EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Smith**	
Respondent:	**Huddersfield Lawn Tennis & Squash Club Limited**	
Heard at:	**Leeds**	**On: 20 March 2019**
		9 May 2019
		10 May 2019
		17 May 2019 (Reserved)

Before: **Employment Judge Trayler**

Representation

Claimant: Mr A Marshall, Counsel
Respondent: Mr S Sweeney, Counsel

RESERVED JUDGMENT

1. The Respondent unfairly dismissed the Claimant.
2. The compensation for unfair dismissal will be:
   2.1. A basic award reduced by 75% because of the Claimant's conduct.
   2.2. A compensatory award reduced in respect of loss of future earnings to one month's pay and in all other respects by 75% because of the Claimant's conduct.
3. The complaint as to holiday pay is well founded. The Respondent is ordered to pay to the Claimant the sum of £370.02 as compensation for untaken paid holiday entitlement.
4. The Tribunal will determine remedy at a hearing on a date to be fixed.

REASONS

1. The issues to be determined in this case were agreed and set out within a draft list of issues prepared by the parties. The claimant complains of unfair dismissal and for holiday pay at the end of the claimant's employment.

2. So far as the unfair dismissal complaint is concerned the issues are as follows:

    (1) Did the claimant terminate his contract of employment in circumstances in which he was entitled to terminate it without notice by reason of the respondent's conduct? In considering this the claimant says that the conduct alleged in paragraph 4 – 18 of the particulars of claim amounted to a repudiatory breach of the implied term of mutual trust and confidence as contended in paragraph 19 of the particulars of claim.

    (2) If the claimant is able to show that the alleged conduct constitutes a fundamental breach of his contract of employment did the claimant terminate his contract by reason of such repudiatory breach?

    (3) If the claimant did terminate his contract by reason of a repudiatory breach of contract, has the respondent shown a potential fair reason for the dismissal?

    (4) If the claimant was unfairly constructively dismissed, did the claimant cause or contribute to his dismissal?

    (5) If the claimant was unfairly constructively dismissed what is the likelihood if any that he would have been fairly dismissed?

    (6) Did the respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

3. The parties address a wrongful dismissal complaint in which the issue is whether the respondent wrongfully terminated the claimant's contract of employment such that he was entitled to any notice pay. However, there is no wrongful dismissal complaint within the claim and therefore this issue is not determined. This issue may be addressed at the remedy hearing.

4. In relation to holiday pay the issues are:

    (1) What, if any, holiday pay was the claimant entitled to be paid at the date of termination for reason of his employment on 19 July 2018?

    (2) If, on 19 July 2018 the proportion of statutory leave taken by the claimant in the leave year under Regulation 13 Working Time Regulations 1998 was less than the proportion of the leave year which had expired, did the respondent make the claimant a payment in lieu of such leave in accordance with Regulation 14(3) Working Time Regulations?

5. So far as the relevant law is concerned the law relating to the unfair dismissal complaint is within Sections 95 and 98 Employment Rights Act 1996. For the purposes of section 95 of the 1996 Act an employee is dismissed by his employer if

(a) The contract under which he is employed is terminated by the employer…[or]

(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

6. Such a dismissal in Section 95(1)(c) is termed a constructive dismissal. Where a last straw is relied on by an employer to justify resignation as a dismissal that last straw must be related to the preceding course of action relied upon which is repudiatory but the last straw itself need not be repudiatory, **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

7. Where there has been an express or constructive dismissal it is for the employer to show the reason for the dismissal and that it is a reason set out within Section 98 Employment Rights Act 1996 or for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. If the employer shows this the tribunal is to apply Section 98(4) and determine whether the dismissal is fair or unfair having regard to the reason shown by the employer which depends whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. This is to be determined in accordance with equity and the substantial merits of the case. In a constructive dismissal the employer has to show the reason for the conduct which caused the resignation and that it is a reason within section 98 as above, **Delabole Slate Ltd v Berriman [1985] IRLR 305 CA**.

8. So far as constructive dismissal is concerned there has to be conduct on the part of the employer which causes the employee to resign. The employee has to be entitled to resign immediately although he does not need to do so. However, if he waits, there is a risk he will be treated as accepting the contract as broken by the employer. An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once, (see **Western Excavating (EEC) Ltd v Sharp [1978] 27 CA**).

9. There is an implied term in a contract of employment that the employer shall not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of the implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract, **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347EAT**.

10. A change of duties may be a fundamental breach of contract, see **Hilton v Shiner Ltd [2001] IRLR 727 EAT**. Whether in a particular case the breach is sufficiently material to be repudiatory has to be judged objectively by reference to its impact on the employee. Abusive comments or swearing at or in the presence of an employee is capable of being a breach of the implied term as to trust and confidence, see **Moores v Bude and Stratton Town Council [2000] IRLR 676 EAT** and **Isle of Wight Tourist Board v Coombes [1976] IRLR 413 EAT**.

