would be taken into consideration (as the other letters had). CW did not give evidence and therefore could not be asked about this, but it appears to have been a deliberate action to remove reference to consultation that appeared in previous letters.

24. CW had not spoken to the Claimant to make her aware of any problems with the service or discuss any operational need to change hours prior to this, since the previous discussion with the former Centre Manager. The proposed change in hours is at page 109. It covered a two week pattern. Week one was Monday 09.30-10.30 and 14.30-20.30; Wednesday 08.30-15.30; Friday 08.30-15.15. Week two involved Monday 09.30-10.30; Tuesday 08.30-14.30; Wednesday 09.30-10.30 and 14.30-20.30; Thursday 08.30 -13.30 and Friday 09.30-10.30 and 11.30-12.15.

25. This rota therefore involved significant changes including up to 4 hour unpaid breaks in the middle of the day and a day when she was required to attend for just one hour to teach a class. She was unhappy about the number of additional journeys to and from the centre that would be required. Both weeks involved an evening shift. The shifts would also have prevented the Claimant from collecting her grandson from school. As explained later in the grievance, as a family they had just invested in the Claimant's daughter to become a swim instructor and the Claimant was her only childcare whilst she taught her classes (also at the Respondent).

26. The hours therefore did not suit her personally. She also felt they were not the best hours for the role.

27. An email exchange between the Claimant and CW followed (pp 95-97). Initially the Claimant explained why she felt her existing hours, including early mornings, worked for the business. CW replied, although not until 2 November 2017, setting out the rationale for the change. She said she was able to amend rotas to suit operational needs. She said she did not agree with the Claimant that she was needed at 06.30 each morning. She also explained that attendance at classes had been falling, attaching a table demonstrating lower throughput throughout 2017, in comparison to the previous year. She said it was vital to ensure the coordinator is able to monitor a range of days/times to ensure that a high standard

of coaching is maintained. This was not something the Claimant was doing but she wanted the Claimant to conduct more observations going forwards. She wanted to consider changes to the availability and range of classes. I did not hear evidence from CW but accept this email reflects the rationale for the change in rota.

28. CW agreed to put back the start date to 20 November 2017. She said she was happy to continue to discuss the matter but she would be looking to continue with the proposed rotas though she was happy for the Claimant to propose an alternative to cover the aspects she had raised.

29. The Claimant replied again raising a number of issues the most pertinent being that her hours fitted with childcare and other commitments in her life; the increased travel expenses involved and the waiting time between hours. She continued to maintain why she felt the early start was useful to the role but did say she was prepared to be flexible and come at weekends and in the evening when there was a requirement to do so, giving examples when she had done so in the past.

30. CW held a meeting with the Claimant on 8 November 2017. The Respondent's record of that meeting (pp98-99) was typed up some time after as it had not been typed up by the grievance investigation meeting with CW on 29 November 2017 (p121). The Claimant had her own notes which were undated. The Claimant repeated that the new shifts did not fit her lifestyle and she had to look after her grandson. She said she felt it was a way of forcing her out. CW said that was not the intention, the change was to increase usage of classes and have more observations going forwards. She also said it related to building relationships with customers and would like the Claimant to observe instructors.

31. CW's record, supported by her account given in the minutes of the meeting with her as part of the Claimant's grievance, suggests CW suggested they work on a rota that suited both the operational and the Claimant's needs. She says the Claimant in response said she was not willing to change her rota as she had worked it for a long time and it suited her needs. CW cites the Claimant as saying her existing hours were the hours she could do. The Claimant on the other hand said she was told any rota she suggested must not include the early starts and must include every day of the week over two weeks (this is reflected in her own undated note). She says she was told it should also include two evenings. Ie she could suggest an alternative that was similar to the new rota. I accept that an impasse was reached with the Claimant being presented with a requirement to change away from her early starts and to work each week day and some evenings across a two week period. I also accept that the Claimant did not seek to offer any compromise that might work better with her lifestyle and commitments.

32. It is not reflected in either note but the Claimant says CW said to her that if she came in on her normal days after 20 November 2017 she would be removed. She did say in her grievance that she was told if she came in outside of the new rota she would be removed or told to leave. She is recorded as correcting herself and

saying of the word removed "maybe it wasn't that strong, but she said something like I will tell you to leave" (page112). In the absence of evidence from CW I accept the Claimant's account about this as she relayed it in the grievance.

33. As explained in the grievance meeting the Claimant said she had been very upset to have been given 2 weeks to "turn [her] life around". She strongly disagreed that there was an operational need for the change and felt the change in hours were malicious due to something she had said to CW.

34. The Claimant resigned with notice by letter dated 22 November 2017. In that letter she said she had lodged a grievance in respect of the change in working hours and what she viewed as the compromise of her ability to be effective in her role. She said she had no alternative but to resign. The letter does not mention any personal difficulty doing the hours. She said she would continue in her instructor role.

