EMPLOYMENT TRIBUNALS

Claimant: Ms C Feingold

Respondent: Harrogate Borough Council

HELD AT: Leeds **ON:** 16-20 October 2017

BEFORE: Employment Judge Tom Ryan

Appearances:
Claimant: Mr M Feingold, claimant's husband
Respondents: Mr N Siddall, Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the complaints of constructive unfair dismissal, breach of contract and unauthorised deductions from wages are not well-founded and are dismissed.

REASONS

1. By a claim presented to the Tribunal on 17 February 2017 the claimant brought complaints of: constructive unfair dismissal; breach of contract in respect of notice pay, pension contributions and level of pay. She sought an uplift in respect of breaches of the ACAS Code and a claim for an award under section 38 of the Employment Act 2002 in respect of a failure to provide a written statement of terms and conditions. The respondent resisted all the complaints.

2. At a preliminary hearing for case management on 28 April 2017 the complaint under section 38 of the Employment Act 2002 was withdrawn. The claimant was given permission to provide further and better particulars. Those were provided on 23 May 2017. In addition to providing further information the claimant made there for the first time 22 allegations of bullying that were not included within the initial claim form. No application was made to amend the claim prior to the

hearing. The claimant was professionally represented until shortly before the hearing. I explained to Mr Feingold that in order for the allegations of bullying to be considered as comprising part of the complaint of constructive dismissal an application would have to be made and granted. No application was made by the claimant before me.

3. The claimant's further information of 23 May 2017 identified the following matters as comprising breaches of the implied term of trust and confidence:

   3.1. The claimant's suspension on 30 August 2016 being unlawful as the allegations did not reasonably amount to gross misconduct;

   3.2. the suspension being unlawful as it was not kept under review;

   3.3. the suspension being unlawful as the respondent gave insufficient thought to relocating the claimant;

   3.4. the suspension being unlawful as respondent did not give any, or sufficient, consideration to relocating/suspending the claimant's colleagues;

   3.5. the unreasonable duration of the suspension;

   3.6. requiring the claimant to return to work with her harassers on 18 October 2016;

   3.7. requiring the claimant return to work with her harassers without mediation being concluded;

   3.8. requiring the claimant return to work with her harassers without adequate support. The support sought was to:

      3.8.1. consider protecting the claimant from contact with her harassers until the grievance was concluded;
      3.8.2. taking the claimant's complaint seriously;
      3.8.3. providing a safe working environment for the claimant;

   3.9. failing to address matters confidentially (referring back to an allegation of breach of confidence by the respondent's CEO);

   3.10. failing to address matters impartially on the basis of a disparity between the claimant and the authors of the group grievance;

   3.11. failing to address the claimant's grievance as quickly and efficiently as possible;

   3.12. failing to suspend/transfer the alleged bullying/harassers.

4. In the event that the tribunal were to find that the claimant was dismissed, the respondent did not assert or seek to show a potentially fair reason for dismissal. Arguments in respect of Polkey and contributory conduct reductions in any award were raised.

5. The claimant's complaint of breach of contract comprised the following matters:

   5.1. That she had not been paid the holiday pay to which she was entitled as her pay was calculated on an incorrect rate;
   5.2. that she had not been paid the pension to which she was entitled;

   5.3. that she had not been paid back pay to which she was entitled as a result of an express term of her contract;

   5.4. that she was not being paid back pay to which was entitled as a result of an implied term of her contract.

Evidence

6. I heard oral evidence from the claimant. On behalf of the respondent I heard evidence from: Ms Joanna Worth, Ms Jeanette Packwood, Ms Kim Betts, Ms Bernice Elgot, Ms Susan McGarry and Mr Ben Cutting. I was provided with written witness statements from all of those witnesses. The claimant and Ms Worth provided supplementary statements in addition. I was also provided with statements from Ms Cara-Jane Feingold, the claimant's daughter, but she was not called to give oral evidence. The respondent indicated that whilst it did not accept her evidence it was not intended that she should be cross-examined.

7. I was provided with a bundle comprising 3 files of documents to which I refer by page number. The respondent provided an opening skeleton argument. Both parties had prepared chronologies. Both parties provided written closing submissions.

Findings of Fact

8. I make the following findings of fact.

9. The claimant commenced employment at Ripon Leisure Centre ("RLC") on 1 August 2008 as a part-time casual gymnastics coach and part-time crèche assistant/leisure assistant.

10. In 2011 the claimant's employment became that of casual head of gymnastics coaching. She then worked throughout the year but not during the summer school holidays. From 1 September 2011 to 31 July 2013 the claimant was a permanent contracted member of staff in her role as a crèche assistant.

11. When the claimant became head of gymnastics she was paid for coaching at 15.5 hours per at the rate of £13.67 per hour. She was paid £7.88 per hour for a further 5 hours per week which was a leisure assistant rate for administration and attending meetings. This continued until after a job evaluation the claimant was offered a contract of employment in October 2016. The rates stated above were the effective rates at the time of the termination of the claimant's employment. As a casual employee the claimants submitted and signed time sheets (1443-1505). These records reflect the different levels of pay as do her payslips (1525-1611).

12. The pay arrangements were confirmed to the claimant on 4 March 2013 (359) by Mr Pederson who was the operations manager at RLC.

13. The claimant resigned her position as crèche assistant at the end of July 2013. As a result the employer's pension contributions that had been made to the claimant in respect of that role ceased to be paid by the respondent.

14. With effect from 1 October 2013 the claimant was automatically enrolled as a member of the pension scheme in her role as head of gymnastics coach and employer's pension contributions were made (1619). On 9 June 2014 the claimant opted out of the pension scheme in respect of that role (387-388) and the contibutions ceased..