11. By Regulation 14 Working Time Regulations 1998 where a worker's employment is terminated during the course of a holiday year the worker is entitled to be paid in lieu for a proportion of the annual holiday year entitlement in accordance with the part of the holiday year which has elapsed less any paid leave actually taken in the holiday year.

12. The ACAS Code (above) gives guidance as to how disciplinary and grievance procedures in the workplace should be conducted. The code recognises the need I assessing fairness to take into account the size and administrative resources of the employer. The code includes at paragraph 6 in relation to disciplinary processes that in misconduct cases where practicable different people should carry out the investigation and disciplinary hearing. By paragraph 27 an appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case. In dealing with grievances by paragraph 32 an appeal should be dealt with by a manager who has not previously been involved in the case. In each procedure the employer should provide the employee to be heard and appeal against decisions made

13. By section 118 of the 1996 Act when a tribunal makes an award of compensation for unfair dismissal it shall consist of a basic award and a compensatory award. By section 122 (2) where a tribunal considers that any conduct of a claimant before dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent the tribunal shall reduce the amount accordingly. By section 123 the compensatory award shall be such sum as is just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal so far as that loss is attributable to the action taken by the employer. By section 123(6) where a tribunal finds that the dismissal was to any extent caused or contributed to by the action of the complainant it shall reduce the amount of the compensatory award accordingly. The conduct in question will need to be culpable and blameworthy and cause or contribute to the dismissal in order for a reduction in the award. It will not be just and equitable to award compensation for all loss sustained if the Tribunal finds that there is a chance that dismissal would have occurred in any event had a fair procedure been adopted or that employment would have continued only for a limited period. In either case the tribunal may reflect those factors in the amount of the compensatory award, **Software 2000 Ltd v Andrews [2007] IRLR 568 EAT**.

14. The claimant in this case is Mr Matthew Smith born 21 August 1984. The respondent is the Huddersfield Lawn Tennis and Squash Club Limited.

15. Mr Smith was employed by the respondent from 29 March 2016 until his resignation on 19 July 2018, a total of two full years. At the outset Mr Smith was employed as Head Coach and Rackets Manager.

16. The claimant's pay in relation to that post at the time of his resignation was £20,000 per annum. This equates to £1,666.67 per month gross and £1,387.38 net of tax and national insurance per month.

17. The claimant, by a claim presented to the tribunal on 27 November 2018, complains solely of unfair dismissal and failure to make payment of holiday pay entitlement at the termination of employment.

18. The claimant is a Lawn Tennis Coach and recites in his claim form his achievements as a player which were curtailed by an injury and thereafter his successful career as a Lawn Tennis Coach.

19. At the outset of his employment the claimant was provided with a written contract of employment and statement of terms and conditions of employment which is at pages 33 – 39 of a bundle agreed between the parties.

20. I heard evidence in this case from the claimant Mr Matthew Smith, the respondent's Chairman Mr Nicholas Booth and a further Director of the respondent Mr Charles Pinder.

21. In addition to the bundle of documents agreed between the parties and numbered up to page 244 additional documents were added during the hearing. I read the documents I was referred to by the parties and make findings of fact on the balance of probabilities.

22. Within the contract of employment, the claimant's job title is confirmed as Head Coach and Rackets Manager and his duties included within Schedule 1 to the agreement. Within this is included a term that he is to work with Tennis and Squash Coaches in order to grow the number of people participating in classes and coaching programmes. In addition, he is to set up squash leagues and initially to investigate how to better development the junior squash section. There are a large number of other responsibilities concerning tennis and coaching generally. His salary initially is £19,000 per annum which was subsequently increased to £20,000. The claimant's hours of work are stated to be 20 hours per week and there is a contractual entitlement to holiday pay namely 14.5 days being half the 29 days annual entitlement of full-time employees. There is a contractual period of notice of one month by the respondent to terminate the claimant's employment. There is a provision that the respondent reserves the right to make reasonable changes to any of the terms and conditions of employment detailed in the statement. There is also provision that the claimant would be notified of minor changes of detail by way of a general notice to all employees and any other changes will take effect from the date of the notice. It is stated that Mr Smith would be given not less than one month's written notice of any significant changes which would be deemed as accepted unless written objection was given within a notice period. The respondent accepts that there is no contractual authority to reduce pay and duties as a disciplinary sanction.

23. The increase in pay afforded to the claimant was because of his good performance.

24. There had been an occasion during the course of his employment (and prior to the events of 11 May 2018 to which I will return later) when the claimant had intended to

leave his employment. However, Mr Booth had persuaded him to stay with the respondent which the claimant did.