35. Her grievance is dated the same day (pp105-6). In it she said she was unable to work the proposed hours because of personal and financial constraints. She said she had been threatened with removal from the building. She felt the fact that she had been given a rota that was impossible to fulfil was a mechanism to force her resignation. She also said she was no longer able to be effective in the role. She added that there was a 4 day gap across the two weekly rota. She also added that she had given up working evenings a long time ago and that factoring the travel time the days with evening shifts she would leave at 9am and not get home until 9pm. She explained her daughter would have to give up teaching the swimming lessons. She explained why she felt it might be personal in response to a comment she made about CW's management style. She also said that she felt if she stayed there would be other issues such as disciplinaries or refusal of leave.

36. The grievance was dealt with by Matthew James, Centre manager at another centre. In addition to the meetings with both the Claimant and CW there was some further investigation including an email from the Centre Manager at Sidcup. He reiterated the view that he did not see the benefit of working at 6.30am and not being available afternoons, lates and weekends as required. He said that to never be available after 1.15pm (in fact it was 1.30pm) is not suitable particularly given the reduction in attendance at the classes.

37. Similar investigation with the centre manager at Crook Log showed that that GEC worked between 10 and 6pm but with flexibility weekdays and weekends and evenings as needed. He said that she would not generally have split shifts unless there is a break between coordinator hours and coaching.

38. In her meeting CW was asked whether evening observations needed to be every week and she said they did not, but that the Claimant did need to build rapport.

39. The grievance outcome dated 21 December 2017 confirmed (pp131-134) that the Claimant's current hours allow her to support her daughter who is a single parent with childcare as she collects her grandson whilst her daughter works as a

swimming instructor. It explained the additional financial commitment resulting from the change in hours and also the long days resulting from the 4 hour break in shifts. The panel accepted the proposed rotas would have both a financial and personal impact but also that the Claimant was not willing to engage and find an alternative to meet business needs. The panel found that the manner in which the Claimant was consulted could have been significantly improved but that communication could have been more open on both sides.

40. There was no finding that they disagreed with her account that she was told that should the Claimant continue her old hours she would be asked to leave.

41. Overall they found that the Company are able to propose new rotas in order to meet the needs of the business however the grievance was upheld as the way in which it was communicated to the Claimant and the manner she was consulted could have been significantly better. Normally they would recommend further consultation to agree a change to meet business needs however this was no longer possible as the Claimant had resigned (and had indicated she did not want to return). In evidence Mr James said that if Claimant had not resigned there could have been mediation between the Claimant and CW and an outcome found that suited both. He thought the split shifts in particular could have been looked at.

42. The Claimant's resignation was accepted 2 January 2018.

43. The Claimant continued to teach four classes under her other contract. On 12 January 2018 the Claimant found out from a class member that one of her classes had been changed to 50+ stretch and tone (rather than simply stretch and tone which she had agreed) which had not been discussed with her and which she says was not appropriate. This did not reflect the membership of the class, led to customer complaints and jeopardised its success. The Claimant raised this with both CW and then another Centre Manager by the email dated 24 January 2018 (p143). She asked that it be corrected urgently. The response was that a Fitness manager had been employed who would be starting mid February who could look at the issues the Claimant raised. It had not been resolved by the time of the Claimant's email to the new Fitness Manager on 28 February 2018 which records the ongoing issues with the incorrect title, and that by this time the class description had also been amended, without informing or discussing with the Claimant, to advertise the session to those with mobility problems (also unsuitable). Ultimately the Respondent did agree to keep the class as it had been advertised prior to the change.

44. In the meantime on 19 February 2018 the Claimant submitted her first claim to the Tribunal in respect of the termination of her coordinator position.

45. The Claimant was off sick from 28 February 2018 to 5 March 2018 with stress. She called to report her sickness to a Duty Manager at 6.45am on 28 February 2018. She also spoke to her line manager by telephone. She emailed her line manager on 28 February and amongst other matters said she would be returning on 5 March 2018 and proposed how her absence from her classes could be

addressed. She forwarded that email to the new Centre Manager on the same day. On 2 March 2018 the Step up Duty Manager wrote to the Claimant stating she had failed to follow sickness procedures and make direct contact with a duty manager by phone. The Claimant explained what she had done by further email on 2 March 2018. The new Centre Manager then replied and said that although she had called into the Centre and spoken to her Line Manager she still needed to call and inform a duty manager. He said "if needed the matter can be discussed formally next week".

46. On 5 March the Claimant showed the new Centre manager the sickness procedure to explain how she had complied with it. He replied that it was out of date and ambiguous and he would speak to HR to see if he needed to take any action.

