EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103925/2023

Held in Glasgow on 16, 17 and 18 January 2024

Employment Judge B Campbell

Mr M Duffy	**Claimant In Person**
Renfrewshire Leisure Limited t/a OneRen	**Respondent Represented by: Ms K Smith - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal was that the claimant was not constructively unfairly dismissed, and his claim is dismissed.

REASONS

Background

1. This claim arose out of the claimant's employment with the respondent which ended on 28 May 2023 with his resignation. He alleges that he was constructively dismissed. His employer denied the claim.

2. The hearing took place in person over four days. The claimant represented himself and gave evidence. He called a witness and former colleague named Andrew Masson, Facilities Manager, in support of his case. The respondent called three witnesses, Derek Cuthbertson, Area Manger; Mark Coyle, also an Area Manager and Jason Duncan, Facility Duty Manager.

3. A joint bundle of documents was prepared for the hearing and numbers in square brackets below are references to page numbers in the bundle.

4. At the end of the hearing both parties provided submissions orally. The respondent also provided a note summarising their submissions.

5. The witnesses, including the claimant, were each found to be generally credible when giving their evidence. A relatively small number of facts were ultimately in dispute between the parties. The area of focus was more in relation to whether various events could amount to a material breach of the claimant's contract of employment.

Relevant law

1. By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

2. An employee may terminate the contract but claim that they did so because their employer's conduct justified the decision. This may be treated in law as a dismissal under section 95(1)(c) ERA, commonly referred to as constructive dismissal. The onus is on the employee to show that their resignation amounted to dismissal in that way. The employer's conduct prompting the resignation must be sufficiently serious so that it constitutes a material, or 'repudiatory', breach of the contract. The breach may take place or be anticipatory, i.e. threatened. It may be way of a single act or event, or a chain of events ending with a 'last straw'. The employee must resign in response to the breach, and not delay unduly in doing so or they may be deemed to have accepted or 'waived' the breach.

3. Unless the reason for dismissal is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA.

4. Whether a dismissal is direct or constructive, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4) ERA, taking in the particular circumstances which existed, such as the

employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

Legal Issues

The tribunal had to decide the following legal issues:

1. Did the respondent materially breach the claimant's contract of employment, whether by breaching one or more express terms, or by breaching the implied term of mutual trust and confidence?

2. If so, did the breach occur by way of a single event or a sequence of events?

3. When did the breach occur, and if it was as a sequence,

    a. when was the last event in the sequence?

    b. Was it a breach in itself or a 'last straw' with lesser effect?

4. Did the claimant resign in response to the breach?

5. Did he do so promptly so as not to waive the breach?

6. If the claimant was constructively dismissed, was his dismissal fair, i.e.:

    a. Was it for a potentially fair reason under section 98(2) of the Employment Rights Act 1996; and

    b. Did the respondent act reasonably according to section 98(4) of that Act in treating its reason as sufficient to justify dismissing the claimant?

7. If not, and the claimant was constructively unfairly dismissed, what compensation should he be awarded?

Findings of fact

The following were found to be fact based on the evidence provided to the tribunal.

1. The claimant was employed by the respondent, which is a charitable trust established by Renfrewshire Council. He worked as a personal trainer in various sports and leisure facilities operated by the respondent. His contract allowed the respondent to ask him to work in any facility within the council area. He worked in different facilities, but predominantly at the Johnstone Community Hub. It is located next to a school and pupils from the school have exclusive use of it at certain times. It has a gym, sports halls and a swimming pool. There is an office which will be used by one or more Duty Managers.

2. The claimant began his employment on 20 June 2010 and it ended on 28 May 2023 with his resignation.

3. At various times the claimant reported to Mark Coyle and Derek Cuthbertson, who were Area Managers, and Jason Duncan and John Glenn who were a Duty Managers.

