EMPLOYMENT TRIBUNALS

Claimant: Ms A Mensah

Respondent: JC Fitness Ltd

Heard at: Liverpool (in person) **On:** 28 and 29 October 2021
16 November 2021
(in Chambers)

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr B Henry of Counsel

JUDGMENT

1. The claim for constructive unfair dismissal in accordance with section 94 of the Employment Rights Act 1996 is unsuccessful and is dismissed.

2. The claim for unlawful deduction from wages in accordance with section 13 of the Employment Rights Act 1996 is unsuccessful and is dismissed.

3. The claim for compensation related to entitlement to leave in accordance with regulation 14 of the Working Time Regulations 1998 is unsuccessful and is dismissed.

REASONS

Introduction

1. The claimant worked as a gym instructor for the respondent, a gym with only female members, until 24 January 2020. The claimant resigned and claimed constructive unfair dismissal citing a breach of the implied term of mutual trust and confidence. The claimant started the early conciliation process on 1 February 2020

and received a certificate on 15 March 2020. The claimant submitted her claim form on 20 March 2020 and further and better particulars of the claim on 8 July 2021.

2. The respondent initially submitted a response on 8 May 2020 and amended that response on 22 July 2021. The respondent denied that there had been a breach of the implied term.

3. There was a case management hearing before my colleague, Employment Judge Benson, on 20 May 2021, and the List of Issues was agreed between the parties on 29 July 2021.

Evidence

4. The parties agreed a bundle of 132 pages with the addition of a lone working policy. During the course of the hearing the claimant also provided a full copy of the employment contract that was missing from the bundle.

5. I heard evidence from the claimant, her colleague Gemma Barker and gym members Mrs Cullen and Mrs Bryan. I heard evidence from the owner of the respondent gym, Cheryl Stephens, and from an ex-employee, Anne Walsh.

Issues

6. The parties had agreed an updated List of Issues dated 29 July 2021. They were as follows:

Constructive Unfair Dismissal – section 95(1)(c)

(1) Did the claimant end her employment with the respondent, entitling her to bring a constructive unfair dismissal claim?

(2) If so, did the respondent treat the claimant in a manner which breached any of the express or implied terms of her contract of employment, specifically:

(a) by changing the claimant's holiday year from 1 July to 30 June to 1 April to 31 March, resulting in remaining holiday being lost?

(b) by changing the claimant's shift patterns and overtime procedures pay?

(c) by not being permitted to exercise her right to a 20 minute break?

(d) by being required to work alone?

(e) by failing to undertake risk assessments to ensure staff are capable of carrying out the role of instructor?

(f) by breaching the disciplinary procedure?

(3) If so, did the respondent without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the

relationship of trust and confidence between the claimant and the respondent?

(4) If a breach occurred, was it sufficiently serious as to constitute a repudiatory breach? Did this repudiatory breach entitle the claimant to have been considered constructively dismissed, thereby terminating the contract with immediate effect?

(5) If so, did the claimant resign as a result?

(6) If so, did the claimant resign in a timely fashion?

(7) Did the claimant affirm any alleged breaches by allowing sufficient time to pass following the incidents?

(8) Did the claimant choose to resign for reasons unrelated to the respondent's conduct?

Arrears of Pay

(9) Is the claimant owed arrears of pay?

(10) Does this relate to unpaid SSP?

(11) What was the date of the deduction?

Holiday Pay

(12) Is the claimant owed 9 hours of remaining holiday pay?

Remedy

(13) What amount, if any, should be awarded to the claimant in respect of pecuniary losses?

Relevant Findings of Fact

Claimant's Employment

7. The claimant was a fitness instructor at the respondent gym from 1 October 2016 until 24 January 2020. The claimant had worked with the previous owners of the gym from 1 October 2016 until her employment was transferred in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 1 April 2019. The new owners were Cheryl Stevens and John Small.

8. The claimant's contract of employment provided for her role as a part-time fitness instructor, with the right of the respondent to vary the claimant's duties and responsibilities at any time. The claimant's hours of work were described as 15 hours a week during the times that the gym was open, and that she would work shifts of four, five or six hours which would be agreed a minimum of one week in advance.

9. The contract also provided that the claimant could work additional hours in excess of her normal hours of work and be paid an overtime rate for those additional hours. The respondent reserved the right to require the claimant to work different hours on a temporary or permanent basis and shorter or longer hours on different days of the week.

10. The claimant's holiday year was confirmed as 1 July to 30 June and there was no right to vary that term.

11. The claimant's employment was supplemented by an employee handbook which she received in April 2017 which, whilst non-contractual, set out that instructors would be extremely flexible in their work patterns and may be asked to work extra shifts at short notice if required.

12. The respondent also operated a lone working policy which set out circumstances when lone working may be required.

13. The respondent operated non-contractual disciplinary and grievance procedures which were appended to the contract of employment. The disciplinary procedure provided for suspension, a written warning, final written warning and dismissal if misconduct was proven.

14. In April 2019 the respondent altered the terms of the employees' contracts by changing the holiday year to 1 April to 31 March and replacing remuneration for overtime with time off in lieu.