47. Ultimately no action was taken about that, but an hour later, when the Claimant was teaching her class it was interrupted and she was told not to leave the building as a letter was waiting for her. She was then given a letter dated 2 March 2018 (page 151) inviting her to attend an investigatory hearing to address a number of allegations under the disciplinary policy. Four allegations were made of five serious breaches of the disciplinary policy including fraud. The letter did not say so but the breaches of policy are all listed in the disciplinary policy under gross misconduct justifying summary dismissal. They all related to her previous coordinator role. They all essentially involved one alleged incident when it was said the Claimant inappropriately confirmed to a new freelance instructor that he could have staff membership at a different leisure centre in the group, in breach of policy. Self employed instructors are not entitled to staff membership. She was said to have failed to follow correct procedures in that she:

    47.1 sent an email to the instructor confirming that pre-existing membership would be transferred to staff membership,

    47.2 had agreed to his being issued a staff membership;

    47.3 had advised him that a particular invoice would be "taken care of".

48. The Claimant had not done what was alleged. I note that in the Claimant's handover documentation when she left the Coordinator position, dated December 2017, she said that she had "auditioned three new freelance instructors and submitted their paperwork, but they have not been added to the payroll". She said she had left the remaining paperwork with a named colleague (supporting what she said in her resignation letter). This included the instructor in question and so the Claimant had never completed his recruitment. There was no mention of membership. She no longer had access to her emails to show that she had not sent the email alleged.

49. She was very upset by the allegations and felt vulnerable as she did not have access to her email and other records as she was no longer in post. She had concerns that CW was setting her up (and I have noted that she had expressed

fear of future disciplinaries, by implication unfounded, in her previous grievance), but also did not have faith that she would be treated fairly.

50. She lodged a further grievance and resigned her instructor position on 7 March 2018 with notice giving a leaving date of 5 April 2018. In the grievance dated 8 March 2018 she explained that she had never issued staff membership throughout her 27 years in employment and that her emails with the customer/instructor concerned would be proof that she had not done so. She also said she had never been able to complete the paperwork for the recruitment of the said instructor and said which staff member she had left the paperwork with.

51. On 14 March (after her resignation) she attended an investigation meeting at which a document (email) was presented to her. It is now accepted by the Respondent that that had been falsified, but that was not known at the time.

52. The email appeared to have been written by the Claimant to the freelance instructor during his recruitment. The emails allegedly to and from the instructor are at page 207. They appear to have been copied and pasted into an email chain between the instructor and the Respondent's finance department. It appears this was done by the instructor who was challenging a membership invoice. He alleged the Claimant had said he could have staff membership (to which he was not entitled as a freelance instructor). As the emails have been copied and pasted into the instructor's own email to finance, it would be very easy for the instructor to have altered them to strengthen the case he was making.

53. The emails presented by the instructor began with an email from the instructor allegedly to the Claimant:

"I hope all is well with you, I just wanted to check you did actually get the second lot of paperwork. Also following on from our phone conversation I just wanted to confirm I didn't need to do anything about my membership."

The reply that was alleged to be from the Claimant said:

"Yes I did thank you, and I am in the process of getting you added to our payroll system. I have spoken to membership who will transfer your membership to a staff member, from when you accepted the position. Please note you will no longer be able to prebook classes once this is done.

I will be in touch very soon as I am hoping to include MetaFit in our 2018 programme." (p207)

54. The emails are part of a longer chain which included messages to the instructor form the Centre Manager of the relevant leisure centre. The customer was seeking to avoid membership fees which predated the alleged email chain (but post dated his acceptance of the position) in addition to a two month cancellation fee. The Centre Manager informed the instructor that despite what the Claimant was alleged to have told him, he was the only person able to waive fees of that

value. He said to the instructor that the Claimant had no "ability to remove debt and membership fees from a centre that she does not work at and had no ability to do the same at …[her own] Leisure Centre". Any request would have to come to him for authorisation and it had not. In a further email dated 1 March 2018 the Centre Manager is recorded as saying the Claimant had not in effect actioned anything in respect of the instructor's membership. The instructor continued to challenge this and ultimately successfully received some reimbursement the same day, but also agreed to pay the cancellation fee (thereby appearing to concede he was not entitled to membership). He also named another colleague who he had spoken to about membership and said that the Claimant had verbally told him he would be eligible for membership after the interview (pp203-204).

55. In the investigation meeting (pp166-169) the Claimant said that she and another colleague had auditioned the instructor concerned and when he asked about membership, both she and her colleague had confirmed he would not be able to obtain a staff card. She said she had not written the falsified email. She said she had not agreed to take care of the instructor's outstanding balance, and she was not involved in finance, her role had been class coordination. She suggested that her work email was checked to see the original email chain. She did not have access to membership or clearing debts. The meeting was conducted by TC (Duty Manager) as Investigating Officer. He had a pre-written script which presumed the Claimant had done as alleged and his questions proceeded on that basis, despite the Claimant's responses. This was his first disciplinary investigation.