Initial Covid-19 related measures and events

4. In the early stages of the Covid-19 pandemic, i.e. from late March 2020, the claimant was placed on furlough in common with many colleagues. Some months later the respondent began bringing employees back to work in areas where they could open facilities to the public.

5. In October 2020 the claimant was asked to return to work, initially by helping out at Barshaw Golf Club by carrying out a variety of general duties, including some outdoor work and assisting customers at reception. The claimant worked as he was asked to do without complaint. Another colleague was also supposed to work there but took compassionate leave on the death of a close relative. A further colleague was asked to attend in his place, but she worked for one day at the course and then began a period of absence from work through illness. The claimant asked about two other colleagues from the Johnstone Hub. His manager said they were not being sent to the course, that they were being sent to cover other locations, and that in any event it was expected that in November everyone would be back in their normal roles at their usual places of work.

6. The restrictions did not ease as quickly as had been anticipated. In December 2020 the claimant was asked to move to the Renfrew Fitness Suite. He was prepared to do so but asked if a colleague had refused to work there an Mr Cuthbertson confirmed so, but that an arrangement would be reached where they would both share the work requirement there for a personal trainer. The arrangement was not implemented as more stringent Covid-related restrictions were then announced and the venue could not open to the public.

7. In January 2021 the claimant was asked to help staff a Covid-19 vaccination centre. He had not been vaccinated himself and considered that work to be too high a risk for him and his family. The respondent offered Covid vaccinations to all staff. It was the claimant's personal choice not to receive one. He said that he was reluctant to work at the centre. He did not explain specifically why, but said to Mr Cuthbertson that he felt uncomfortable about working there. He was asked to submit an illness self-certification or a fit note if he was saying he could not work on health grounds. He obtained a fit note from his GP and sent it to the Johnstone Hub at the beginning of February 2021. It gave the reason for absence as stress and anxiety.

8. The claimant had an Occupational Health appointment on 18 February 2021. The report which followed [65] said he was fit for normal work but unable to work due to 'perceived work issues'. It recommended those issues be addressed so he could return.

Return to work in March 2021

9. Mr Cuthbertson decided in the circumstances not to ask the claimant to work in any vaccination centres and offered him outdoor work at the Seedhill Playing Fields instead. The claimant agreed and returned to work. He worked there from mid-March to around 26 April 2021, when he returned to the Johnstone Community Hub which by then was reopening.

10. In March 2021 the claimant took up a second job which involved working at night and finishing his shift at 8am on weekdays.

11. Between late April and September 2021 the claimant worked as a personal trainer at the Johnstone Community Hub as he had traditionally done, but on flexible furlough. His working hours included time on Saturdays and Sundays. He regularly used small amounts of annual leave so that he could have time to finish his second job before starting in the morning working for the respondent. He also used annual leave to fit in with family activities. This continued up until March 2022 when the claimant gave up his second job. He was never ordered to use annual leave in this way, but had done so for a long time. His requests were always granted.

12. The claimant found out that around the same time a colleague was permitted to start work late and did not have to use annual leave to cover the time missed, or lose out on any pay. The circumstances of that employee, which the claimant did not know at the time, were that he could only get to work by bus. The bus times resulted in him arriving at work either an hour early or 20 minutes late. Mr Cuthbertson reviewed the options for that employee and agreed with him that he could take the later bus for three weekends during the summer of 2021, but then would need to build up extra working time in order to take it in lieu of normal working time if he wanted to go on doing so.

Flexible working request and annual leave

13. In July 2021 the claimant was asked to work at the Erskine Leisure Centre. This was further for him to travel from his home and his start time would be 6.30am. He had difficulty working there during the week because of his second job, and at weekends because of his family activities. He asked whether he could work back shifts instead so that he would begin working later, but he was told that it was the earlier shifts which needed covered. He made a flexible working request to reduce his weekly working hours from 27.75 to 14 so that he would not have to work at weekends. This was granted on 5 July. The request was dealt with under the respondent's flexible working policy, which entailed that it would be in place for 12 months and reviewed every three months. In retrospect the claimant believed that he ought to have been placed on flexible furlough, so that he would work reduced hours at Erskine and be paid furlough pay for the balance of his contractual hours. He

would then have been able to maintain his second job. He did not ask for this at the time. There was no obligation on the respondent to do so. There was work which needed to be done and which the claimant was capable of performing.