15. On 5 May 2016 the claimant raised a grievance (480a-512). She complained that she not be provided with a written statement of terms and conditions or a job description as head coach. She referred to having made numerous written and verbal requests for that. She complained that she was paid at a general leisure assistant rate for the work that she was undertaking. She alleged she been bullied and harassed by Mr Pederson, Ian Law, Mark Foyle and Jan Filippi. She alleged she had been shown a lack of respect by other employees and aggression by Ian Law and that she had been sworn at on a number of occasions in front of junior coaches within public areas by Ian Law and Mark Foyle.

16. On 14 June 2016 Ms Packwood wrote to the claimant providing a response (550-552) to the stage one grievance that the claimant had raised. Ms Packwood recommended that the grievance be resolved as to the contract and pay matters by completing a job description and a job evaluation and then, subject to approval by the appropriate committee, adding the post of head gymnastics coach to the establishment. As to the issues within the staff team at RLC, Ms Packwood recommended that communication processes be improved, that there should be continued consultation on the restructuring of the gymnastics program and implementing any necessary changes and that, if all parties were willing, to look to offer mediation with an independent body in order to improve working relationships. The allegations of bullying and harassment were not upheld.

17. The claimant responded on 17 June 2016 (557) expressing the opinion that most of the outcomes of the grievance had "the appearance of a whitewash". She stated that there was a "complete breakdown of trust". She said that she was no longer willing to work with Mr Pedersen Mr law or Miss Filippi. The claimant suggested that she would be prepared to engage in mediation but only if it happened before the end of term and that agreed objectives to be achieved were identified. She asked whether the respondent wished to conduct mediation in parallel with an appeal against the grievance outcome.

18. Mediation was not taken further because of the claimant's desire to appeal. Ms Packwood explained that to the claimant in an email of 21 June 2016 (557).

19. On 21 June 2016 the claimant made her appeal in writing to Mr Avison. By the time he replied to her on 30 June 2016 the claimant had written a 2nd grievance again complaining further about Mr Pederson and the staff at RLC (596). This was treated by the respondent as a bullying and harassment complaint by the

claimant. However, the claimant's exchange with Mr Pederson on 30 June 2016 led to another member of staff, Mr Ferguson, complaining that the claimant had acted in an abrupt and unprofessional manner.

20. The respondent nominated Lois Toyne to hear the claimant's appeal and Jeanette Packwood to conduct the first stage meeting in relation to bullying and harassment. The claimant objected to those officers being appointed to those tasks.

21. On 12 July 2016 the respondent nominated Madeline Bell and Susan McGarry to deal with those matters respectively.

22. On 18 July 2016 the claimant confirmed that she could attend a meeting with Madeline Bell on Wednesday, 20 July 2016 and that she was available to meet Susan McGarry after 5 September 2016.

23. The respondent changed the shift patterns for certain staff members at RLC from 20 July 2016 to accommodate the claimant's request that some members of staff were transferred to different shifts while she was at work. This change lasted until 23 July 2016.

24. On 20 July 2016 the contractual elements of the claimant's first grievance were considered at a stage II meeting attended by the claimant and Madeline Bell.

25. On 25 July 2016 the claimant commenced a period of annual leave.

26. On 26 July 2016 Ms Elgot, chief solicitor to the council, wrote to the claimant (725) asking whether the claimant had copies of personal data about customers of the council at home. The claimant responded saying only that she was on holiday until 6 September.

27. On 5 August 2016, after further correspondence between the claimant and Ms Elgot, Kim Betts wrote to the claimant requiring her to attend a disciplinary investigation interview on 1 September 2016 in respect of allegations of: falsifying signature on a timesheet, holding personal data in breach of the council's policy and establishing and operating an unauthorised website using the council's logo and Facebook pages referring to the gymnastic classes at RLC without authorisation.

28. On 10 August 2016 the local Unison branch secretary wrote to Jeanette Packwood raising a collective grievance about the change to shift patterns which the council had imposed and the working environment at RLC. The grievance was raised on behalf of 6 named members of staff at RLC. The basis of the grievance was that no explanation had been given for the change to shift patterns although it was understood that the changes were due to a request made by casual employee. Although the claimant was not named this was clearly understood to be a reference to her. The grievance stated that staff were "unhappy at what they believe is the intolerable working environment that on-going issues relating to the casual member of staff have created."

29. Also on 10 August 2016 respondent informed the claimant that mediation would be progressed on her return to work (760).

30. On 22 August 2016 Lois Toyne and Jeanette Packwood held a meeting for those who had raised the collective grievance (773-776). Those whose names were included in the grievance were present save for Nyree Salter who was on holiday. Mr Pederson, Mark Foyle, Matt Simpson and Iain Hendry also attended. It was made clear that all those present shared the concerns outlined in the collective grievance. These comprised all or nearly all the members of staff at RLC.

31. On 29 August 2016 the claimant wrote to say that she was not available to attend the disciplinary investigation on 1 September 2016 (807). She asked that it be rescheduled for 5 September because of her coaching commitments.

32. On 30 August 2016 Ms Toyne wrote to the claimant (810-812) suspending the claimant pending investigations into allegations of breach of trust, improper, disorderly or unacceptable conduct at work and failure to comply with reasonable orders or instructions. She explained that the allegations arose following a collective grievance raised by the claimant's work colleagues. She set out the effect that it was asserted the claimant's behaviour had on her colleagues' well-being and described it as "disruptive to the proper delivery of the Council's services to its customers."

33. Ms Toyne recorded that the suspension would be kept under review and the council would aim to make it no longer than was necessary. She explained that Miss McGarry would continue to deal with the claimant's bullying and harassment allegations. She listed 3 instructions: that the claimant was not to attend the workplace unless authorised nor communicate with workers, contractors or customers; that the claimant return to Ben Cutting any data relating to her work and that any customer queries received by the claimant must be referred to Mr Cutting. Mr Cutting had succeeded Mr Pederson as operations manager at RLC. The letter made it clear that the restriction on communication with workers did not apply to the claimant's daughters who were casual gymnastics coaches at RLC. The respondent did not require the claimant to keep the fact of her suspension confidential.