25. For the purposes of the current claim the circumstances of the employment changed with a meeting on 11 May 2018. On that date a meeting took place between a Mr Phil Helawell, Mr Smith, Ms Julie St John and a Mr Malcolm Pickup. The meeting took place in the bar area and some of the events of this were recorded by a CCTV camera. There is no sound recording of the meeting although the images recorded were subsequently copied by filming on a mobile telephone and there are some comments to be heard whilst this filming is being done. During the course of that filming there is some audio recording in which Mr Pickup is heard to say to Mr Smith "you hit me…you are a psycho". It is accepted by both parties that Mr Smith is calm during that recording whereas Mr Pickup was not.

26. As a matter of fact, Mr Pickup and Mr Helawell were members of the club although Mr Pickup at times also carried out squash coaching and received a payment on some occasions in relation to teaching children of £1 per child per session. Mr Pickup, was not therefore an employee of the respondent. Ms St John is a Manager and on level terms with the claimant in terms of seniority.

27. Also, near by the meeting were two members of the club aged 15 and 20 years namely Charlotte Howard and Emily Morton.

28. At the outset of the hearing, during the hearing and prior to making the Reserved Judgment in this matter I viewed the recording both with the parties and subsequently alone. So far as that meeting is concerned the recording lasts for 2 minutes 29 seconds. The camera views across a bar. Opposite it can be seen that a man in a white shirt, who it transpires is Mr Pickup, stands up. At that point another gentleman who is clearly the claimant stands up and walks quickly around the table and pillar towards Mr Pickup. Mr Smith can then be seen leaning into Mr Pickup and the stance of Mr Smith seen from the back is indeed confrontational. At this point both Mr Pickup and the claimant have their arms raised and each pushes the other's arms but it is not possible to determine which of them did this first. It continues after 22 seconds with the claimant standing his ground and thereafter there are more arm movements by the claimant and Mr Pickup towards each other. After 30 seconds Ms St John and Mr Helawell intervene and Ms St John is in front of the claimant. The claimant continues and raises his arm to point towards Mr Pickup and turns away with Ms St John. Mr Helawell stands in front of Mr Pickup facing towards the claimant after 40 seconds of the recording. At 48 seconds the claimant returned to the other side of the table but then returns to the area where the other three members of the meeting were standing but this time further away from Mr Helawell, Mr Pickup and Ms St John. Mr Pickup and Ms St John are between Mr Helawell and the claimant. The claimant is seen to try to move towards Mr Pickup again and Mr Helawell adopts a defensive stance with his arms slightly raised which I described in the hearing as like having rolled up carpets under his arm, a stance often adopted by body builders. This is at 1 minute 32 seconds. At this point somebody else walks across the screen which is clearly unconnected with the meeting and by 1 minute 43 other people walk across with a conversation continuing. Mr Pickup remaining in his position and the claimant raising his arm and pointing. By 2 minutes 08 seconds the claimant is some eight feet away from Mr Pickup raising his arms and pointing and

at 2 minutes 19 seconds each walk away after which others walk across in view of the camera and the recording finishes after 2 minutes 29 seconds.

29. The confrontation is between Mr Smith and Mr Pickup, Mr Helawell is wearing a purple shirt in the film.

30. The following day 12 May Mr Smith again approaches Mr Pickup at the squash courts and it is apparent that Mr Smith stimulates further discussion on this matter. By the time they return to the camera Mr Pickup is heard to make the comments "you hit me, you're a psycho". By this point the claimant is calm.

31. Thereafter the claimant raises a complaint about Mr Pickup he already been aware that Mr Pickup has raised a complaint about him.

32. On 12 May 2018 Mr Booth a Director writes to Mr Smith that he is staggered and disappointed to receive feedback from the meeting and the further altercation on 12 May. He says that he has received a formal complaint about Mr Smith from Mr Pickup and will investigate it. He says he has arranged to meet Mr Pickup on the following Monday the next day and will arrange to meet the claimant afterwards. He states "Malcolm taught me to play squash about thirty-five years ago and I have always considered him one of the most gentle, lovely, caring, pleasant and agreeable people I have ever met. Your comments are also the only negative comments I have ever heard anyone utter regarding Malcolm. Your email therefore surprises me greatly. However, I will approach my investigation with an open mind and independently". Mr Booth continues that Mr Smith must not move Mr Pickup from the coaching team and he is to do nothing more to antagonise the situation.