56. The Claimant was signed off sick the next day and did not return to work. When informing the Respondent she said the meeting and the anxiety over the false allegations had left her feeling very unwell. There was a further grievance hearing on 24 April 2018 and the outcome sent to the Claimant on 3 May 2018. The grievance was upheld as the grievance panel investigated and upheld the Claimant's allegation that her email had been "doctored". The panel found it reasonable of the Company to investigate the facts of the matter but the manner in which it was conducted could have been improved. It found the email thread had been doctored and although it had not been able to confirm it, they believed it to have been by the member. It considered that had the investigation continued this would have been discovered and there would have been no case to answer.

57. The grievance outcome also found the Claimant had followed the sickness procedure but was also asked to notify additional individuals whilst off with stress (p188). The panel concluded that the Claimant had provided enough information to fulfil the Sickness Absence procedure and that she actually took additional measures to cover her absence from work. The panel agreed that the email communication whilst she was off sick with stress was unnecessary.

57. The grievance panel looked at the emails sent from the Claimant's account. Her email had in fact said

"Yes I did thank you, and I am in the process of getting you added to our self employed payroll system.

I will be in touch very soon as I am hoping to include MetaFit in our 2018 programme" (page 208).

58. The email to which she was responding was "I hope all is well with you, I just wanted to check you did actually get the second lot of paper work". There was nothing about membership.

59. The Claimant believes that CW had doctored the email and was trying to get her dismissed. There is no evidence to support such a serious allegation. It is clear from the interviews in the grievance investigation that CW was instrumental in planning for the investigation. She told TC that the Claimant did not need to be provided with an investigation pack in advance of the meeting. It was the Sidcup Centre Manager who instructed CW to get one of her team to conduct the investigation and CW who instructed TC what to go into the letter (p184). CW also assisted TC to put together questions (page 185). It was clear CW was the lead in respect of the sickness absence issues also (p188). There is also evidence in the grievance investigation that CW had her own complaints about the Claimant (though the Respondent takes no issue with this). She accepted however that the one line in the instructor's email chain allegedly from the Claimant did not necessarily warrant gross misconduct charges (p192). There is also no evidence that she had anything to do with the email from the instructor's account. The Claimant alleged that she had been copied into the Claimant's original emails with the instructor and that her email address has been redacted. I do not find this is the case, it appears simply that the instructor's email address has been redacted.

60. The Claimant says there is little chance of her finding another coordinator role. After leaving the Aerobics Coordinator post the Claimant had sought alternative work through word of mouth without success. She says there tends to be one coordinator per Centre and the person appointed tends to "come up" through instructing for the Centre first. She considers it would be difficult to start again as an instructor elsewhere at her age. She has taken a decision to return to study and eventually work for herself.

61. The Respondent's evidence was that age would not prevent someone being employed by the Respondent. It was accepted however that the Respondent runs all the centres in the Claimant's Borough so she would have to go outside the Borough, though there is another operator in the vicinity. Although some candidates are appointed externally, the Respondent also accepted some posts are filled internally by those progressing from being instructors.

62. I accept that the Claimant was initially very affected about what that had happened, and not in a good mental state to seek work. I accept the opportunities for work as an aerobics coordinator/instructor are limited due to the limited number of alternative centres in the area that are not run by the Respondent, and also that some appointments at least are made internally. That said, it is accepted the

Claimant had been very good at her job and I find that she has transferrable skills that would be useful in other roles. She did not present any evidence that she had looked outside of the sector.

Relevant law

Constructive dismissal

63. Section 95 of the Employment Rights Act 1996 states:

> **(1)For the purposes of this Part an employee is dismissed by his employer 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.**

64. The leading authority is *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221. For section 95 (c) to apply the following must be shown:

64.1 a repudiatory breach of contract by the employer (i.e. 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 and which entitles the employee to leave without notice);

64.2 the breach caused the resignation; and

64.3 the employee did not delay so long before resigning that he is regarded as having affirmed the contract and lost the right to treat himself as discharged.

65. There was an implied term in the Claimant's contract of employment as described in *Malik v Bank of Credit & Commerce International* [1997] IRLR 462 that the employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

66. A breach of the implied term involves conduct which seriously damages or

destroys the trust and confidence between the employer and employee. Both sides are expected to absorb lesser blows (*Croft v Consignia Plc* [2002] UKEAT 1160_00_3009).

67. .A series of actions culminating in a "last straw" can cumulatively amount to a breach of the implied trust and confidence, but the "last straw" must contribute something to the breach, it cannot be entirely innocuous (*Omilaju v Waltham Forest LBC* 2005 ICR 35).