14. In July or August 2021 the claimant asked about taking some holidays. He was told he did not have many left. A colleague said he had a large number days left, and the claimant wondered why that would be as he thought they were working to similar arrangements. He went to speak to a Duty Manager to see if there was an anomaly. He spoke to Mr Glenn who checked the holiday records on his computer. The system appeared to show two colleagues had significantly more leave than the claimant, and on closer review it appeared that the claimant had had a week of leave deducted whereas his colleagues had not. The deduction had been made automatically under a rule of the respondent's policy which said that any annual leave accrued up to December 2020 would be lost if not taken by the end of that month. The claimant was unaware of the rule, which had not apparently been applied to his two colleagues. The inconsistency was not understood by Mr Glenn but he referred the matter upwards to Mr Cuthbertson, who reviewed the details. He accepted that the claimant may not have received an email about the rule – the claimant by his own admission rarely if ever used email - and decided to reinstate a week of annual leave from 2020. The claimant was therefore able to take the restored week of leave in 2021.

15. After the first three-monthly review of his flexible working arrangement the claimant was told that it would continue for a further three months, and then come to an end. The claimant wanted to continue longer. He happened to meet Mr Cuthbertson in a local supermarket and asked him to allow the arrangement to run longer. Mr Cuthbertson agreed and the extension was confirmed by letter [83].

16. The claimant was notified in in January 2022 that his reduced hours arrangement would end after nine months on 5 March of that year. He believed it should have been capable of continuing for 12 months subject to 3-monthly reviews. He knew of a female colleague who had been allowed a

flexible working arrangement – again by way of working reduced hours – on her return from maternity leave. That arrangement had run for 12 months. The claimant had a meeting with a Duty Manager named Susan Munro around 21 February and asked if he could work for 21 hours per week rather than his full contractual amount of 27.75 hours. She sought guidance from an Area Manager and reverted to say it was not possible. His choice was to change to 14 hours per week permanently or revert to 27.75 hours. Mr Cuthbertson said in evidence that he offered to provide the claimant with seven additional hours of overtime each week, to bring his total up from 14 to 21 if he wished to work that way. It was unclear however whether that was communicated to the claimant.

17. The claimant decided to go back to his original hours. This meant he had to give up his second job with another employer. This further reduced his income. After he had submitted his resignation, Ms Munro received an email from Mr Cuthbertson to say the claimant was entitled to a further three months of working 14 hours per week. In effect it was being acknowledged that Ms Munro had made an error in saying that the claimant had to either revert to his previous hours, or make his temporary hours permanent, after nine months. However, the claimant felt it was too late for him to withdraw his resignation form his second job. He had planned to work in that role for a year, meaning that he intended to resign from it around March or April 2022, in any event.

18. The claimant was absent due to illness between 9 March and 27 July 2022.

19. On 14 April 2022, during his absence, the claimant raised a grievance [92].

Grievance meeting on 24 May 2022

20. Mr Coyle was appointed to hear the claimant's grievance and a meeting took place on 24 May 2022. He had some training and experience of hearing grievances. Mr Masson accompanied the claimant.