34. Ms Toyne informed the claimant that RLC would issue a statement which she set out in the letter. It was to the effect that the gymnastic programme would not resume on 7 September 2016.

35. On 30 August 2016 also the claimant asked if the mediation would proceed in the light of her suspension. The respondent replied to the effect that it felt it should proceed and a meeting was fixed for 11 October 2016 (820).

36. On 1 September 2016 an email was sent by a member of the public to Mr Sampson, the chief executive of the respondent, expressing concern about the suspension of the gymnastic provision at RLC (927). He replied on 6 September 2016 saying that he was referring the matter for response to Ms Packwood in the absence of Lois Toyne.

37. On 5 September 2016 Ms Betts wrote to the claimant setting out 8 allegations that were made against her. The first 3 repeated those contained in Ms Betts earlier letter of 5 August 2016. Allegations 4 to 8 were: photographing and filming customers of the council including children without consent in advance and publishing them on various media; setting up Facebook and Instagram accounts with reference to the gymnastics classes at RLC; an irretrievable breakdown in the claimant's relationship with colleagues and managers due to her behaviour at work; that the claimant's conduct at work in communication and behaviour towards member of staff and insubordination to managers was improper and unacceptable; and, that she had repeatedly failed to comply with reasonable orders or instructions from her managers.

38. On 6 September 2016 Ms McGarry interviewed the claimant, with her husband present, concerning the allegations of bullying and harassment (942-968).

39. Also on 6 September 2016 the person who had emailed Mr Sampson earlier responded to him saying, "Surely it is not an unreasonable request to know why a successful club with a talented and dedicated crew of coaches has been suspended?" Mr Sampson replied saying, "unfortunately Jeanette will be unable to provide you with any further information at this time as it is not our policy to disclose information where an individual has been suspended pending an investigation."

40. On the same day the claimant raised a further grievance to Joanna Worth. She alleged that information had been communicated to at least one parent of the gymnastics scheme that a member of staff had been suspended in terms which made it obvious that she was that member of staff.

41. On 8 September 2016 the claimant raised a further grievance (1043) alleging that she had attended at RLC to hand over data/information relating to the gymnastic scheme and that personal effects had been removed from her pigeonhole.

42. On 9 September 2016 the claimant raised a yet further grievance (1120) alleging that Ken Ferguson had been discussing the allegations made against the claimant in respect of the collective grievance.

43. When on 12 September 2016 the mediator called the claimant, the claimant said she was to be interviewed for the purposes of the collective grievance and suggested deferring the initial discussion until after that meeting. The claimant conveyed the same message to the respondent. She did not ask the mediator to convene a meeting nor did she ask the respondent to do so.

44. The role of head gymnastics coach was evaluated by a job evaluation panel on 13 September 2016.

45. The claimant was interviewed by Kim Betts in respect of the disciplinary allegations on 16 and 19 September 2016 (1064-1116). Ms Betts asked for the timeline to be produced of the events because of the number of issues that the claimant alleged had occurred. Mr Feingold agreed to produce that timeline but was unable to do so.

46. On 22 September 2016 Ms Toyne wrote to the claimant confirming that her suspension would remain in force and would be reviewed on 30 September 2016.

47. On 30 September 2016 interviews were conducted with staff against whom harassment and bullying allegations being made: Ian Law, Matt Simpson, Lesley McDonald and Jan Filippi.

48. Ms Toyne wrote to the claimant again on 3 October 2016 confirming that her suspension would continue and be reviewed on 7 October 2016.

49. On 5 October 2016 a stage I grievance meeting concerning the claimant's complaint against the chief executive of breach of confidentiality was held by Jennifer Norton.

50. On 6 October 2016 Sarah Ridley provided a response to the contractual element of the claimant's first grievance. She informed the claimant that the position of head coach had been evaluated, a job description had been written and a contract confirming terms and conditions of employment was being prepared. She stated that the claimant "will be paid the same rate of pay for all your contracted hours regardless of activity undertaken" and that this would be at a head coach rate of pay. She referred to the mediation that had been put on hold and asked if the claimant would like it now to take place.

51. On the same day solicitors acting for the claimant wrote a long letter to Ms Toyne summarising and rehearsing a number of the allegations that the claimant had earlier made (1194-1198). The letter asserted that the "unlawful and inordinately lengthy suspension" had destroyed trust and confidence between the parties. It recorded that the claimant had been advised with regard to her employment position and that the claimant did not accept what was alleged to be a repudiatory breach of contract at that stage. The letter was said to comprise a further grievance against the claimant's suspension. It stated that the suspension must be lifted immediately and that the claimant must be allowed to return to work by 17 October 2016.

52. On 7 October 2016 a report into the 8 disciplinary allegations made against the claimant was completed (1217-1232) by Ms Betts. She found there was no case to answer at a disciplinary hearing in respect of any allegation. In the overall conclusion to the report Miss Betts referred to the investigation centring on the claimant's belief that she should be allowed to run the gymnastic scheme "her club" as she wishes and as she had been allowed to do so. Ms Betts referred also to a serious breakdown of relationships and the need for a huge amount of HR time and support. Ms Betts expressed the opinion that the claimant would consider any attempt to manage her running the gymnastics programme as bullying by management. Having spoken to the claimant over many hours Ms Betts said it was evident that the claimant had "very clear views on how a gymnastics club should be run and that may not necessarily fit with the gymnastics programme that the Council wants to deliver." Ms Betts overall opinion was that there was some evidence of weak management and that the claimant's reaction to management requests had not always been professional but there was no strong evidence that the claimant had breached the disciplinary code.