68. The Respondent's Representative sought to rely on *Kerry Foods v Lynch* 2005 IRLR 680 to argue that the implied term cannot fetter an express term, however *Kerry Foods* was about whether giving notice of dismissal and an offer of re-employment on new terms could be a breach of the implied term of trust and confidence and it was found that the *Johnson v Unisys* 2001 IRLR 279 exclusion zone applied (that the term of trust and confidence does not apply to dismissals as they are covered by the statutory right in respect of unfair dismissal). I cannot see the relevance to this case and it does not prevent an employer's exercise of a contractual right being subject to the obligation not to undermine trust and confidence without reasonable and proper cause.

Unfair dismissal

69. In relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that

of his employer) of a duty or restriction imposed by or under an enactment.

(3). . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

70. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances.

71. Where any action by the Claimant to any extent caused or contributed to the dismissal the compensatory award may be reduced by such amount as the Tribunal considers just and equitable (s123(6) Employment Rights Act 1996). For conduct to be the basis of a finding of contributory fault under s123(6) it must be culpable or blameworthy (*Nelson v BBC (No 2)*[1980] ICR 110.

Conclusions

Group Exercise Class Coordinator

Did the Respondent fundamentally breach the contract of employment?

In particular did the following occur: a personal attack by a manager?

72. In the event there was no evidence about any personal attack by a manager. It's not clear what this was a reference to and this aspect of the claim was not pursued by the Claimant.

Imposing a change of hours that the Claimant could not do; giving two weeks' notice and saying that although an alternative could be considered it could not involve the Claimant's current hours; threatening to physically remove the Claimant from the premises if she attended at her normal hours?

73. The Respondent did seek to impose a change in the Claimant's hours. This was the second attempt to do so, the Claimant having successfully retained the hours she had been doing for many years in consultation with her Manager in January 2017. The letter received by the Claimant in October 2017 had been drafted differently to previous "consultation" letters, albeit the Claimant had not received those. It presented the rota as a fait accompli to begin in two weeks' time. It did invite questions, but unlike previous letters did not say they would be given consideration.

74. The new hours were radically different in the following respects:

    74.1 They involved a two-week rota covering every week day rather than fixed days each week of Monday, Wednesday and Friday;

    74.2 Later starts;

    74.3 Evening work; and

    74.4 Long gaps between classes and her coordinator work.

75. They included hours when the Claimant was responsible for childcare so her daughter could work and involved very long days (or increased travel to and from work more than once a day) and evening work. She was not prepared to do them.

76. She was initially given only two weeks' notice, though that was then extended by a further two weeks. She was invited to propose an alternative that better suited her but it still needed to cover each week day and evening work. It should not include the early starts. As was noted by Mr James, a compromise could possibly have been reached that avoided the split shifts. The Claimant could also have proposed hours which still enabled her to meet her childcare obligations.

77. The Claimant was not threatened with physical removal but she was told that if she attended at her normal hours she would be asked to leave. In that sense the Respondent did seek to impose the hours on the Claimant despite her lack of agreement to doing them.

By the above conduct did the Respondent, without reasonable and proper cause act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and Claimant?

78. The Respondent did have an express right to vary the hours. However, there are aspects to the way this was addressed that was likely and did seriously damage the trust and confidence between the Claimant and her Manager. I note that the grievance itself found the consultation process could have been better.

79. Firstly, the different wording of the letter, changing it from a consultation letter (like previous drafts) to an instruction to work the new rota without consultation, appears to have been deliberate. The rota was therefore deliberately presented

to the Claimant as a fait accompli. The new hours were radically different to those she already did, and had been doing consistently for many years. Even without knowing her personal circumstances they were varied across two weeks, involved uneconomical split shifts and introduced evenings whereas previously she had only worked mornings. I accept the Claimant's evidence that apart from a previous consultation about her hours, which led to her successfully keeping her hours, there was no warning that this was coming.

80. There had been no prior meeting to discuss the Claimant's role since CW became acting manager, despite a reason for the change being changing priorities for that role. The hours themselves were set without any discussion with the Claimant, though with the knowledge that her previous consultation with her manager had led to her retaining her hours (and that therefore at that time she had objected).

81. To suddenly impose such a radical change, without consultation or even explanation, and with only two weeks' notice, was high handed and capricious, and likely to seriously damage the relationship of trust and confidence.

82. The email from CW which followed was sent the Thursday evening prior to the Monday the new rota was due to commence. The Claimant had had no response to her objection until then. It did contain an explanation and explained why she disagreed with the Claimant's early starts. It contained content that should really have been discussed with the Claimant prior to issuing the amended rota. Although she did say the discussion could continue and moved the date for the new rota to commence, she nevertheless effectively said that unless the Claimant could provide an alternative rota which met her requirements (which were not entirely clear other than no early starts and a rota which covered a range of days and times) then her rota would be introduced on 20 November 2017, despite the Claimant's disagreement. This continued to be somewhat high handed and was likely to have continued the serious damage to trust and confidence.