21. The meeting started as normal but ended up being brought to an end by Mr Coyle as he considered that the claimant would not move on from a particular

point of complaint to discuss other matters, and was becoming more and more frustrated. The point related to how two of his colleagues had been treated since the Covid epidemic. The claimant believed that they had been given more favourable treatment. Mr Coyle repeated that he was unable to share details personal to them, which meant that he could not fully answer the accusation. He said that a process had begun with each employee, and if there was any wrongdoing on their part it would be dealt with. He did also say that he had attempted to order them to return to work after furlough, and that one colleague had 'played the game' or 'played the system' – taken to mean that he looked for ways to avoid coming back to work without clearly breaking any rules, such as self-certifying his absence. The claimant understood that this employee had gone off ill, but at the same time was working in another job. Unknown to the claimant at the time, that employee had been ordered by Mr Cuthbertson to report to the Renfrew Leisure Centre but had refused, stating that he had had a disagreement with the previous centre manager. He would not do as Mr Cuthbertson asked and threatened to go off ill. Before the matter could be resolved, more stringent Covid restrictions were introduced and the centre had to close again. When those restrictions were eased, the employee resigned before he could be brought back to work.

22. Mr Coyle kept his own notes of the meeting [102-104]. A more formal minute of the meeting was prepared [105-108], but only a year later after the claimant resigned, because the meeting had been suspended before being concluded and because the process was not concluded later, as explained below.

23. Attempts were made to reconvene the grievance meeting on 8 and 15 June 2022, but the claimant was unable to attend on those dates. The grievance was not formally concluded. On 21 July 2022 the claimant intimated by text message to Mr Coyle that he did not want to pursue the grievance any further, and wanted to return to work [128]. Mr Cuthbertson praised him for his willingness to work when Covid restrictions had been in place. He also confirmed that of the two colleagues the claimant had complained about at his grievance meeting, one had resigned and one was back at work.

24. The claimant returned to working at the Johnstone Community Hub. He again reported to John Glenn. Shortly after coming back to work a person came into the gym who the claimant did not recognise. The claimant felt the man was behaving strangely, and felt intimidated. Around two weeks later another man came into the gym who the claimant did not recognise. Again, although the individual did nothing overtly threatening, the claimant felt vulnerable. He asked Mr Glen if he knew the individuals and how they had gained access to the gym if they were not members. He suggested that Mr Glenn was deliberately allowing non-members into the gym to intimidate, and possibly harm or threaten, the claimant. Mr Glenn denied doing so.

25. The claimant felt intimidation by people using the gym twice more, once in November 2022 and then in February 2023. On one of those occasions Mr Glenn admitted that he had allowed a former member whose membership had lapsed to use the equipment on the understanding that he was going to renew his membership.

26. In or around October 2022 the claimant had earned two hours of time off in lieu ('TOIL') by working outside of his normal hours. Mr Glenn confirmed that he had been granted the time back on the system. However, he had recorded the time by hand on a Post-It note but forgotten to add it to the electronic folder on his computer where details of TOIL and annual leave were recorded. At the end of November the claimant wished to use the time to attend the funeral of a close relative on a working day. He asked Mr Duncan, who checked the computer and could not see a record of any accrued TOIL. The claimant believed that his earned time had been deleted from the folder deliberately. However, Mr Duncan asked Mr Glenn, who was not on duty, by text message whether the claimant had earned the time and it was confirmed that he had. He was granted the time off he requested.

27. In February 2023 the claimant was working a two-week pattern at the Johnstone Hub. In the first week he worked three early shifts on weekdays plus either a Saturday or Sunday. In the second week he worked four back shifts on weekdays. He had childcare responsibilities on Wednesdays, and so asked to work longer hours on other days and have Wednesdays off. He

asked Mr Duncan but the request was declined. Mr Duncan said that it could not be accommodated as the gym was closed to the public after 11am on some days when the claimant wanted to work beyond that time, and it was considered less effective for him to be at work when customers were not using the gym, given his role as a personal trainer.

28. The claimant did not accept this decision, as he understood another fitness consultant at the Hub named Mr Mitchell was allowed to work on until around 1.30pm, and therefore after the Hub was closed. He understood that Mr Mitchell carried out duties such as cleaning after closing time. Mr Duncan told the claimant that Mr Mitchell had been permitted to do that because he was a full-time employee. The claimant did not accept that he was, believing Mr Mitchell wo be working around 18.5 hours per week. The claimant accepted that Mr Mitchell was made full time, but believes it happened later in that year.