15. All employees, including the claimant, met with John Small to be told of the changes. I find that there was no consultation at these meetings but rather employees were informed of the unilateral change.

16. In or around May 2019 Angela Murphy was appointed as the Assistant Manager of the gym. Angela Murphy had previously been a member of the gym.

July 2019

17. In or around 1 July 2019 John Small was taken ill and admitted to hospital. On the same day the claimant sent a text to Cheryl Stephens complaining that she was undervalued. In response Cheryl Stephens arranged to meet with the claimant and maintained that she was appreciated and asked the claimant to think about what she wanted from her role. The claimant's response was that she was in support of the owners and did not mean for the text to be taken in the wrong way.

18. The claimant was asked to think about her role and attend a meeting on Friday 5 July 2019.

19. On 3 July 2019 the claimant was asked to work beyond her shift of five hours, for an additional two hours. The claimant was not consulted about this change but rather was told that Cheryl Stephens was unable to attend at the gym. The claimant had no choice but to carry on working.

20. On 5 July 2019 the claimant worked a shift which lasted 11.5 hours. The claimant worked this shift alone and did not receive a break.

21. The claimant's one-to-one with Cheryl Stephens did not take place on 5 July 2019 and was postponed until 18 July 2019. At that meeting the claimant was given a verbal warning and told she must improve her communication skills and think about what she said before she said it. The claimant did not object to this warning.

September 2019

22. On 10 September 2019 the claimant attended a training session which was led by Angela Murphy. Prior to the start of that training session Cheryl Stephens asked the claimant to assist with the training if required. During the training session Angela Murphy asked the claimant to show the group, mostly made up of new instructors, how calisthenics should be performed. The claimant refused to do this on the basis that she was attending the session as a trainee and it was not her job to train other instructors. The claimant advised Angela Murphy to show the trainees a video instead.

23. Following the training session, Angela Murphy contacted Cheryl Stephens and informed her that the claimant had refused to help.

24. On 16 September 2019 Angela Murphy provided a statement setting out what had happened during the training session. On the same day Anne Walsh, a newly appointed instructor, sent an email to Cheryl Stephens setting out her concern about the claimant's lack of respect towards Cheryl Stephens and complaining that the claimant had made nasty comments about new colleagues. Anne Walsh also complained about the unhelpful attitude of the claimant during the training session.

25. On 17 September 2019 the claimant attended a meeting with John Small and Cheryl Stephens. In that meeting John Small and Cheryl Stephens questioned the claimant about what had happened at the training session and why she had failed to assist with the training. Following that discussion, the claimant was suspended.

26. I find that there would have been raised voices in that meeting due to the frustration of both parties. As a result, the claimant was shaking when she was asked to hand over her keys before leaving the premises.

27. On the same day the claimant received a letter advising her of her suspension. The claimant was informed that she had been suspended as a result of her attitude and behaviour in the workplace with colleagues and customers and that she would be subject to a disciplinary investigation.

28. On 19 September 2019 the claimant received a letter inviting her to a disciplinary hearing on 24 September 2019. The claimant was also informed that she was required to attend the hearing as a result of a failure to assist the Assistant Manager in the training session and to follow a reasonable management instruction; her attitude and manner in the training session and in general her attitude towards colleagues and in particular a comment made to a new member of staff about being stupid.

29. On 21 September 2019 the claimant submitted a grievance in which she complained of alienation, being asked to conduct training, a lack of consistent rotas, being asked to work a long shift as a lone worker, and not being subject to risk assessments. In addition, the claimant complained of a change to holiday

entitlements, change in overtime remuneration, incidents of aggression, ineffective and bullying leadership and badly managed change.

30. Also on 21 September 2019 the claimant responded to the disciplinary invitation stating that she would not be attending the disciplinary hearing because the odds were stacked against her and that her defence was within her grievance letter of the same date, and that a decision should be made in her absence

Claimant's sickness absence

31. The claimant reported sick on 18 September 2019 and on 16 October 2019 submitted a fit note from 18 September 2019 to 18 November 2019. Within that letter the claimant acknowledged that the disciplinary was on hold and that the grievance meeting would be arranged when she was mentally capable of attending.

32. On 26 October 2019 a local photographer posted on his Facebook site a picture of the claimant attending "Antonia's gym party". The picture showed the claimant attending a party with gym members.

33. In or around 27 November 2019 the claimant submitted a fit note from 19 November 2019 to 31 December 2019.

34. On 2 December 2019 the claimant sent an email to the respondent saying she was capable of meeting to discuss her grievance on 16 December 2019 and asked that they meet at a neutral venue in a totally private environment.

35. In December 2019 Icon Fitness & Lifestyle, a company set up by the claimant's husband for the claimant to run as a gym, posted on Facebook stating the following, "We are more than a ladies' gym, we are a community of fun-loving women who love anything social and we aim to support women's charities close to our hearts".

36. On 6 January 2020 the claimant submitted a further grievance asserting that there had been a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures and asked that a grievance meeting be arranged within the next five days to discuss the matter.