33. Thereafter, an investigation starts conducted by Mr Booth who is occasionally accompanied by Mr Pinder. The first meeting is on 15 May at 9.00am between Mr Booth, Mr Pinder and Mr Smith. This is at page 45 – 46 of the bundle. There is also a meeting between Mr Booth and Mr Helawell on 15 May at 1.00pm the notes at which are at pages 55 and 55(1), between Mr Booth and Mr Pinder with Malcolm Pickup on 14 May at 3.00pm pages 56 – 56(1) and on 15 May at 8.00am between Mr Booth and Mr Pinder and Julie St John. The latter of these is at pages 57 – 57(1). The three attended gave their version of events and referred to the aggressive conduct of the clamant. Mr Booth also had the opportunity to view the CCTV camera recording.

34. The notes of the meeting are sent to the claimant on 16 May. It is confirmed to him that Mr Pickup is not an employee. On 16 May the claimant writes asking what he is being investigated for and by email it is confirmed that the accusation concerns what occurred on the Friday and Saturday previously which may or may not lead to a disciplinary process.

35. On 18 May 2018 Mr Booth writes to Mr Smith attaching a letter asking him to attend a disciplinary meeting. The three witness statements are provided to him and it is stated that he has had the opportunity to view the CCTV. The letter concludes "having undertaken the investigation I would like to let you know that we do not consider this event to be a matter for which dismissal on the grounds of gross misconduct would be a potential outcome".

36. By the time of the disciplinary hearing the claimant provides short statements from Ms Morton and Ms Howard who say that they heard the squash coach (Mr Pickup) say to the claimant in the meeting on 11 May that he is disgusting.

37. On 24 May 2018 a disciplinary meeting takes place conducted by Mr Booth who is accompanied by another board member Pollyanna Dawber. The notes of this are those of the claimant at pages 67 – 70. The respondent's notes are at pages 72(2) and 72(3). Within these notes it is clear that the aggressive behaviour of the claimant is what is being discussed and what can be seen on the recording is also recounted. A conclusion is reached that the claimant has behaved inappropriately and that his conduct showing aggression and threatening behaviour towards a member was unacceptable. Therefore a six month written warning would be issued. It is explained that this will remain on the claimant's record for six months after which it will disappear. Mr Smith is notified of his right of appeal to Mr Moorhouse. Mr Smith is recorded in the notes of the meeting to be very unhappy with the course of action and that he did not consider his behaviour warranted that level of discipline. Mr Booth then tells Mr Smith that the club had reviewed his working hours and suggested a reduction in hours from 20 to 18 so that he no longer has to manage the squash function in the future. His wage would also reduce accordingly from £20,000 to £18,000 per annum. The plan therefore would be to find a squash coach to work those hours and they would get paid for that time. In that respect Mr Smith would not have to deal with Mr Helawell and Mr Pickup anymore. Again, Mr Smith is recorded as being extremely unhappy with the decision and his right to appeal is reiterated.

38. The outcome letter is dated 24 May which confirms the sanction, this is at pages 71 – 72 of the bundle.

39. By email of 24 May the claimant asked the respondent what he had been disciplined for and he also raises issues about the notes of the meeting. It is pointed out the claimant that in his letter is not treated as an appeal (27 May 2018 page 75).

40. On 27 May the claimant writes to Mr Pinder and others on the board that he is taking legal advice and that he will not be speaking to Mr Booth again, page 76. There are apparently seven board members by this time including a Mr Ahmed who replies to the claimant and also says that he is to resign as a board member.

41. By a letter of 31 May 2018, the claimant appeals, this is at page 78 – 80 of the bundle. The claimant says that Mr Booth should not have been involved in the investigation or disciplinary hearing because he had been friends with Mr Pickup for thirty-five years. He complains of a failure to hold and conduct a fair and meaningful investigation and of failing to interview Ms Morton or Ms Howard. Mr Smith complains that he has never had it properly explained to him what he is supposed to have done. Mr Smith further complains that he had been informed in the disciplinary hearing that the board had decided to impose a disciplinary sanction which could not be true as there was only a five minute adjournment and only Mr Booth and Ms Dawber who are board members were present. Mr Smith says that if the board did make the decision it must have been decided before the disciplinary hearing took place and he points out that Mr Ahmed had no input to the decision.

42. On 8 June 2018 the claimant received notes of the disciplinary meeting and subsequently an appeal hearing is arranged, taking into account the claimant's availability, for 13 June 2018. This is conducted by Mr Moorhouse and Mr Pinder. The claimant is accompanied a Mr Lawrence Kelly. The claimant's notes of the appeal are at page 83 to 85 and the respondent has not been able to produce any notes.

43. There are emails on fees being charged to academy players around this time and also as to the stringing of instruments.