83. Once the Claimant made clear her financial and personal constraints, including caring for her grandson and the additional transport costs/waiting time, CW did meet with her. It is right that she suggested the Claimant suggest an alternative that could meet the Claimant's needs and the business needs. There was greater clarity that this meant no early starts, covering every week day across two weeks and some evening work. Nevertheless she did not seek to explore in any depth whether there might be an alternative that met both the Claimant's needs and the business needs but pushed the onus onto the Claimant. She did say that in the absence of an acceptable alternative her rota would be imposed from 20 November 2017 and the Claimant would be asked to leave if she attended another time. I find she was of the view that irrespective of the Claimant's lack of agreement she could impose a radically different rota with just two weeks' notice (as is reflected in her comments in the grievance). I find that the suggestion the rota would be imposed and the Claimant asked to leave was high handed and likely to (and did) continue to seriously damage the relationship of trust and confidence.

84. I turn to whether there was reasonable and proper cause for the above actions which damaged or were likely to seriously damage trust and confidence. I accept that there was reasonable and proper cause to seek to make some change to the hours. The Claimant was not singled out and others had changes to their hours also. The Claimant strongly believed that she needed to start at 6.30am but I accept from the comments of both CW and the Sidcup Centre Manager recorded in the grievance process that the Respondent did not consider that the best time for the Claimant to be present, and they did not agree that it would have a detrimental effect on the Claimant's work for her to start later. In any event it was within the Respondent's managerial prerogative to seek to have a later start which was felt to be better for the business.

85. I accept that the Respondent was concerned about attendance at classes and performance of some of the classes. It is clear attendance had fallen from the previous year. I accept that CW wanted the Claimant to be involved in observing and appraising classes which required attendance on different days and some evening attendance.

86. For the avoidance of doubt, this evidence in my view also suggests that the change in hours was not malicious.

87. That said, I have heard no explanation as to why there needed to be split shifts or why the Claimant needed to work an evening a week (as opposed to ad hoc evenings which she was prepared to do). I note that CW said she did not need to be observing on a weekly basis in the grievance and that Mr James believed that there could be compromise on the split shifts.

88. Moreover there has been no explanation for the high handed manner in which this was approached. There has been no explanation for why the issues with the attendance at classes and the Claimant's role were not discussed with her first by CW. Nor has there been any explanation offered for why there was no consultation with the Claimant prior to the attempt to impose the radically different hours, nor why this was at such short notice. There is also no explanation for why the Claimant's difficulties with the hours were not addressed by the Respondent seeking to find an alternative solution in discussion with the Claimant, or why, once it was evident she had personal difficulties with the hours, and it was not just about the best hours to perform her role, the Respondent saw fit to nevertheless impose the hours within two weeks, with a threat that she would be asked to leave if she attended her usual hours.

89. Overall I do not find that there was reasonable and proper cause for imposing those particular hours in the manner done by the Respondent, at the time imposed by the Respondent.

Did the Claimant resign in response?

90. The Claimant did resign in response to the change in hours and how that was handled, including the fact she was told she would be asked to leave if she

attended work on her existing hours after 20 November 2017. The Respondent seeks to say that she resigned because she wanted a settlement payment. However, I disagree, it is clear she resigned in response, the week the new hours were to be imposed. That she then sought a payment in response to the partially successful grievance only reflects the fact that she believed she had this claim for constructive unfair dismissal.

91. No issue was taken by the Respondent in respect of whether the Claimant affirmed the contract.

If the Claimant was constructively dismissed was the reason for dismissal some other substantial reason?

92. I accept the reason for the attempt to change hours was that the Respondent wanted to address the fall in attendance at classes by having the Claimant attend more varied hours, including evenings. I have heard no reason for the high handed and at times capricious manner in which this was done. However it is likely this was because CW believed she could impose whatever hours she wanted with two weeks' notice, because of the express clause in the contract. This was a point she repeated a number of times.

93. I accept therefore the reason was the Respondent wanted to address the fall in attendance with a change in hours and that this has the potential to be some other substantial reason that would justify dismissal.

Was the dismissal reasonable in all the circumstances?

94. I do not find the dismissal (the conduct in breach of trust and confidence) reasonable in all the circumstances, including the Claimant's length of service of 27 years. The Respondent had business reasons to seek to change at least some of the hours but it was unreasonable not to follow a reasonable consultation process in doing so. This would involve discussing the changing requirements or priorities of the role and the possibility of changing hours with the Claimant prior to deciding the rota, and taking account of the Claimant's circumstances and views as far as possible in setting that rota.

95. It is possible that had such a process been followed there would still have been an impasse, especially in relation, for example, to the early starts. However the Respondent did not raise the possibility of there being a fair dismissal at some stage in any event, and I consider it too speculative to make a finding that there would have been a fair dismissal at some stage due to the inability to agree new hours. A process would have had to have been followed prior to this. However it is a possibility and this is reflected in the award to the Claimant as set out below. I also note that the Claimant, had she been dismissed for failing to agree to a change in working hours, would have been entitled to 12 weeks' notice.