Claimant's resignation

37. On Friday 24 January 2020 the claimant resigned from her employment with the respondent. The reasons given by the claimant were that there had been a breach of TUPE, the last straw doctrine, having waivered breaches in the past but now unwilling to do so, and not carrying out the grievance procedure in line with either the contract or ACAS.

38. On the same day the Icon Fitness & Lifestyle company posted a picture of the claimant with commentary advising ladies that the first week of registration was coming to an end, that many applications had been made for membership and that the community was growing from strength to strength. People were invited to go along and see the relaxing fitness studio and sign up for afternoon tea that was taking place that Sunday.

39. It is clear from the Facebook post that Icon Fitness & Lifestyle was at the very least in existence in December 2019 and certainly trading in January 2020 as there is reference to a relaxing fitness studio already being in existence and arrangements being made for membership the week commencing 20 January 2020. There were subsequent posts on 25 January 2020, 30 January 2020 and 31 January 2020 about the setting up of a new gym.

Relevant Legal Principles

40. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 is Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> "**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."**

41. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

42. However, it was also said by Lord Denning in the same case that an employee:

> '**must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'.**

43. In **Chindove v William Morrison Supermarkets plc EAT 0201/13** the Employment Appeals Tribunal confirmed that duration of time between a fundamental breach and resignation will not necessarily be evidence of an employee affirming the breach. Instead a Tribunal must look at the conduct of the employee following the breach. If the conduct of the employee is such that the Tribunal can conclude that the employee wanted to continue with the employment relationship, then a finding of affirmation of the breach may be made.

44. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

45. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

46. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

47. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

48. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

49. In some cases, the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. Actions by an employer that do not amount to fundamental breaches of any contractual term may have the cumulative effect of breaching the implied term of trust and confidence.

50. In **Lewis v Motorworld Garages Ltd 1986ICR 157, CA**, the Court of Appeal held that a course of conduct can cumulatively amount to a fundamental breach of contract leading the employee to resign following a 'last straw' incident even though that last incident did not alone, amount to a breach of contract.

51. However, the 'last straw' cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

52. There is also an implied term that an employer will reasonably and promptly give employees an opportunity to seek redress for any grievance: **Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516**. Alternatively, failure to handle a grievance properly might amount to breach of the implied term as to trust and confidence if serious enough to be repudiatory.

53. In the case of **Assamoi v Spirit Pub Company (Services) Limited (formerly known as Punch Pub Co Limited) UKEAT/0050/11/LA** the Employment Appeal Tribunal confirmed that (paragraph 36):

> **"There is a fundamental distinction which, it is perhaps more easy to recognise than to define, between there being a fundamental breach of contract that an apology by an employer cannot cure and there being action by an employer that can prevent a breach of contract taking place."**

54. In the case of **Blackburn v Aldi Stores Limited [2013] IRLR 846** the Employment Appeal Tribunal determined that a failure to adhere to a grievance procedure was capable of amounting to or contributing to a fundamental breach. However, not every failure to adhere to such procedure will constitute a fundamental breach. The Employment Appeal Tribunal was clear that this is a question for the Tribunal to assess in each individual case.

Unlawful Deduction from Wages

55. The unlawful deduction from wages claim was brought under Part II of the Employment Rights Act 1996. Section 13 confers the right not to suffer unauthorised deductions unless:

> **"(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision in the worker's contract; or**
>
> **(b) The worker has previously signified in writing his agreement or consent to the making of the deduction."**

56. A relevant provision in the worker's contract is defined by section 13(2) as:

> **"(a) One or more written contractual terms of which the employer has given the worker a copy of on an occasion prior to the employer making the deduction in question; or**

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

57. A deduction is defined by section 13(3) as follows:

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

58. Section 27 defines wages, which includes:

> **"(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.**
>
> **(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992."**

59. Section 24 provides that:

> **"Where any complaint under section 23 is well-founded the Tribunal can make an order that the employer pay to the worker the amount of any deduction in contravention of section 13."**

60. However, section 25 determines that:

> **"(3) An employer shall not under section 24 be ordered by a Tribunal to pay or repay to a worker any amount in respect of a deduction or payment, or in respect of any combination of deductions or payments, insofar as it appears to the Tribunal that he has already paid or repaid any such amount to the worker."**

Holiday Pay

61. Regulation 14 of the Working Time Regulations 1998 provides:

> **"(1) this regulation applies where –**
>
> **(a) a worker's employment is terminated during the course of this leave year, and**
>
> **(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.**
>
> **(2) where the proportion of the leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3)."**

Submissions

Respondent's submissions

62. The respondent submitted that there are four elements to constructive unfair dismissal claims:

(1) Breach of contract, whether it was written or implied?

(2) Whether the breach went to the root of the contract, was it a fundamental term?

(3) Had the employee resigned in response to the breach?

(4) Whether there had been a delay in acting on the breach or had there been a waiver?

63. It was the respondent's position that the claimant had taken legal advice in September 2019 and wanted to go to a Tribunal. The respondent submitted that in refusing to attend the disciplinary hearing the claimant wanted to be sacked so she could take the claim to a Tribunal.