44. Also at page 106 is an email from Mr Booth to Mr Pinder and Mr Moorhouse on 26 June 2018. He recites the message that Julie had told him that "Lawrence has told everyone he is stopping running the academy". Mr Booth says he "hoped he would try to move it elsewhere so that he would end up needing to leave just for logistics". He states that instead he thinks Mr Smith is going to try to hang onto his job with the club and that Mr Pinder and Mr Moorhouse really need to apply pressure on Mr Smith's performance by monitoring him against targets for meetings with staff, numbers on the programme, communication with staff and members etc and also by tracking his hours to see they are getting their 20 hours "so that we have evidence of things to beat him up with". Mr Booth continues "I don't know if he will be able to replace the Academy and stringing income with private coaching income but I will be surprised. It might just take a few months for him to realise he needs to leave". The respondent had set a deadline of 30 June by when the claimant was to have academy members join membership of the respondent club. The academy was run by the claimant with the agreement of the board. They used the facilities at the club including the courts and it is clear in my finding that the respondent had required the claimant to ensure the academy members with whom only he had contact should be aware that they had to have some form of membership so as to use the facilities. The need for the respondent to have this is fairly obvious because if there were complaints from members or potential complaints that non members were using the facility and stopping them using them, the respondent would be able to justify this by the fact that Academy players were members. It is in my finding a legitimate requirement of the respondent that the claimant ensure that non members in the academy became members of one sort or another and to facilitate this. It is obvious that either he should do this himself or at least refer the academy members to Ms St John to enquire what the terms for membership were. My finding is that by this time the claimant had become somewhat disenchanted and had decided because of the impact of the fees on academy members that he would have to close the academy down. I find also that this disenchantment on the claimant's part stemmed from the outcome of the disciplinary hearing and the way that this was dealt with by the respondent.

45. Around this time the claimant removed a racket stringing machine from the club. This piece of equipment was provided by a sponsor, Sergetti, on the basis that the company's products would be promoted by the club. Prior to this rackets were strung by Mr Smith using this machinery and both he and the club would receive a fee for this. Around this time however, Mr Smith removed the Sergetti machine without telling anyone from the respondent and then began to write to members offering his services to continue stringing their rackets outside of the club environment. By this the club would of course lose income.

46. In paragraph 32 of his statement the claimant complains of "unusual occurrences" at the club where either he or his girlfriend are ignored. I can make no findings in relation to these in that such attitudes and issues if they existed at all are a matter of perception and I do not believe they are sufficiently specific or weighty enough to be able to make any organised findings of fact about them.

47. The appeal conducted by Mr Moorhouse and Mr Pinder results very quickly in the sanction imposed at the disciplinary hearing being changed in that the claimant's existing hours and pay are restored to 20 hours for £20,000 per year. The sanction of the written warning remains and the responsibility for squash is also kept from the claimant.

48. There are discussions about a number of issues following on from that meeting and arrangements are made thereafter to have a "water under the bridge" meeting with Mr Smith. It is clear from the notes of the appeal meeting that decision on the change of sanction is made very quickly. The basis for this is not really explained and it is clear that there is no active discussion about the individual points raised by the claimant in his appeal letter. Mr Pinder explained this as being due to the fact of Mr Smith being asked whether he wished to say anything and when he did not wish to do so they continued to the issue of whether the sanction should remain as it was. After that decision had been made and communicated to the claimant the issue as to the Sergetti machine is addressed and it is confirmed that there would be a further meeting. The respondent initially agrees to allow Mr Lawrence Kelly to attend a subsequent meeting which is subsequently changed by the respondent. The subsequent meeting takes place on 28 June 2018 at which the claimant attends and discusses various issues with Mr Moorhouse and Mr Pinder. There are no notes from the respondent as to this meeting but the claimant took notes. The respondent refused the claimant's request to record the meeting. Within that meeting, the notes of which are substantially accepted by Mr Pinder, it can be seen that Mr Pinder swears frequently throughout using the word "fuck" on a large number of occasions and telling the claimant to "fuck off". Mr Pinder says it is usual for him to swear for emphasis but that was not the claimant's interpretation of it. Given the circumstances of the meeting and the background of complaints from both sides as to how each is treating the other this use of abusive language and swearing was perhaps not the most conducive way of dealing with the issues. The claimant says he was upset by this and I find that as fact. Soon afterwards the claimant saw his GP due to the upset it had caused him and was absent from work through illness as a result. From the notes of the meeting it does appear that Mr Pinder is being aggressive with Mr Smith and he was also abusive.

49. The claimant raises a written grievance by 5 July which is at pages 128 – 135. The claimant was absent due to work related stress and received an email concerning the signing up of academy members as members of the club. This is at page 117 of the bundle on 28 June. So far as the written grievance is concerned Mr Smith does complain of the conduct of the meeting including the swearing at him. A grievance meeting is arranged and rearranged on more than one occasion between 17 July and eventually to 3 August due to the work pressures of Mr Booth and his time away from his work for a holiday.