53. On the same day, 7 October 2016, Mr Avison wrote to the claimant say that he would like to meet with her to review her suspension and discuss the outcome of the disciplinary investigation on 10 or 12 October 2016. He recorded that he had received a letter from the claimant's solicitors and that the claimant might wish to bring a solicitor to the meeting although it was not a formal disciplinary or grievance meeting and she could be accompanied by her husband or any other person. He stated that the recommendation of the investigation was that there would be no disciplinary action taken against the claimant.

54. On 11 October 2016 Ms Toyne wrote to the claimant confirming that the suspension had been lifted and that the claimant had agreed with Mr Avison that she was to have a further period of "exceptional paid leave" until 17 October 2016.

55. On 11 October 2016 the respondent issued a contract of employment to the claimant (1328-1331). The claimant did not accept the terms of the contract. Paragraph 4.1 of the contract contained express provision about pay. Paragraph 12.1 provided that in addition to the terms and conditions contained in the contract itself other terms and conditions attached to the post would be in accordance with those prescribed by the National Joint Council for Local Government Service and are set out in the National Agreement on Pay and Conditions of Service as varied or supplemented by the respondent's local conditions and local collective agreements.

56. The claimant went to RLC on 13 October 2016 with her husband and met Mr Ben Cutting who had become the claimant's manager in succession to Mr Pederson. In advance of the meeting the claimant wrote to Mr Cutting saying that she needed to prepare to return to work and to advise him how the gymnastics scheme was being run and how she expected it to continue to run. In a subsequent email she spoke of looking forward to working with someone new and exploring new ideas for gymnastics.

57. During the meeting Mr Cutting formed the impression that the claimant seemed anxious and was not really listening to him. He did not think that the claimant was looking for a positive bilateral working relationship with him based on the emails and the claimant's attitude at the meeting. On the way out of the meeting the claimant went into the small office behind the reception area asking to see her in-tray. Mr Cutting's evidence was that this caused a degree of consternation and distress among staff in the office and he formed the impression that she had done it deliberately to provoke conflict. He persuaded her to leave and escorted her out.

58. On 14 October 2016 Ms Norton provided the outcome (1334-1338) to the stage I grievance the claimant had made against the chief executive of breach of confidentiality. She did not accept that there had been such a breach of confidence.

59. The claimant's period of special leave was extended to 24 October 2016.

60. On 18 October 2016 Ms Elgot wrote to the claimant (1344) confirming that she was required to return to work at RLC in the week beginning 24 October 2016. She asked that the claimant attend a meeting with Mr Cutting and Jeanette Packwood on the following day in order to make necessary arrangements and to discuss a cooperative and constructive way forward. Miss Elgot said that Sarah Ridley of HR would attend to provide support and advice and to assist in making arrangements as soon as possible for mediation to be conducted between the claimant and other staff at RLC.

61. The claimant responded (1343-1344) suggesting that it was "completely inappropriate" even to be invited to such a meeting. She asserted that having a meeting with both the area manager and senior HR present would be unbalanced and intimidating. She alleged that she had discovered that Ms Packwood had been party to some of the "bullying tactics" of Mr Pedersen and Mr Law. She said that Ms Packwood and Ms Ridley had both ignored numerous requests for her to be separated from the situation. The claimant stated she was still awaiting the outcome of her grievance from 5 May 2016. As to mediation she said: "I fail to see what value would be achieved by mediation without a conclusion and report of my grievances and a proper establishment of my contract of employment and job description." She asserted that the course of action suggested by Ms Elgot "only furthers the breakdown of trust and confidence I have in Harrogate Borough Council as my employer." She said that she had made an appointment to see her solicitor and that either she or they would respond subsequently.

62. On the same day Ms Toyne wrote to those who had presented the collective grievance (1346-1347) explaining that the claimant's suspension had been lifted that there was no disciplinary case for her to answer and that she was due to return to work in the week of 24 October 2016. She explained that a mediation would be put in place and that she had arranged a meeting for 20 October 2016 for them with Jeanette Packwood and Ben Cutting for questions or concerns to be raised and to discuss and agree a clear and constructive way forward.

63. On 19 October 2016 Ms Toyne wrote to the claimant (1352) having learned from Ms Elgot that the claimant had declined to attend the meeting. She sought to address the claimant's concerns. She asked the claimant to change her mind about the meeting and comply with what she described as "my reasonable management instruction that you attend".

64. The claimant responded saying she did not doubt that instruction to meet was a reasonable instruction in ordinary circumstances but that these were not ordinary circumstances. She said she was taking legal advice on the breach of trust and confidence and was scheduled to meet her solicitor on the following day. She therefore asked for the meeting to be rescheduled.

65. Ms Toyne replied (1354) saying that she had cancelled the meeting for that day. She did not accept that the request to attend was unreasonable. She asked the claimant to attend a rearranged meeting on 24 October 2016. She recognised this was a day upon which the claimant did not normally work but stated that the claimant would be paid for her attendance.

66. On 23 October 2016 the claimant responded to Ms Toyne (1369-1370) saying that on the advice of her GP she was too unwell to attend the meeting. She referred at length to the stress and anxiety that she had been subjected to. She said:

> "The final straw came when I received an email from Bernice Elgot on 18 October 2016 advising me that I must return to work on 24 October 2016. This would inevitably involve me having day-to-day contact with, and working alongside, the people at Ripon Leisure Centre against whom I had raised my grievances regarding their bullying and abusive behaviour towards me. None of these grievances has been resolved to date and investigation is still ongoing despite having raised my grievances in May 2016."

67. The claimant continued, referring to a disparity of treatment by the respondent between her and other staff. She said that:

> "To expect me to attend a return to work interview to discuss returning to an environment working alongside those people who are the subjects of my unresolved grievances of bullying and abusive behaviour flies in the face of the council's policy statement of zero tolerance towards harassment and bullying."

68. Ms Toyne acknowledged the email and said that she had notified Mr Cutting of the sickness absence and asked the claimant to submit a fit note to him.