64. The respondent submitted that the claimant had accepted the holiday year change despite it being a unilateral change. The respondent accepted that this change amounted to a breach of contract. However, it was the respondent's position that it was not fundamental: the claimant's holidays were honoured and therefore it was not relevant to constructive unfair dismissal.

65. The respondent also submitted that there was no contractual right to shift patterns and therefore there had not been a breach of contract.

66. In regard to overtime, the respondent accepted that there had been a unilateral change from pay as remuneration to TOIL as remuneration, and whilst this was a breach, it was not fundamental. The respondent submitted that the claimant did not resign in response and therefore it was not relevant to constructive unfair dismissal.

67. The respondent submitted that there was no contractual term to a rest break and that the claimant had not brought a separate claim for breach of the Working Time Regulations. The Tribunal was asked to accept that the respondent did allow breaks to be taken at appropriate times. The respondent also submitted that there was no contractual term in regard to lone working and that the policy was in support of lone working.

68. The respondent noted that the claimant admitted that she had already received risk assessments and that therefore, there was no breach of contract.

69. The respondent submitted that the disciplinary procedure was non-contractual and therefore not following the procedure was not an express breach. The respondent took the view that it had reasonable cause to act in the way that it did, and it did not seriously damage the trust and confidence of the claimant. The respondent submitted that the atmosphere had become toxic and it was necessary to deal with the claimant's behaviour. The respondent submitted it was not a breach to suspend the claimant.

70. In addition, the respondent took the view that the claimant had sufficient notice of the disciplinary hearing with sufficient time to prepare, and in any event the hearing did not go ahead as a result of the claimant's illness.

71. It is the respondent's case that the claimant resigned as a result of setting up her own gym. It was not accepted that the claimant did not know about the setting up of the gym, and that the evidence given by, in particular Mrs Bryan, was that there were discussions between the claimant and new members about alternative locations prior to the claimant's resignation.

Claimant's Submissions

72. The claimant submitted that she was subject to such treatment to force her dismissal. The claimant relied on the further and better particulars document that she had previously submitted as her detailed submissions. The claimant maintained that she was forced out of the business and had she not been, she would never have set up her own alternative business.

Discussion and Conclusions

Change to Holiday Year

73. The claimant's contract provided for a holiday year from 1 July until 30 June each year. The calendar dates for the holiday year were also confirmed in the employee liability information and due diligence document at pages 53 and 54 of the bundle. The contract did not allow for a variance of this particular term.

74. The claimant did not provide evidence in chief about this potential breach of contract, and there was no mention by the claimant of such a potential breach in her original claim form.

75. In the further and better particulars document provided by the claimant, the claimant complained that there was a breach on 29 March 2019 (when the new owners took over the business) that changed her holiday year from 1 April to 31 March. The claimant stated that she had lost holiday entitlement and had lost pay.

76. In an amended response, the respondent admitted that there had been a change to the holiday year, but with consultation and that employees had been offered one extra day's leave to compensate for the change.

77. In cross examination the claimant admitted that she was told by John Small that there would be a change to the holidays. She also admitted that her holidays were honoured and there was no loss. The claimant said she was concerned that she would not be able to take her holidays in the future.

78. The claimant also stated in cross examination that this change was not something for which she would resign. The claimant admitted that she now owned her own business and understood that things change, and that this was not a factor in her resignation. The claimant admitted that the issue she had with the change to the holiday year was the way in which it was handled, as opposed to the change itself.

79. In evidence in chief Cheryl Stephens said that all holidays were honoured, and all employees were consulted. In cross examination Cheryl Stephens said that John Small was an ex-trade union representative and he was responsible for the payroll and financial side of the business and she was responsible for the operational

side. Cheryl Stephens was adamant that John Small met with all staff, including the claimant, and this is how she knew that the claimant had questions about the holiday year after that meeting.

80. In submissions the respondent's representative admitted that this amounted to a breach of contract because it was a unilateral change but denied that it was fundamental.

81. I find that this did amount to a unilateral breach of contract because the change was imposed upon the employees. Informing an employee about a change does not amount to consultation. The claimant was however, clear that she did not object to the change but rather the methodology of how she was informed of the change

82. Whilst it was a breach, it was not a fundamental breach of the contract which went to the root of the contract and showed that the respondent did not intend to be bound by the contract. The employees were compensated with one day's extra leave and the claimant admitted that the change did not cause her any loss.

83. In addition, the claimant took holidays in May 2019, June 2019 and August 2019 thereby affirming the change imposed by the respondent.

Change to shift patterns

84. Paragraph 5.1 of the claimant's contract did not provide for set or permanent shifts. Instead, the claimant was required to work a minimum of 15 hours per week during the hours that the gym was open. Paragraph 5.2 of the claimant's contract allowed for a variation in the number of hours the claimant could be asked to work. No notice period was required for any change in the number of hours worked. Paragraph 5.3 allowed for a general variation to the claimant's hours.

85. In her claim form the claimant stated that there was a breach because she was required to work longer hours than had previously been the case under the previous owners.