50. On 15 July after the meeting has been arranged for 3 August Mr Booth writes to Mr Smith concerning who he could have with him at a grievance meeting which will be

conducted by Mr Booth and that he is happy for "Adam" to attend with him. The meeting is offered for 3 August being as soon as Mr Booth can do it and he asks for confirmation from the claimant that he will attend. Thereafter is a section in which Mr Booth says he has had a meeting with a representative from the Lawn Tennis Association which had caused him concern. A grant to the club had been approved which would mean writing off some £5,000 of building costs, this being an award essentially for player development programmes at the club. The application was successful but whilst Mr Smith had been off sick he had emailed the Lawn Tennis Association effectively to withdraw the application which meant that the club would lose money. Mr Booth says that withdrawal does not have board approval and the respondent being provided with funding would have been great support to the under tens part of the club. Mr Booth states that it also made the club look foolish in front of the Lawn Tennis Association and could prejudiced future applications. Mr Booth says that he trusts that Mr Smith appreciates the gravity of the action he has taken. He says that he would be interested to hear how Mr Smith could perceive the action he took could be deemed to be in the best interests of the club and that he would appreciate Mr Smith's comments by return.

51. Mr Smith replies by email of 16 July that between 19 and 26 June he had written to the respondent on a number of occasions about what to do about members of the academy paying attendance fees but that he had received no reply. Mr Smith explains his approach to the LTA as needing to be transparent over the grant application and therefore having to inform the LTA that the academy was no longer running. However, by 19 July Mr Smith resigned. The letter of resignation is at page 150 of the bundle and in it Mr Smith states that there had been arrangements made for Mr Booth to address his grievance personally. However, before he had returned from stress related sick leave, as he termed it, he complains that Mr Booth had sent him an aggressively worded email in relation to the funding application. Mr Smith says that he fails to see how he could reasonably expect Mr Booth to conduct a grievance meeting in an impartial fashion when he is the subject of a number of the grievances he has raised. He also says that given the course of conduct towards him over the past two months, the Board's decision to allow Mr Nick Booth to conduct the grievance meeting himself, combined with the tone of his email of 15th July have been the last straw. The claimant says that he no longer has any trust and confidence in the club's ability to address his concerns in a fair, reasonable or unbiassed fashion. Mr Smith concludes "therefore, please accept this email as my resignation from the position of Head Coach and Rackets Manager with immediate effect from today, Thursday 19th July 2018".

52. The pay and hours reduction made at the disciplinary hearing was never in fact implemented by the respondent.

53. Thereafter there is no approach by the respondent to the claimant asking him to reconsider his position. A further letter is sent to the claimant which is inadmissible in these proceedings.

54. I make a finding of fact in this matter that there was no intention on the part of Mr Booth to drive the claimant from his employment. The evidence relied upon in respect is the email at page 106 referred to above and the fact that Mr Booth looking for an agreed way out of the employment of Mr Smith. In neither respect am I convinced that there was any such intention. I find that there was no such intention

because the email of Mr Smith is a private email which he has disclosed in these proceedings. It was not initially addressed to the claimant nor was it known by him at the time of resignation.. In it he expresses a financial reality in that the claimant had at this time reduced his earning capacity at the club by ceasing to conduct the academy. By that he reduces his capacity for earning substantially albeit his wages of £20,000 per year from the respondent are unaffected. I find that Mr Booth is simply expressing a financial reality as he perceived it and that Mr Smith would therefore not be able to continue on that basis for very long.

55. In addition, I believe that all he is doing is requiring Mr Moorhouse and Mr Pinder to ensure that the work done by Mr Smith can be accounted for so that they can see what they are getting for the £20,000 and there is nothing illegitimate about that enquiry. It is purely a management reality.

56. I turn now to my conclusions in this matter. I have to determine whether there has been a dismissal in this case.

57. The claimant relies upon a breach by the respondent of the implied term as to trust and confidence which more fully stated is that the respondent should not without reasonable and proper cause act in a way which is calculated or likely to breach the implied duty as to trust and confidence in the employment relationship. My finding here is that there has been such a breach. I do not agree that there is the same degree of breach of this term as the claimant asserts.