Meeting with Mr Coyle on 30 March 2023

29. On 30 March 2023 the claimant asked to meet urgently with Mr Coyle. Mr Coyle had just left the office to begin a week of annual leave but agreed to meet the claimant. The meeting took place at the ON-X Centre in Linwood and lasted approximately an hour.

30. The claimant complained about three matters:

    a. Mr Glenn appearing to allow non-members to come into the fitness suite where the claimant was working, causing increased risk to his personal safety,

    b. That his accrued TOIL had been removed from the system in November 2022, and

    c. that Mr Mitchell was allowed to work additional weekly hours outside the opening times of the Johnstone Hub, whereas he was not given that opportunity, and instead could only work when the Hub was open to the public.

31. Mr Coyle was about to go on holiday abroad and was due back at work ten days later. He undertook to look into the claimant's concerns on his return, as he could not answer them immediately. He offered to look into whether the claimant could transfer to a larger facility such as the ON-X Centre, which would take him away from being managed by Mr Glenn and allow more flexibility with his hours. This was to be revisited once Mr Coyle got back from his holiday. That was explained to the claimant.

32. On 6 April 2022, and therefore before Mr Cuthbertson had returned from holiday, the claimant emailed a number of senior managers with an expanded list of concerns [136-139]. He said he was considering resigning. One particular point he made was that he did not want Mr Glenn to be asked by email about letting unauthorised individuals into the gym. He felt that this would give him time to make up a false story.

33. The claimant was asked by reply whether he wished the issues to be considered under the respondent's grievance procedure. He said he did not. He was looking for a settlement which would incorporate him agreeing to leave. In his evidence he said he had already decided to leave the respondent's employment. Via this email he was trying to find a way to agree the best terms under which to leave. He believed there had been a decision not to investigate the issues he raised with Mr Cuthbertson at the meeting. There had not. Mr Cuthbertson was still on holiday.

34. The claimant was absent from work due to illness between 21 March and 28 May 2023, the latter date being his last day of service. The cause of absence stated on his fit notes was work-related stress. Mr Duncan called the claimant to try to arrange an Occupational Health meeting and an absence early intervention meeting. He left a voicemail as he didn't reach the claimant.

35. On 27 April 2023 the claimant submitted his resignation, giving four weeks' notice [149]. This was acknowledged the following day and the claimant was asked again whether he wished to attend a grievance meeting to explain his issues. On 4 May 2023 the claimant again confirmed that he did not.

36. The claimant said in evidence that his reason for resigning was that the respondent were not taking his concerns seriously. He emphasised that he had met with Mr Cuthbertson on 30 March 2023, but that there was an inadequate response to the issues he brought up. When asked to clarify further he also referred to earlier events where he believed he was treated unfairly or unequally by comparison with colleagues.

Discussion and decision

37. The parties' closing submissions were carefully considered, although are not reproduced or summarised in this judgment.

Did the respondent materially breach the claimant's contract of employment?

38. The claimant alleges that he was constructively unfairly dismissed. This entails first that he establishes that his contract of employment was materially breached by the respondent. The breach can be of a specific term, or of the underlying relationship of mutual trust and confidence.

39. The concept of the latter is described in ***Malik v Bank of Credit and Commerce International SA [1998] AC 20***. It is an underlying and permanent feature of every employer-employee relationship. Implicit in that is that at all times the parties will not act in a way calculated to destroy the relationship. It is possible for a breach of this type to occur even if no express term is broken. So, for example, an employer exercising a contractual power in a particularly malicious or capricious way may breach the implied duty. Whether the duty has been breached is to be objectively tested. The perceptions of the parties may assist but they will not determine the question.