69. By letter dated 26 October 2016 (1373-1375) the claimant gave notice of resignation stating that her last date of employment was that day. She outlined the matters that she said were a fundamental breach of the implied term of trust and confidence. Having regard to the fact that this case proceeded on the basis of the allegations recorded above it is not necessary to set out the substance of the letter here.

70. By letter of the same date Ms McGarry wrote to the claimant (1393-1399) setting out the outcome of the investigation into the bullying and harassment allegations. She set out her conclusions at length. In summary she did not uphold the allegations of bullying again made against Mr Foyle, Ms Filippi or Mr Law. In respect to Mr Pederson whom she had not been able to interview since he had left the respondent she found that there was one instance of bullying when he had copied the claimant into an email to Jeanette Packwood on 1 August 2016 (748). Ms McGarry found that this was unprofessional and since Mr Pederson had already apologises for doing a similar thing previously she described it as incompetent and said that it could be construed as intimidating and therefore bullying. She concluded that there had been difficult relationships within the staff team and fault on both sides resulting in unprofessional behaviour also on both sides. She accepted that some of the incidents were not being dealt with professionally and that the management team needed to address how communication conflict was dealt with within RLC.

71. On 28 October 2016 the claimant appealed the outcome of her grievance against the chief executive (1404-1405). The appeal was addressed to Mr Richard

Cooper leader of the council. The matter was discussed at a meeting on 19 December 2016. On 4 January 2017 Mr Cooper wrote to the claimant (1433-1436). Although in response to a request remember the public Mr Sampson had referred to "an individual has been suspended pending an investigation" Mr Cooper concluded that Mr Sampson had not referred to the claimant by name nor published a statement to anyone other than in response to one individual and for that reason did not agree that there was a breach of confidence by the chief executive.

72. For completeness, I record that the claimant further appealed that decision to the human resources committee of the Council on 28 March 2017. The committee also rejected the grievance.

73. It is necessary to identify the relevant documents upon which the claimant's additional complaints of breach of contract relied.

74. In addition to the contractual documents referred to above the claimant's case was based upon the argument that the respondent's Job Evaluation document (192-194) which provide information when Single Status was brought in was incorporated into her contract of employment.

75. The relevant Single Status agreement itself was included in the bundle (1803-1807).

76. The respondent arguedthroughout that the Job Evaluation document was not one which is incorporated by virtue of the provision at 12.4 of the contract given to the claimant on 11 October 2016. The respondent maintained that the role in respect of which the contract of employment was offered in October 2016 was a new role and neither the creation of the role nor the contract of employment that was offered gave the claimant any right to the back pay upon which her contractual claims were based.

Submissions

77. The parties made submissions. Those of the respondent was set out in a skeleton argument prepared for the outset of the hearing and in written submissions provided at the conclusion of the evidence. Mr Feingold provided written submissions also at the conclusion of the evidence.

Relevant law

78. In his skeleton argument Mr Siddall set out at paragraphs 20 to 36 a summary of the relevant statutory and case law concerning constructive dismissal. He summarised the decision of the Court of Appeal in the case of **Western Excavating v Sharp** [1978] IRLR 27 and the decision of the House of Lords in **Malik v BCCI** [1997] IRLR 462.

79. Mr Siddall next referred to the need for the tribunal to conduct the two-stage exercise derived from **Hilton v Shiner Ltd** [2001] IRLR 727. He submitted the tribunal should ask if the respondent had reasonable and proper cause for acting in the manner it did. If it did not have such cause the tribunal must assess whether the actions of the employer, objectively judged, damaged trust and

confidence. In the event that the first of those questions was answered in the affirmative or the second in the negative then no breach of the implied term could be made out.

80. Mr Siddall referred also to the more recent authority of **Pearce v Receptek** [2013] All ER (D) 364 in which Langstaff J, then President of the Employment Appeal Tribunal, underlined the gravity of the conduct needed to amount to a repudiatory breach.

81. In other authorities as cited in his argument Mr Siddall referred to the following propositions. The implied term does not impose a general obligation to act reasonably nor does it require the employer to meet the reasonable expectations of the employee. The band of reasonable responses test is of no application when addressing the question whether there was a dismissal but the tribunal may consider reasonableness and delay in considering the issue of affirmation. A breach of contract cannot be cured once it is found to have occurred. All breaches of the implied term are fundamental. A failure wholly to address a grievance can itself amount to a fundamental breach of contract. Lesser breaches of a grievance procedure have to be assessed against the **Malik** test.

82. Since the claimant was relying upon the concept of the last straw the current state of the law is summarised in paragraphs 15 and 21 of the decision of the Court of Appeal in **Waltham Forest LBC v Omilaju** [2005] IRLR 35:

> "The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:
>
> > "(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."
> >
> > …
> >
> > "If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

83. Mr Siddall reminded me also that the issue of whether the claimant resigned in response to any bridge contract is a question of fact as is the question of whether the claimant affirmed any breach, the position on the latter point being summarised in paragraph 17 of the judgment of HHJ Burke QC in the Employment Appeal Tribunal in **Hadji v St Luke's Plymouth** [2013] UKEAT/0095/12.

84. I refer to these parts of the skeleton argument expressly as they encapsulated, in my judgment, an accurate summary of the relevant law on constructive dismissal for the purposes of this claim.

85. In determining the complaints of breach of contract the law can be summarised simply. The claimant must identify either an express term of the contract or, if there is no such term, a term which can be properly implied into the contract in one of the ways permitted by the decided case law. These can include business necessity or in the case of a term that the tribunal considers would normally have been included but is absent by the application of the officious bystander test. Terms can also be implied by the conduct of the parties. Once the term has been properly identified and established it is for the claimant to prove on the balance of probabilities that the other party to the contract was in breach. Finally, the claimant must also prove to the same standard that damage has been suffered by reason of the breach.