86. In the further and better particulars document, the claimant set out that the breach occurred on 29 March 2019 and complained that she was provided with short notice of a shift change and had to work extra hours. The claimant did not provide any further evidence of this alleged breach.

87. In the amended response, the respondent stated that the claimant agreed to work extra hours and change shift patterns because the gym was short-staffed after a number of resignations.

88. In the claimant's evidence in chief she complained that she was asked to work beyond her normal 15 hours and sometimes 20 hours per week. In particular, the claimant highlighted a shift on 3 July 2019 in which she was asked to stay on shift by Cheryl Stephens.

89. In cross examination the claimant admitted that she received at least one week's notice of her shift pattern but complained that it used to be three weeks. The

claimant also admitted that she knew she could be asked to work more hours when she took the job.

90. The claimant revealed that prior to the change of ownership, she would often swap shifts with colleagues when it suited her. The claimant was unhappy that the changes were now made without consultation.

91. When it was put to the claimant that her shifts were changed the week of 1 July 2019 at short notice because John Small was in hospital, she denied she knew about his illness. I find that it is likely that the claimant knew that John Small was in hospital in light of the texts sent between the claimant and Cheryl Stephens on 1 July 2019.

92. In Gemma Barker's evidence she admitted that the issue that she had with the shift change was that they had to give notice in writing as opposed to being able to agree changes between each other.

93. In Cheryl Stephens' evidence in chief she explained that on taking over the business the owner left and the other main instructor, Karen, also left, and this left 20-30 hours that needed to be filled. It was Cheryl Stephens' evidence that the claimant had agreed to do extra hours to fill the gap. In cross examination Cheryl Stephens said that during the week of 1 July 2019 John Small was in hospital and this was why there had to be a change to the claimant's shifts without consultation.

94. In submissions the respondent submitted that there was no contractual shift pattern and therefore no breach of contract.

95. I find that there was no contractual shift pattern and that there was a term within the contract that allowed variation of hours both in terms of duration and the timing of hours worked. The claimant agreed to work more hours after the respondent was left short staffed

96. The claimant only provided evidence about the long shifts she worked on 3 July 2019 and 5 July 2019. These shifts coincided with the week that John Small was hospitalised. The claimant was aware of his illness and Cheryl Stevens inability to attend at the gym during that week. The claimant's contract provided for a variance to her hours. The claimant had previously agreed to vary her hours. I do not conclude that being asked to work long shifts in exceptional circumstances amounted to a breach of the claimant's contract.

Claimant's Overtime

97. The claimant's contract provided for additional pay if overtime was worked. Employees could be required to work overtime to meet the operational needs of the business.

98. In her claim form, the claimant complained that she was required to work longer hours. In her further and better particulars document, the claimant complained that the breach occurred on 29 March 2019 when the new owners changed the remuneration for overtime from pay to time off in lieu. The claimant also complained that when she requested time off in lieu it was declined.

99. The amended response stated that the employees were consulted about this change and given an extra day off as compensation.

100. The claimant did not provide any evidence in chief about this overtime issue but under cross examination admitted that she was never actually denied time off in lieu but could foresee that this is what would happen. The claimant also admitted that because she now had her own business, she respected that things would need to change to meet the operational needs of the business, and that this was not enough to resign on its own.

101. The claimant admitted that she was told of this change by John Small and it was likely that this was at the same time as she was told about the change to the holiday year. The claimant also admitted that she worked overtime after she had been told of the change in remuneration.

102. The claimant complained that there was no record of the additional overtime but admitted that the failure to record any overtime was not something she raised in her grievance.

103. Gemma Barker gave evidence that when she tried to take the time off in lieu it was denied.

104. In Cheryl Stephens' evidence in chief she explained that the time off in lieu had been implemented and that the claimant had affirmed it by working overtime after the change was made. In cross examination, Cheryl Stephens said that the respondent had changed to the TOIL system as a result of discrepancies in the previous system and to help staff with leave. She admitted that the business could not sustain overtime payments but could sustain time off with the level of staff that were in the business prior to many of them resigning.

105. In submissions the respondenct accepted that there had been a unilateral breach but denied that it was fundamental. In the alternative it was said that if it was fundamental the claimant had affirmed that breach.

106. I find that there was a breach of the claimant's contract because there was a change from remuneration in pay to remuneration in time off in lieu. This was a fundamental breach of the claimant's contract because she was denied pay despite working extra hours. This change showed that the respondent chose no longer to be bound by this part of the contract.

107. However, there was no evidence that had the claimant sought to take the time off in lieu, this would have been denied. The claimant did not provide any evidence that she had suffered actual loss as a result of this change.

108. The claimant carried on working overtime without complaint and admitted it did not cause her to resign. I therefore conclude that the claimant affirmed this change to her contract and did not resign as a result of this change.

<u>Rest break</u>

109. The claimant's contract and the employee handbook are silent on rest breaks. The claim form did not mention this part of the claim. In the further and better

particulars document the claimant stated that on 29 March 2019 she was forced to work 12 hours without a rest break, and this breached the Working Time Regulations 1998. The claimant did not provide any evidence about the lack of rest break on this day.