Was there any blameworthy conduct by the Claimant that caused or contributed to her dismissal?

96. I do not find there was blameworthy conduct that contributed to the dismissal. The Respondent relies on the intransigence of the Claimant in not putting forward an alternative rota. However I do not find that blameworthy conduct. The new rota was radically different and imposed without consultation at short notice. The Claimant raised her objections to it. Although she could have suggested an alternative, and that might have led to some compromise, nevertheless there were restraints imposed on the alternative and the Respondent also did not respond by considering a possible compromise despite the Claimant setting out her difficulties with the proposed hours. Moreover the Respondent acted high handedly in the process, so that it is not surprising the Claimant took a defensive stance, seeking to resist the change and hold onto her existing hours.

Instructor

Did the events in box 8.2 occur? In particular:

an inappropriate change to the name of the Claimant's class?

97. I accept the name of the Claimant's class was changed without discussion with her and no longer properly described the class. This affected attendance, leading to complaints from members. I accept that the Respondent did not address the concerns raised by the Claimant until the new Fitness Manager began. I accept that the issue was urgent and the Respondent did not address it for some weeks. Ultimately it was addressed prior to the decision to resign.

"harassing" the Claimant whilst she was on sick leave and upon her return to work with accusations she had not followed the absence reporting procedure and the threat formal action?

98. I accept that the Claimant was required to do more than required in the sickness policy, whilst off sick for stress (as the grievance found). I accept that there was mention of formal action, although no formal action was commenced.

falsely accusing the Claimant of four counts of gross misconduct.

99. The Claimant was invited to an investigation meeting. The letter did make four allegations of five serious breaches of the disciplinary policy (which are listed there as gross misconduct). It said the Claimant, in her Coordinator role inappropriately confirmed to a new freelance instructor that he could have staff membership at a different leisure centre in the group, in breach of policy.

100. She had not done what she was accused of and was ultimately vindicated when the grievance investigated and found the emails had been falsified.

Did they amount to the Respondent, without reasonable and proper cause acting in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and Claimant?

101. The class name change and delay in addressing the Claimant's concerns is likely to damage trust and confidence (and I accept it did) but on its own this is not likely to have caused serious damage or destroyed the trust and confidence. I heard no evidence from whoever was responsible for changing the name of the Claimant's class. In that absence I accept that this change was made without discussion with the Claimant and made it a completely different class. I have been given no explanation for not acting on the Claimant's request to urgently rectify this, and instead leaving it to the new Fitness Manager joining. It was the Claimant's class and she described the effect it was having on her attendance and membership and I have heard no good reason why this was not addressed urgently as she requested. That said it had been addressed by the time she resigned.

102. Again, whilst the demands and accusations in respect of the sickness policy could damage trust and confidence I do not find this on its own sufficient to seriously damage or destroy trust and confidence. There was not reasonable or proper cause as the managers were in error in their understanding of the policy. The only reason given for the way the Claimant was treated in respect of sick leave is that found in the grievance. I have not heard directly from those responsible. The reason asserted is that it was a new manager who was not clear on the process. I do not find this a reasonable or proper justification for treating the Claimant in this way and I also note that CW had been taking the lead and advising him in the background, so that is not an explanation for her actions.

103. In respect of the letter inviting the Claimant to the investigation the Respondent asserts that it was an innocuous act. I do not agree. It did contain serious accusations of gross misconduct and they were, in the event, incorrect. The Claimant had not acted in the way alleged. This was likely to seriously damage or destroy trust and confidence, and did so.

104. The way the investigation was conducted also was likely to seriously damage and destroy trust and confidence. The Claimant's fears that she would not be treated fairly in the process were vindicated. The investigating officer had a script that assumed the Claimant had sent the email and he proceeded to follow that script as if she was guilty of the conduct, ignoring her explanations about not having sent the email. However the Claimant resigned before this occurred. That said, the Respondent asserts that the Claimant should have proceeded with the procedure as she would have been vindicated, as she was in the grievance. The way the investigation was conducted suggests it cannot be certain that the initial disciplinary process would have exonerated her. The grievance process differed in that it was conducted by an independent manager from outside the Centre.

105. The key issue however is whether the Respondent had reasonable and proper cause to send the letter and start the investigation. The Respondent relies on the email from the instructor making the accusation to give reasonable and proper cause for this. I agree that in some circumstances a third party complaint might provide reasonable and proper basis for proceeding down a disciplinary route. It is also not uncommon for charges to be framed prior to the investigation with the member of staff concerned. That is consistent with

the Respondent's disciplinary procedure. There is also no evidence to support the Claimant's accusation that CW was responsible for falsifying the email. She was not copied into the original email as the Claimant alleged. The instructor engaged in a chain of emails with both the Respondent's finance department and the Centre Manager. He also agreed to pay some of his outstanding bill. All of this would have had to have been falsified by CW via his email account, which is unlikely, and there is nothing to suggest this to be the case.