Conclusions

86. Unusually I begin this part of my judgment by referring to the fact that the claimant had until relatively shortly before the hearing been legally represented. She had received advice and had been represented from a point prior to the end of her employment as I have set out above in my findings of fact. The case that had been pleaded on her behalf was complex as was the factual matrix leading to the employment ending as I have also set out. I was concerned that the claimant and Mr Feingold found themselves having to conduct this case without legal assistance at what appeared to me to be quite short notice. I was therefore, as I trust is always the case, acutely aware of the need for there to be a level playing field before me where an unrepresented party is contending against a party represented by solicitors and counsel.

87. The claimant's cross-examination was lengthy. The tribunal was assisted because Mr Siddall addressed the issues in the case on a topic by topic basis. It appeared to me that it was clear to the claimant at each point what specific points were being raised with her in questions. At no point did I consider that the questioning of the claimant was inappropriate. On those occasions when I asked questions of the claimant myself it was to ensure either that I had understood the question or that I was satisfied that she had.

88. Against that background I record that during the course of her cross examination the claimant made a considerable number of significant concessions.

89. Because of those concessions the complexion of the claimant's case, as pleaded and as set out in her witness statement, changed substantially. By the conclusion of the cross examination she had accepted that in respect of nearly

each element of the matters relied upon as amounting to a breach of the implied term the respondent had reasonable and proper cause for acting in the way in which it did. The principal respect in which the claimant did not accept that was in relation to the allegation framed against the chief executive.

90. I therefore summarise the case in respect of each component part by reference to the final submissions of Mr Siddall in which he records, as I accept, accurately the claimant's position.

The claimant's suspension on 30 August 2016 being unlawful as the allegations did not reasonably amount to gross misconduct.

91. The claimant accepted that the suspension itself was reasonable and the disciplinary allegations merited investigation. She accepted that the allegations disclosed a breakdown in relationships at RLC which threatened the provision of the service. She accepted that at this stage the allegations included potential fraud. She conceded that the respondent had considered at this point whether there was an alternative to suspension but had concluded that no such alternative existed.

92. The claimant had considered previously that the non-contractual disciplinary policy precluded her being suspended unless the circumstances fell squarely within its terms. The respondent's case was that it could reasonably consider that the claimant's continuing presence in the workplace was sufficiently harmful to its operation as to justify suspension. It did form such a view and in the light of the claimant's concession it cannot be sustained but that the view was reasonable.

93. For those reasons the act of suspension was reasonable and the respondent had reasonable and proper cause for acting as it did.

The suspension being unlawful as it was not kept under review;

94. As set out in my findings of fact it is clear that the suspension was kept under review. The claimant conceded that the suspension was reviewed and that it was reasonable to continue it.

The suspension being unlawful as the respondent gave insufficient thought to relocating the claimant.

95. Ms Elgot's evidence showed that the possibility of transferring the claimant to a different location was considered and rejected. The gymnastics program could not have been removed from RLC, a point which the claimant herself had made (558, 590). The claimant could have been found work as a diving instructor, for which she was also qualified, at a pool in Harrogate. This had been investigated but there were no vacancies available. The claimant accepted she could not contradict that fact. She conceded that Ms Elgot's conclusion about transfer was reasonable.

96. For those reasons, the decision not to relocate claimant was one for which the respondent had reasonable and proper cause.

The suspension being unlawful as respondent did not give any, or sufficient, consideration to relocating/suspending the claimant's colleagues.

97. This possibility was also considered by the respondent according to Ms Elgot. The effect of it would have been to close RLC. In my judgment this would have probably been the case whether the respondent had transferred the smaller group of those against whom the claimant had raised her first grievance and would have certainly been the case all those who had joined in the collective agreement were to be transferred.

98. The claimant conceded that the possibility had been considered and rejected reasonably.

99. I agree with the submission of the respondent that it is unrealistic to conclude that it was not objectively reasonable to relocate or suspend the other workers at RLC.

The unreasonable duration of the suspension.

100. The respondent's case was that the duration of the suspension was not unduly lengthy given the amount of investigation that was required. A significant part of the delay was due to Ms Betts waiting for the timeline from the claimant which was to be provided to enable her to conclude her investigation but which was never forthcoming.

101. In paragraph 28 of his final submissions Mr Siddall summarised the chronology in this regard. I have included the material dates in my findings of fact. As to the latter part of the period, the respondent sought to interview the claimant soon after she returned from her holiday in the USA. The claimant sought an adjournment of the date. The interview began on 16 September and was concluded on 19 September 2016. Until the end of September Ms Betts was awaiting the timeline. By 4 October 2016 the respondent was informed that the claimant was still working on it. Ms Betts decided to produce her investigation report without it on 7 October 2016.

102. The claimant's suspension was immediately made subject to review and lifted 4 days later.

103. In my judgment, there is no basis upon which the claimant can assert that the respondent did not have reasonable and proper cause for suspension of that length.

Requiring the claimant to return to work with her harassers on 18 October 2016;

104. The respondent's case was that the respondent had, at 18 October 2016, reasonable and proper cause for concluding that returning to work at RLC was what the claimant then wanted.

105. Prior to that point the claimant, and her solicitors, had insisted that she be permitted to return to work.

106. In proposing that the claimant attend work in the following week to have discussions as to how best her return to working could be achieved and the offer to arrange mediation "as soon as possible", the respondent acted with reasonable and proper cause and objectively its actions were reasonable.

107. The claimant's case on this is predicated on the basis that she was subjected to bullying and harassment. The respondent's action has to be judged objectively based upon its conclusion that the course of bullying and harassment that she alleged, save in respect of Mr Pederson's copying her into one email, was not established. By this time Mr Pederson had left. The claimant's argument is really founded upon the proposition that the respondent had not accepted her analysis of the causes of the breakdown of the relationships at RLC. Whilst it may be unreasonable to address a grievance, it is not of itself unreasonable to reject one upon proper consideration.

Requiring the claimant return to work with her harassers without mediation being concluded.