110. In the amended response the respondent denied that the claimant had been denied a break. It was the respondent's position that there was never any assigned break time, but employees knew to take one when it was needed.

111. In the claimant's evidence in chief she only gave evidence about the shift on 3 July 2019 and the change to that shift as opposed to the fact that she did not receive a break. In cross examination the claimant complained that the shift that she worked on 5 July 2019 was a nine hour shift and which she was asked to work alone.

112. In evidence in chief Cheryl Stephens repeated what was said in the amended response: that the employees were free to take breaks whenever they wanted. In cross examination Cheryl Stephens said that when she took over the gym, she did not change the system of breaks and the position was as it was before she became the owner.

113. Cheryl Stephens gave evidence that the practice was to take breaks at quieter times in the gym, usually over lunchtime. It was Cheryl Stephens' evidence that on 5 July 2019 the gym manager, Angela Murphy, would have called into the gym, despite it being her day off, to make sure that the claimant had a break. However, Cheryl Stephens admitted that she did not know whether this had actually happened.

114. The respondent's submissions on the point were that Employment Judge Benson had made clear at the case management hearing that the claimant was not bringing a separate claim for a breach of the Working Time Regulations. It was the respondent's position that there was no contractual term to rest breaks, and the respondent said in any event that they were allowed.

115. I conclude that the right to a rest break, whilst not contained within the claimant's contract, was in fact an implied term that she would be entitled to her rest breaks in accordance with the Working Time Regulations 1998.

116. On 3 July 2019 and 5 July 2019, the claimant worked long shifts. On 3 July 2019 the claimant's shift was extended unexpectedly when Cheryl Stevens could not leave the hospital.

117. The rota does not reveal that Angela Murphy came in to relieve the claimant on 5 July 2019. The claimant says she was unable to take a break on 5 July 2019 and therefore I conclude that it was likely that she did not have an opportunity to take a break during that shift.

118. During this week John Small had been taken ill. Cheryl Stevens and John Small were partners in both a professional and private capacity. In light of John Small's hospitalisation, Cheryl Stevens could not be at the gym. However, the claimant was entitled to rest breaks on 3 July 2019 and 5 July 2019.

119. The lack of rest break during both shifts was a breach of contract. However, there were extenuating circumstances and I do not conclude that the breach was fundamental such that the respondent did not intend to be bound by the contract.

120. The claimant did not provide evidence of any other shifts when she could not take a rest break. I accept Cheryl Stevens evidence that employees usually took rest breaks during quieter periods. It was not possible to do so on these shifts in light of the extenuating circumstances.

121. The claimant was aware of the extenuating circumstances and could not have concluded that she was no longer allowed to take rest breaks during her shifts such that this breach contributed to the claimant's decision to resign.

Lone Working

122. Paragraph 1.1 of the claimant's contract allowed for the variance of duties within the claimant's role. There was no specific clause in regard to lone working. However, the respondent did operate a lone worker policy that had been in place since 2014. This policy allowed for lone working on a regular basis and there was no preclusion of lone working in the employee handbook.

123. The claimant's claim form makes no mention of her complaint about lone working. In her further and better particulars document, the claimant set out that the health and safety of a lone worker was an issue. In the amended response the respondent relied on the lone working policy and denied that the claimant worked alone.

124. In the claimant's evidence in chief she said that on 3 July 2019 she was a lone worker. In cross examination she complained it was the duration of the lone working as opposed to lone working itself that caused her an issue.

125. Cheryl Stephens' evidence in chief denied that the claimant was a lone worker. However, in cross examination Cheryl Stephens relied on the lone worker policy from 2014 and admitted that instructors would work alone due to the shortage of staff. It was Cheryl Stephens' evidence that the claimant never raised an issue about lone working.

126. The claimant complained in general about being isolated and not being asked to work on shift with new team members. This was the context of the claimant's complaint about lone working – that she was isolated.

127. I find that the claimant's real complaints were the lack of rest breaks on 3 July 2019 or 5 July 2019 and the short notice at which the claimant's shift was changed on 3 July 2019. The respondent had a policy from 2014 which allowed for lone working and therefore there was no breach of the claimant's contract in this regard.

Failure to risk assess

128. At paragraph 37 of the employee handbook there is a reference in the claimant's contract to eliminating risks and hazards in the workplace and the duty being upon the employee to disclose to the owners if there were any particular

issues with themselves. There is no right to a risk assessment in the claimant's contract.

129. In the claimant's claim form, she complained that no risk assessments were carried out. In the further and better particulars document the claimant complained that on 29 March 2019 she was not subject to any risk assessments, and in particular they were necessary to establish if an employee was capable of doing a long and lone shift.

130. In the amended response the respondent asserted that all risk assessments had been completed and if there were any further issues it was incumbent upon the claimant to have raised them with the owners.

131. The claimant did not provide any evidence in chief about this issue and in cross examination admitted that risk assessments had been carried out by the previous owners. Similarly, Gemma Barker also admitted that risk assessments had been carried out by previous owners.