58. I have viewed the CCTV recording both with the parties and privately on approximately ten occasions. Throughout that from the first and the last viewing I have sought to determine whether it could be said from what is recorded that the claimant had acted aggressively towards Mr Pickup. My conclusion is that Mr Smith was acting aggressively. I make a further finding that there were sufficient grounds based upon the recording itself together with reports of aggressive behaviour on the part of Mr Smith by Mr Pickup, Mr Helawell and Ms St John to justify that finding. As I have recorded Mr Smith does quickly go around the table and adapts an aggressive stance towards Mr Pickup and there is a repeated exchange of movements between them. Mr Smith does not take an opportunity to back off when he could and it is Mr Smith who instigated this by coming round the table towards Mr Pickup. I wholly disagree with the claimant that he moved slowly and calmly round to Mr Pickup. That is not what can be viewed on the CCTV recording. Mr Pinder in his evidence could not see how Mr Smith could fail to realise what he had done wrong and I agree with that. Mr Booth said that he took into account in the sanction that he gave that there may well have been comments by Mr Pickup which enraged or upset Mr Smith. That is quite different, however, from justifying his actions but as he said it caused him to impose a lesser sanction than dismissal. Again, Mr Booth made it clear in advance of the meeting that dismissal was not an option.

59. So far as Mr Booth dealing with the matter is concerned, although the respondent is a small organisation with seven board members subsequently reduced by one, it does seem unnecessary in this case for Mr Booth who expresses a very positive view of Mr Pickup before any investigation has been conducted and neither he nor anybody else would have a bad word to say about Mr Pickup based on knowing him for thirty-five years. He goes beyond that and makes some very positive comments about Mr Pickup. Objectively, it is easy to see why Mr Smith would say he did not

have any trust in Mr Booth to conduct a fair investigation and to reach a fair conclusion. It is however more as a matter of perception than reality. Mr Smith appeared to be of the opinion that the respondent should ignore his behaviour if Mr Pickup had spoken to Mr Smith in a derogatory manner, I find that to be unrealistic. Mr Booth was dealing with a complaint of aggressive behaviour by a staff member to a club member.

60. As I have found there is ample material based upon the recording alone to suggest that Mr Smith coming out of his chair and walking around the table and the pillar to get in the space of Mr Pickup and then to return as aggression. It was described by some of the witnesses it is the sort of thing one might see outside a nightclub. Again it is hard to see how Mr Smith could fail to see what he was being disciplined for.

61. So far as the sanction is concerned I do not believe it breaches the implied term to give Mr Smith a written warning. There is clearly reasonable and proper cause for the respondent to do that. There is probably reasonable and proper cause also to remove the duties with regards to squash on a temporary basis and they represent, at the maximum, ten percent of his working time. There is also a removal of apparent seniority as Mr Smith is no longer head of the squash function. Thereafter the respondent reduces the sanction by removing the hours reduction and restoring pay but leaving in place the written warning and the reduction in responsibilities.

62. The parties agree that I should view the conduct of the respondent in relation to the change of hours/duties and the warning as it is after the appeal in that technically and in law the claimant has accepted what is essentially an anticipatory breach which was never put into place and therefore the respondent should be judged on the appeal sanction alone.

63. I agree with that approach. It is clear that the claimant stays on until the appeal and thereafter.

64. What is clear, however, is that the claimant does resent this situation thereafter. The claimant did not like what the respondent did in respect of his disciplinary and the way that Mr Booth had taken responsibility for the investigation, the disciplinary hearing and therefore the disciplinary sanction. In addition, he did not like what the respondent was doing by requiring him to ensure that academy members were club members in one form or another and his response to this is to muddy the waters with the Lawn Tennis Association over the grant, he having decided to close down the academy function. In addition, Mr Smith removed the stringing machine without telling the respondent and then invites members of the club to approach him privately thereby depriving the respondent of income.

65. I have made a finding that the respondent did not seek to try and get rid of the claimant. Given that they had a maximum of six board members one of whom was apparently away during summer holidays, to a large extent it could have separated the function between the three members of the board for example one to investigate, one to deal with a disciplinary hearing and one to deal with an appeal. Mr Booth had clearly shown bias in favour of Mr Pickup but I do not believe that affected the sanction he imposed in any way.

66. As far as the appeal is concerned it is also the case that the respondent seems to have taken no effort to address the claimant's individual grounds of appeal and it is clear law that it is possible to breach the implied term by failing to provide a fair disciplinary and grievance process. There is to be a meeting after that and I find it to be within the respondent's powers and not in breach of contract to require Mr Smith to attend alone without representation. It is as the respondent's says a management meeting not a disciplinary or grievance meeting.

67. What is not acceptable in my finding is the swearing used by Mr Pinder which is both in the context of what he is saying and also directed at Mr Smith.

68. I do not find that there is any fault in the respondent sending the letter of 15 July. It is a legitimate enquiry in my view and it is worded in a reasonable manner.