108. This allegation is also based upon the claimant's construction of Ms Elgot's email to the claimant (1344). The email discloses a defined start date and conveyed an intention to convene a mediation as soon as possible. The claimant agreed in cross-examination that the reason that the mediation had not occurred previously was due to her approach to it. The claimant accepted in cross-examination that after the beginning of October 2016 it was for her to indicate if she wished mediation to continue.

109. The claimant's communications prior to meeting with Mr Cutting do not suggest that she considered a mediation was required at that stage. She said that her desired outcome to any mediation, if such had been arranged, was that the respondent restructure the hours and work at RLC so that she was not required to work with the persons whom she alleged had bullied her. The claimant accepted that that was an option that had already been considered and rejected by the respondent as not workable.

110. In all the circumstances, I am unable to uphold the argument that the respondent acted without reasonable and proper cause. Mediation was first recommended as a response to the grievance. It was not progressed then because of the claimant's appeal. The events leading to the claimant's suspension then overtook matters, the respondent offering to restart mediation and the claimant then not having progressed mediation, it cannot reasonably be considered that when mediation was again suggested the respondent was acting without reasonable and proper cause in raising it at the point when it was seeking to accommodate the claimant's desire to return to work. I have little doubt that if the respondent had not raised the topic of mediation again at that stage, the claimant would have complained that that was an unreasonable act amounting to a breach of the implied term.

Requiring the claimant return to work with her harassers without adequate support. The support sought was to: consider protecting the claimant from contact with her harassers until the grievance was concluded; taking the

claimant's complaint seriously; providing a safe working environment for the claimant.

111. Whilst it is clear that the claimant still continued to believe that she was the subject of bullying and harassment, by this stage the respondent had carried out detailed investigations and had come to a different view. Therefore, in considering whether this could amount to an act comprising part of or contributing to a breach of the implied term I have again to consider whether the respondent had reasonable and proper cause for the conclusion.

112. I am satisfied that they did have reasonable and proper cause. The respondent's submission on the elements of support show that their argument is sound. The breakdown in relationships which led up to the claimant's allegations led also to a grievance levelled against her by virtually the entire staff of RLC. There was no suitable alternative location from which the claimant could perform her duties, as she conceded. The removal or separation of the claimant at RLC from the remaining staff against whom she had complained was impracticable, had in part led to workplace difficulties and was not objectively reasonable.

113. The claimant's complaints were taken seriously. The failure to give the response to a grievance that the employee desires is not alone a breach of the implied term. As the respondent submitted, requiring the claimant to return to work, in response to her request to do so, was not, as it were, "throwing her in at the deep end". The respondent sought to meet with the claimant to agree a method of working and proposed reasonable measures as set out in Ms Elgot's email (1344).

Failing to address matters confidentially (referring back to an allegation of breach of confidence by the respondent's CEO).

114. When this matter was considered in the grievance process the respondent came to the conclusion that Mr Sampson had interpreted the email which had come from a parent of a young person who had attended the gymnastics club as being aware of the fact of a suspension of a member of staff. Such an interpretation was reasonable and one for which there was proper cause. Considering the fact that the claimant raised a grievance about this breach of confidence on the same day as Mr Sampson's second email indicates to me that the claimant was probably informed of his response as soon as it was sent. That there was communication between members of the public (parents) and the claimant about this is confirmed by the contents of the claimant's grievance itself (991).

115. However, Mr Sampson's email does not identify the claimant. Assuming, to put the claimant's case at its highest, that he was obliged not to break her confidence, there is no objective basis for finding that he did so. He did not name her and, whilst it might be inferred that the scheme would not been suspended in its entirety had she herself not been suspended, that is not an inevitable conclusion.

116. On further reflection, I have come to the additional conclusion that it is in fact likely that the claimant's suspension was already within the knowledge of the

person who wrote to Mr Sampson. For that reason also I am satisfied that there was no breach of confidence on the part of the respondent.

Failing to address matters impartially on the basis of a disparity between the claimant and the authors of the group grievance;

117. The respondent's position was that this allegation mirrored that in respect of which I have set out my conclusions at paragraphs 97-99 above.

118. Beyond that the respondent submitted that the contention was not founded on reasonableness. The claimant accepted in cross-examination that the situation in respect of her allegations were not comparable to those of the authors of the collective grievance. She further accepted that the respondent had a reasonable basis to believe that her continued presence at RLC would affect delivery of the service.

119. In those circumstances the respondent submitted, correctly in my view, that it had drawn a reasonable distinction between the two cases. In those circumstances it cannot be sustained that it acted without reasonable and proper cause.

Failing to address the claimant's grievance as quickly and efficiently as possible.

120. The respondent accepted that there was delay in providing a response to the 1st and 2nd of the claimant's grievances. In respect of the remainder of the grievances the claimant either accepted in cross-examination that they had been determined within a reasonable timescale or that she had not progressed them herself. For example, she explained that she did not want to get a member of the public involved in her 3rd grievance.

121. The claimant's 1st grievance comprised 2 elements - job evaluation and bullying allegations. The latter overlapped with the contents of the 2nd grievance. As to those the claimant accepted it was reasonable for them to be combined and dealt with together by Ms McGarry.

122. The respondent accepted that having met Madeleine Bell on 20 July 2016 there was then a delay in the claimant being notified informally of the outcome of the job evaluation on 6 October 2016.

123. In my judgment the respondent could reasonably point to the multiplicity of issues as, at least in part, explaining the delay. It would have been better practice to provide a more formal response. Beyond that there had to be a meeting of the relevant committee in order to evaluate a new substantive post.