132. In her evidence in chief Cheryl Stephens did not comment on risk assessments, but in cross examination confirmed that all risk assessments had been completed by the previous owners.

133. In submissions the respondent stated that there had been no breach because the claimant had accepted that she had been subject to risk assessments.

134. The respondent has a duty of care for an employee's health and safety. This is an implied term of a contract that should be adhered to. However, the claimant did accept that she had previously been subject to risk assessments and the employee handbook made it clear that it was incumbent upon the employee to bring anything different to the owner's notice that could change that risk assessment. I conclude therefore that there was no breach of this implied term.

Disciplinary Procedure

135. The disciplinary procedure that accompanied the claimant's contract was non contractual. It allowed for suspension of an employee if there was serious or gross misconduct. Gross misconduct included extremely serious insubordination. Any allegation had to be set out in writing and the employee given sufficient information to prepare a case before a hearing. The employee also had to be given reasonable time to prepare before the hearing.

136. In her claim form, the claimant complained that she had been falsely accused and suspended on 17 September 2019. In her further and better particulars document the claimant stated that she was unaware of why she had been suspended and that the respondent had failed to follow the less formal stages of the disciplinary procedure before suspension. The claimant asserted that the respondent had made false accusations in order to manage her out of her role and that she had been given no opportunity to defend her position.

137. In the respondent's amended response, it was asserted that the claimant had refused to participate in training and that she had been suspended for creating hostility within the business. The respondent asserted that the claimant had an

opportunity to attend a hearing on 24 September 2019 but that this had been postponed because the claimant was off sick from 18 September 2019 until she resigned.

138. In the claimant's evidence in chief she stated that she was asked to contribute to the training without preparation and therefore there was a risk of injury and so refused to get involved. It was the claimant's position that she suggested a reasonable alternative of watching a video. The claimant also stated that she was shouted at by both Cheryl Stephens and John Small during the meeting and was ultimately suspended for not doing as she was told. The claimant also complained that she was forced to hand back keys to the gym.

139. The claimant admitted that her allegations that she was shouted at did not appear either in her grievance or her claim form. In cross examination the claimant said that John Small raised his voice. The claimant also asserted that Cheryl Stephens did raise the July appraisal warning during the suspension meeting.

140. In cross examination the claimant admitted she knew that Angela Murphy had mobility issues and was unable to do the exercise required. However, it was the claimant's position that she had attended the course as a trainee on her day off. The claimant maintained that if she was required to present the training, she should have been given notice the week before in order to prepare. The claimant denied that Cheryl Stephens asked her to do this.

141. The claimant agreed that in such circumstances it would be reasonable for managers to investigate and suspend an individual who had refused to take part in a training exercise and about who there had been complaints of inappropriate behaviour.

142. It was the claimant's position that her grievance document set out her defence to those allegations and she admitted that she had received legal advice and contact with ACAS in September 2019. The claimant also admitted that it was her view that the last straw occurred when she was suspended on 17 September 2019.

143. The claimant admitted that she was frustrated because she had been denied career progression to manager level. The claimant said she did not resign on 17 September 2019 in order to help the business because she had done nothing wrong. It was the claimant's position that the change to her holiday hours and treatment of the members was still an issue when she resigned from the business.

144. The claimant confirmed that there had been no attempt to revive the disciplinary hearing and instead had wanted her grievance to be heard but could not agree a neutral venue with the owners.

145. In evidence in chief Cheryl Stephens said that she did ask the claimant to contribute to the session on the morning of 10 September in light of her own absence from the business and because Angela Murphy had mobility issues. Cheryl Stephens said that the claimant's continuous attitude was affecting the business and because she had not improved since the appraisal meeting in July, she had to be suspended.

146. In cross examination Cheryl Stephens said that Angela Murphy had text Cheryl Stephens on 10 September 2019 following the training session and following this contact, Angela produced a statement.

147. Cheryl Stephens denied that she spoke to the claimant at the suspension meeting on 17 September 2019 until the claimant had been given an opportunity to respond to what John Small had said. It was Cheryl Stephens' view that it was clear that the claimant was not going to be a team player and needed to be suspended. She admitted that the claimant was shaking as she handed over the keys. Cheryl Stephens said that there had been a number of issues which showed the claimant's insubordination and therefore there was no choice but suspension.

148. Anne Walsh gave evidence that she joined the business after the change in ownership and she submitted a statement about the claimant's inappropriate attitude towards her as a new member of staff.

149. The respondent submitted that it had a reasonable cause to suspend and investigate the claimant. The respondent relied on the statement from Anne Walsh and the statement from Angela Murphy. The respondent also relied upon the fact that the claimant had been given a verbal warning about not being a team player and that Cheryl Stephens had given evidence about a particular incident in March where she had been embarrassed in front of members by the claimant. The respondent submitted that the decision to suspend and investigate was not a breach but was in fact a reasonable thing to do.

150. The claimant was aware of why she had been suspended. The respondent sent a letter on 19 September 2019 setting out the allegations against the claimant. It was not possible for the respondent to deal with the less formal stages of the disciplinary process because it had to investigate and decide whether the claimant should in fact face dismissal or whether a lesser sanction would have been appropriate.