106. On the other hand there still needs to be reasonable and proper basis for framing the charges as gross misconduct. Here, the email sent by the instructor was copied and pasted within the body of his email and was therefore easily amendable to support his case (in the context of the Claimant having left her role). The instructor's accusation was inconsistent with the Claimant's actions. The evidence was that she had not spoken to Membership and asked that his membership be transferred to that of a staff member. The membership had not been altered. In the Respondent's systems had she spoken to Membership that would still need to have been authorised by the Centre Manager in any event. It was not her role and she had never given staff membership to anyone in 27 years of service. Her handover note when she left had left the completion of the instructor's recruitment to others and mentioned nothing about staff membership. She had not even finished the recruitment. The instructor's allegation was therefore at odds with the facts known to the Centre Manager about how the systems worked, what the Claimant had actually done (or not done) and her performance record with the Respondent. The questions framed by Mr Carter in the grievance investigation record that he considered the email trail as a whole supported the Claimant. The instructor appears to have conceded that he was not entitled to membership as a self employed person as he agreed to pay part of the invoice. CW when interviewed in the grievance conceded that if all the Claimant had done was write the alleged email to the instructor that would not necessarily warrant gross misconduct.

107. I find this decision finely balanced as I do recognise the instructor produced the email and there was no reason on the face of it to question that it had been written by the Claimant. The Respondent was entitled to question the Claimant about it. On the other hand for the reasons above I consider it was premature and there was insufficient evidence to allege five counts of gross misconduct. Doing so was heavy handed when there was otherwise no evidence to support she had in fact done what was alleged, apart from write the email. I find the Respondent did breach the term of trust and confidence, without reasonable and proper cause. In doing so I take into account too that the Claimant had already left the position, the letter making the allegations was given on the Claimant's return to work from a stress related period of absence, and at a time (including on the same day) when there had already been other incidents damaging trust and confidence, without reasonable and proper cause.

108. It is accepted the Claimant resigned in response.

109. The Respondent takes no point in relation to affirmation, nor does it assert a potentially fair reason for dismissal.

If the claim in respect of the Coordinator position is successful, what is the appropriate remedy? Did the Claimant reasonably mitigate her loss? How long should the Claimant be compensated for her Instructor claim?

110. The Respondent accepted the basic award for the Coordinator role is £4,590 and for the instructor role is £2160. The weekly net loss of wages for the Coordinator role was £161.54 and pension loss was £2.59. For the Instructor role weekly loss was £80 and there was loss of centre membership valued at £40 per month.

111. The Claimant had worked for the Respondent for 27 years in total and therefore had the right to 12 weeks' notice. She may well have to work a number of years before she is back in the same position, if she ever is. This is therefore arguably the rare case that merits a higher than normal award for loss of statutory rights. On the other hand there is a possibility that she would have left her Coordinator position in any event if the parties had been unable to agree a change in hours, though I cannot say this is more likely than not. Overall I consider 4 weeks' gross pay (£680) for loss of statutory rights is just and equitable for the Coordinator position, and 6 weeks' for the Instructor position (£480).

112. I accept the Claimant was initially very upset at what had happened and was not therefore initially in the best state of mind to seek alternative work. Her upset continued well after leaving the Coordinator role as issues continued with her Instructor role. The Claimant has sought alternative work through word of mouth within the sector unsuccessfully, but has not otherwise sought to obtain work using her existing skills outside the sector, despite knowing that her chances of obtaining alternative work in the sector are unlikely (on her own case). At some stage she decided she wished to re-train. It was accepted the Claimant was very effective at her job and I find it likely she has skills that would be useful outside the industry, including in roles that would be of benefit to the community (which is important to her). She is of course free to choose to study, but I agree that she has not reasonably mitigated her loss by not applying for other work. That said, I have had no evidence from either side as to how soon she might have been expected to have obtained work if she used her transferable skills outside the leisure industry. I consider that loss of earnings to six months after the Claimant finally left the Respondent is just and equitable as a starting point (41 weeks for the Coordinator role and 26 weeks for the Instructor) in all the circumstances. This gives time to recover from the way the Claimant's lengthy employment with the Respondent ended and to reasonably mitigate loss. In addition I do consider that it is just and equitable to reflect the possibility the Coordinator role might have ended at some stage in any event after about 16 weeks (reflecting time to consult and notice period), with the loss of earnings and pension for the remaining period reduced by 25%. This gives compensation for loss of earnings and pension for the Coordinator role of £6,729.33 and the Instructor role of £2,320.

113. For the avoidance of doubt I do not consider it just and equitable to reduce the award because the Claimant could have sought a different resolution (such as a return to her positions) when her grievances were upheld.

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Employment Judge Corrigan
4 April 2019