40. The breach must be material in the sense that it has to be sufficiently fundamental or serious. It must go 'to the root' of the contract. A minor infringement will not be enough.

41. A material breach may be committed by the employer, or it may be threatened, amounting to an anticipatory breach.

42. It should also be recognised that in constructive unfair dismissal cases, a material breach may be established by a series of events which cause sufficient damage to the relationship when considered together. By extension, the 'last straw' in such a sequence may not be a material breach, or even a breach of contract at all, or and yet when viewed along with related previous conduct it may count towards establishing a breach overall. However, it cannot be completely trivial.

43. Another fundamental requirement of a claim of constructive unfair dismissal is that the employee must resign in response to the breach (or last straw in a sequence) so that they 'affirm' it, and not for another reason. Not only that, but they must do so promptly or there is a risk that they have waived (i.e forgiven) the breach.

44. The onus is on the individual seeking to prove the above matters. The legal test is that they are proven to have happened on the balance of probability – i.e. it is more likely than not that they happened.

45. It was clear on the evidence that the claimant could not have resigned promptly in response to any matter other than whatever happened at, or after, the meeting on 30 March 2023. All of the other events complained about were too historic when viewed individually. His case was that all of the events he raised in evidence amounted to a breach of his contract, beginning with the way he was allegedly treated differently in being asked to work at Barshaw Golf Course in October 2020 and ending with the response (or as he saw it, lack of response) to the concerns he raised with Mr Coyle at the end of March 2023. He was therefore relying on those events being taken as a sequence, or a course of conduct by the respondent, culminating in whatever happened in that meeting and shortly after.

46. The tribunal's view, however, was that not all of the events complained of, even if they occurred as the claimant believed, could be considered part of a sequence. This applies particularly to the earlier events, on the basis that:

    a. The further into the past it is necessary to go, the more difficult it is to generally establish a connection with current events;

b. There are passages of time between the events raised where nothing is complained about, suggesting a break in any sequence;

c. It is possible that the claimant waived any breach which occurred, either by his conduct or simply by allowing time to pass; and

d. The people and situations are different, again pointing away from there being any true connection between them.

47. For this reason the tribunal did not accept that any of the events pre-dating his return to work from illness in July 2022 could be considered part of a course of conduct by the respondent which extended to later events. In particular:

a. The claimant had raised complaints in his grievance of 14 April 2022 and those had been discussed at the grievance meeting on 24 May 2022. Whilst it was not possible to discuss all of the matters concerning him at the meeting, or for Mr Coyle to reach a decision, the claimant later indicated – either by his express words or as implied by his actions – that he considered the process to be concluded. He said he wanted to return from his absence and start afresh. That is what he did in late July 2022. In doing so he effectively drew a line under his previous complaints. Had there been any breach of contract up until that point, he was waiving it; and

b. The grievance was raised during a period of absence from work between 9 March and 27 July 2022 – almost five months. This served as a break between the events before his absence and those following his return. He came back to work at his original location of the Johnstone Community Hub. He was working for a different line manager than before and was not asked again to work anywhere else.

48. As a result, the focus of his complaint was the three matters he raised with Mr Coyle at the meeting on 30 March 2023. That is, the matters themselves, and Mr Coyle's response to them.

49. The first matter was that Mr Glenn appeared to be waiving the rules in relation to membership of the gym, by allowing non-members to use it. The claimant referred to four occasions when this had happened between November 2022 and February 2023. He believed that on one occasion Mr Glenn had admitted his own landlord, presumably as a personal favour. On the limited information provided, the allegation was investigated. Mr Glenn's response was that the individual was not his landlord, but owned a property in the same block as his home. This was evidenced by Mr Glenn producing his council rent book showing that he was a tenant of the council. Mr Glenn said that the individual had come in to renew his membership, but the receptionist who would deal with that was on her lunch break. Mr Glenn had therefore allowed the individual to use the gym that day and he had renewed shortly afterwards. This was the only person who the claimant could describe in any detail. Mr Glenn had no recollection of anyone else being allowed to use the gym without showing they were a member in the preceding months.