151. I do not agree that the claimant was not given an opportunity to defend her position. The respondent arranged a disciplinary hearing for 24 September 2019 but was unable to hold that hearing because the claimant was off sick.

152. The claimant's grievance effectively amounted to a defence of those allegations and the respondent sought to convene a grievance hearing to hear what the claimant had to say. Unfortunately, the claimant was unwilling to attend at the venue identified and then requested that the grievance hearing take place when the business was closed or at the busiest time in January.

153. I do not find that the claimant was falsely accused. The claimant did not help with the training session and had already received a verbal warning for not being a team player. Both Anne Walsh and Angela Murphy submitted statements setting out their account of the claimant's behaviour and the respondent was entitled to take them at face value and investigate.

154. I do not find that the respondent breached the disciplinary procedure by suspending the claimant on 17 September 2019. The respondent acted reasonably in suspending the claimant in light of alleged continued insubordination and seeking to investigate the matter further.

Reason for Claimant's resignation

155. The claimant relies upon the suspension on 17 September 2019 as the last straw prior to her resignation. The claimant was absent on sick leave from 18 September 2019 until her resignation in January 2020.

156. However, because I have found that the suspension did not amount to a breach of the claimant's contract, I have considered whether cumulatively all the acts about which the claimant complains, could amount to a breach of implied term of trust and confidence and be said to be the cause of the claimant's resignation.

157. The respondent made changes to the claimant's leave year and overtime remuneration as soon as the new owners took over the business. The claimant accepted the changes and took leave and worked overtime in accordance with those changes and did not suffer an actual loss as a result of the changes. The claimant admitted that neither change caused her to think of resignation.

158. The claimant admitted that in May 2019 she was frustrated that she had been overlooked for the management role given to Angela Murphy. By July 2019 the claimant was expressing her frustration via text message to Cheryl Stevens which unfortunately coincided with the serious illness of John Small. As a result, the claimant was required to work two long shifts without rest breaks.

159. However, in March/April 2019 the claimant had agreed to work in excess of her contracted hours and provided no evidence that the denial of rest breaks continued beyond the two shifts identified.

160. The claimant continued to work for the respondent and accepted the verbal warning about her attitude during an appraisal meeting in mid July 2019 without complaint.

161. After the claimant's frustration manifested during the training session on 10 September 2019, she was suspended a week later, but still did not resign until January 2020. The claimant raised grievances but would not agree to attend a hearing until the latter part of 2019/early 2020. The claimant never attended a disciplinary hearing because of her sickness absence.

162. By January 2020 the claimant's husband had set up a gym for the claimant to run as alternative employment. The claimant was adamant she did not know about this plan until the gym had been set up. The claimant admitted that her husband had set the business up in November and December 2019 and she had found out about it in early January 2020.

163. I heard evidence from various witnesses including gym members such as Mrs Bryan. It is clear that the claimant was considering alternative venues prior to January 2020 and communicated the location of those venues to potential members. Registration for new membership opened the week of 21 January 2020 and the gym itself opened in early February 2020.

164. The cumulative issues that the claimant had with the respondent did not amount to a breach of the implied term of trust and confidence. The claimant was frustrated that she had been overlooked for a management position and exhibited a poor attitude that led to her facing disciplinary allegations. The claimant accepted the changes to her working conditions and understood the exceptional circumstances that led to long shifts in July 2019. The claimant accepted the verbal warning about her attitude in July 2019.

165. I conclude that the cause of the claimant's resignation was her new business as a preferable alternative to returning to employment with the respondent with whom she was frustrated.

166. The claim for constructive unfair dismissal is dismissed.

Arrears of Pay

167. The claimant admitted during evidence that she did not submit a fit note for the month of January 2020.

168. In accordance with the Statutory Sick Pay (General) Regulations 1982 the claimant was required to submit a fit note in order to qualify for the payment of statutory sick pay.

169. The claimant therefore conceded that as a result of her failure to submit a note she was not entitled to payment of statutory sick pay and the unlawful deduction from wages claim brought in accordance with section 13 of the Employment Rights Act 1996 is dismissed.

Holiday pay

170. At the outset of the hearing the claimant confirmed that by October 2021, the respondent had paid her the correct rate of holiday pay to which she was entitled on termination of her employment.

171. The claimant was however concerned that the wrong rate of tax had been applied when that payment was put through the PAYE system and she had received a lower rate to which she was entitled.

172. It was agreed that the claimant would raise this directly with HMRC in order to resolve what all parties agreed was probably the application of an emergency tax code in light of the fact that the claimant had left the respondent’s employment in January 2020.

173. I did not hear any evidence on this issue and the claimant did not advise me of any update from HMRC during closing submissions.

174. In light of the claimant’s concession that the respondent paid the correct rate of holiday pay on termination of employment this claim is dismissed.

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Employment Judge Ainscough

Date: 2 March 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

8 March 2022

FOR THE TRIBUNAL OFFICE

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