124. The progress of the 2nd grievance was prolonged. It was lodged on 30 June 2016. The claimant objected to the officers nominated to decide it at first. The respondent sought to appoint others. Ms McGarry whom the claimant accepted, had limited availability to which the claimant did not object. By the middle of July the claimant was aware that she was not going to meet Ms McGarry until 6 September. She conceded that a reasonable reading of the email exchange did not disclose that she had an issue with the delay. The meeting on 6 September

2016 went on for about 3 hours. Ms McGarry was then away again until 25 September 2016. She interviewed 5 members of staff on 30 September and the claimant's daughter on 18 October. The claimant was informed of the timeframe for the completion of the grievance. The outcome was notified on 26 October 2016.

125. The claimant conceded in cross-examination that the respondent could reasonably consider that she did not object to any of its proposals in regard to determining the grievances or the delays in doing so.

126. In my judgment is relevant to recall that this was the case in which the claimant had raised multiple grievances and that the process of their determination was undertaken alongside the issues disclosed by the collective grievance and the disciplinary process. In those circumstances, I accept the respondent's submission that if the delays were capable of contributing to a breach of contract then such a breach could not objectively be considered to be fundamental.

Failing to suspend/transfer the alleged bullying/harassers.

127. This is a further iteration of the allegation regarding the comparison of the claimant's treatment with that of the other staff with whom she worked against whom she made allegations.

128. For the reasons set out above, I repeat my conclusion that the claimant has not established that the respondent acted without reasonable and proper cause.

129. For completeness, I address the issue that the email from Ms Elgot was alleged to be the final straw. The claimant was asked about this in cross-examination and said that she was "not taking issue" with the email itself. As a proper reading of the communications and the events of the last part of her employment reveals, what triggered the decision to resign was the claimant's attendance at RLC on 13 October 2016 and her realisation that she did not wish to return to work in that environment.

130. Having regard to the conclusions I have reached on the basis of "reasonable and proper cause" on the individual allegations I am not satisfied that the claimant has established that there was a breach of the implied term of trust and confidence.

131. I remind myself again that the claimant was not represented and Mr Feingold could not have been expected to put the claimant's case in the way in which a legal professional might have done. For that reason I have also considered, although this was not specifically raised by either party, what would be my conclusion if I were to have accepted those allegations in respect of which the claimant did not accept that the respondent acted with reasonable and proper cause.

132. In this regard I focus specifically on the allegations of breach of confidence by the chief executive, as to which the claimant did not accept that the respondent

had acted with reasonable proper cause and the admitted delays in the resolution of the grievances.

133. Even if I were to find that the chief executive had in some way broken confidence by revealing that the claimant had been suspended and that the respondent had delayed in providing a response to the 1st and 2nd grievances, I would still have to ask myself the question of whether taken together it could be said that those matters evinced an intention by the respondent no longer to be bound by a fundamental term of the contract.

134. Even on that basis I would have to reach the same conclusion. The factual basis of the allegations was at least in part caused by the claimant's conduct. In my view her conduct was in fact a substantial part of the cause. As the respondent submitted, the claimant was, until she made concessions in cross-examination, prepared to attribute improper motives to any action by the employer with which she did not agree. This led to her grievances and the attempt to address those led to the collective grievance and to the disciplinary allegations and suspension. The claimant's grievances were addressed. Interim steps were taken to enable the claimant to work prior to suspension. A thorough investigation of the disciplinary allegations revealed no case to answer. As soon as the respondent was apprised of that, the claimant was notified that the suspension would be lifted. Consistent with her solicitors' request the respondent sought to return the claimant to the workplace. It recognised the need to try and establish a proper working pattern and reasonably suggested mediation.

135. Balancing that analysis against the claimant's criticisms of the chief executive and the delays in resolving the grievances I ask myself the question whether it can be said that these matters satisfy the relatively stringent test for finding a breach of the fundamental implied term. Put in that way I am driven to conclude that the claimant cannot establish such a breach.

136. In all those circumstances I conclude that the claimant was not dismissed constructively and thus the claim of unfair dismissal is not well founded.

137. In respect of the other complaints of breach of contract and deductions from wages, these matters were addressed in paragraphs 46 to 52 of the respondent's skeleton argument.

138. The respondent, correctly in my judgment, made the following points.

139. The claim for notice pay was dependent upon the outcome of the constructive dismissal issue. If I were to find that failed then the notice pay would also fail. That is a correct approach in law and I accept the submission.

140. The claim for holiday pay depended upon the claim for back pay.

141. The claim for pension could not succeed on the facts. The claimant's own case was that she opted out of the pension scheme. Whether the claimant did so under a misapprehension as she suggested in her witness statement that cannot amount to a breach of contract by the employer.

142. The claim for back pay was put on the alternative bases of a breach of an express or implied term. The two bases cannot be combined.

143. The breach of an implied term can only be sustained if it is necessary to imply the term. The terms in respect of the claimant's contractual pay were in fact clear.

144. Although the claimant submits that the rate of pay was never agreed, at the point when she was a casual worker it is clear on the evidence that the rates were agreed. That this was the case was clear from the timesheets and the payslips.

145. There was then no proper basis for the claimant to argue for an implied term.

146. The claim in respect of an express term for back pay was based upon the contract that was issued to the claimant in October 2016. In evidence the claimant confirmed that she had never accepted the terms of that contract. The terms for pay in that contract were clear. They do not provide for the payment of back pay. Neither the document that the claimant relied upon (the job evaluation guide) which was not incorporated into any contract nor the relevant single status agreement, upon which she could have relied and which would be incorporated, provide a basis for saying that the contract contained a term for the payment of back pay when the claimant's job became established as head of gymnastics in October 2016. There was no evidence that the claimant was ever told that back pay would be paid to her if the job were established.

147. For those reasons, I find that the claimant has not proved on the balance of probabilities that the respondent was in breach of contract or failed to pay her the wages that were due to her on any occasion.

148. Finally, I apologise to the parties for the length of time it has taken to send them this judgment and reasons in writing. This has been caused by the volume and demands of other judicial work.

Employment Judge Ryan

Dated: 15 January 2018