50. The tribunal could not see how there could have been a breach of contract either at the time of the events alleged, or in the way Mr Coyle responded to the claimant raising them. The onus was on the claimant to prove the breach, which did not relate to a specific term of his contract, and could only therefore have been a breach of mutual trust and confidence. He alleged that there had been a breach of the duty to provide a safe working environment, but there was not enough evidence to show that such a breach occurred. Mr Coyle's response to the issue was reasonable and proportionate. He made such enquiries as he reasonably could and he was entitled to accept the position as described by Mr Glenn.

51. The second issue related to the alleged removal of two hours of accrued TOIL from the electronic folder on Mr Glenn's computer some time in either October or November 2022. This was credibly explained by Mr Duncan simply to have been an error. Mr Glenn agreed in the first place to grant the TOIL and when asked at the point the claimant wanted to take it whether this was the case, he immediately confirmed so. He simply forgot to transfer his written note to the computer folder.

52. In this matter there was no breach of an express term of the claimant's contract. Nor was there a breach of mutual trust and confidence. The claimant suspected that someone had deliberately deleted the record of his earned time in order to deny him the right to take it, but this is not what happened. This was a matter that was quickly clarified when Mr Coyle enquired about it following his meeting with the claimant.

53. The third matter related to the comparative working arrangements in place for a colleague, Mr Mitchell, at the Johnstone Hub, particularly in the early part of 2023. The claimant believed that individual was being more favourably treated by being allowed to work during hours when the Hub was closed to the public. The claimant believed that Mr Mitchell was only working 18.5 hours per week, becoming full-time later that year whereas Mr Duncan's recollection was that the move to full-time working happened earlier in the period affected by Covid. During that time, the comparator would carry out additional cleaning duties, pick up litter and supervise school pupils who had exclusive use of the facility at set times when it was closed to the public – i.e. after 11am on weekdays.

54. There was no breach of an explicit term of the claimant's contract, and his concern was that someone else was being treated more favourably than he was. This again therefore could only be a breach of mutual trust and confidence. The tribunal accepted however that there were adequate reasons for the comparator to perform some duties after 11am on weekdays whereas the claimant did not. The comparator had at least 4.5 more hours than the claimant to make up, assuming his figure was 18.5 hours per week. As and when he moved to full-time hours, the difference obviously would have been greater. It appeared reasonable that of the two individuals, the employee working more hours per week would be asked to perform tasks that needed done after the centre closed.

55. The claimant was not asking for an increase to his weekly working hours. He would and could have made a flexible working request or similar application if he wanted to do so. He merely wanted to work for part of his time when the centre was closed to the public. The respondent was entitled to ask him to

work when there were members of the public present, given his role as a fitness instructor. That was when his time was most usefully spent.

56. Mr Coyle did not know the details of Mr Mitchell's situation as the Johnstone Community Hub was not within his area. He agreed to look into that, but in the end the claimant resigned before he was able to do so. What he did do in the meeting was offer to move the claimant to a larger centre within his area, which would allow him more flexibility in his hours and scope to increase them if he wanted.

57. Again, there was no breach of mutual trust and confidence either in the original working arrangement which the claimant complained about, or Mr Coyle's proposed way of dealing with it.

58. On the basis of the above conclusions the claim could not succeed. The claimant was unable to prove that a material breach of his contract occurred. It was not therefore necessary to consider in detail whether the claimant resigned promptly in relation to any material breach, whether such a constructive dismissal was nevertheless fair, or any details of compensation if the dismissal was unfair.

59. The claimant therefore was unable to prove the material breach of contract necessary to succeed in a claim of constructive unfair dismissal, and the claim must therefore be dismissed.

B Campbell

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Employment Judge

26 March 2024

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Date

Date sent to parties **02 April 2024**