69. The claimant in my finding resigned as a result of all that had gone on including what I have found to be not in breach of the implied term and that is which it is. I find however that one of the principal reasons for the resignation is the swearing by Mr Pinder, another is the lowering of his status and the fact that Mr Booth has been identified as the person dealing with his grievance as well as the disciplinary hearing when Mr Booth is effectively the subject of those grievances. There is sufficient connection between these matters and Mr Smith's resignation for me to find in this case that there has been a dismissal and I find there was a dismissal by the respondent in these actions alone

70. As above I find it was a legitimate approach by the respondent to require academy members to be members of the club in one form or another and legitimate to expect the claimant to deal with that. There were legitimate comments on what Mr Smith had done about the grant. Whatever Mr Smith's motives were when he referred the matter to the Lawn Tennis Association it is hard to see how this was necessary to address this so quickly. The respondent was not going anywhere and the matter could have been explained to the LTA subsequently had the grant conditions not been met. Additionally, Mr Smith seeks to rely on a quick succession of emails to Board members over fees to which there had been no reply as justifying shutting the academy whereas this could easily have been addressed more temperately. Mr Smith also incorrectly represented the respondent's position on fees as requiring full membership whereas reduced fees were applicable to academy members, a fact Mr Smith could have confirmed had he not responded in the way he did to the requirement of membership. Similarly, he had covertly removed the stringing machine from the club without mentioning it to the respondent and then sought to recruit club members as his own customers direct.

71. I find particularly that the respondent's actions by Mr Pinder swearing at Mr Smith are significant and a breach of the implied term by the respondent. My finding is that the claimant was entitled to resign without notice after that. He delayed by only fifteen days, 28 June 2018 to the 19 July and in these circumstances where Mr Smith is still raising a grievance and has complaints about the further involvement of Mr Booth and that the issues he raised on appeal had not been dealt with that he did not affirm the contract as broken by the respondent in this respect. There has therefore been a dismissal.

72. The respondent has not shown the reason for the conduct of which Mr Smith legitimately complains in that it could have divided the function on the investigation of the grievance, it could have avoided Mr Pinder's intemperate comments which were unjustified in the circumstances and it could have dealt with his issues on appeal which it failed to do. The respondent having failed to show the reason for the dismissal the dismissal is unfair. I therefore do not have to apply Section 98(4) of the 1996 Act to determine the fairness of that dismissal.

73. My finding however, is that the conduct of Mr Smith in the meeting of 11 May and by aggravating matters further on 12 May is culpable and blameworthy. In addition, his decision to ensure that the respondent did not receive a grant which had already been approved and in removing the stringing machine and competing with the respondent shows to me as it did the respondent that there is little prospect that this relationship would continue for very long. Given Mr Smith's actions I think it is likely that as Mr Booth contemplated in the email at page 106 it would not be long before the financial realisation upon Mr Smith and he would have to move elsewhere.

74. My judgment of this is that he was unlikely to survive the full summer at least by the end of October 2018 would have needed to have moved on.

75. My further finding however, is that the respondent had legitimate concerns about the failure of Mr Smith to ensure academy members were members of the club in one form or another. Mr Smith had been representing to academy members and/or their parents that they would need to have student memberships at a far greater cost than the respondent was proposing. The respondent legitimately approached the academy members to say that they had always required Mr Smith to put this in place but that he had failed to do so.

76. There is a further legitimate concern over the undermining of the respondent's grant position by Mr Smith because this matter could have been resolved more calmly and generally to the benefit of all without any deception of the Lawn Tennis Association. Further, the respondent had taken it upon himself to compete with the respondent with the stringing of rackets.

77. Mr Booth was clearly concerned about this I think it is extremely likely that had his employment not come to an end by the claimant's resignation there would have been disciplinary action and that therefore so far as any compensatory award is concerned any compensation in respect of loss of earnings should be limited to a maximum of one month, the period it would have taken the respondent to address these issues. I make that assessment on the basis that the respondent was quickly able to arrange meetings to deal with issues with Mr Smith even though the board members were volunteers and accept the respondent's evidence that dismissal was the likely result.

78. In addition, I find it is just and equitable to reduce any basic award in this matter because of the claimant's conduct in that respect. In my view it is blameworthy conduct both in relation to the meeting of 11 May, the stringing issues, the academy membership and undermining the grant. I am reinforced in this by the fact that the claimant had an entrenched attitude about the disciplinary process which was unjustified in relation to findings of aggressive behaviour. Accordingly, I find it is just to reduce the basic award by 75% because of the claimant's conduct leaving in place one quarter of the basic award to reflect the failures of the respondent.

79. I make these findings in order to assist the parties to resolve any remedy issue without a further hearing if possible.

80. So far as the ACAS Code is concerned I consider that the respondent has failed to comply with the code. I do not believe that the code requires an employer to deal with matters such as transpired on 11 May, aggravated on 12 May informally. I find that the respondent did provide a hearing but should, in order to comply with the code separated the function as above between Board members as it was practicable to do so. I also find that Mr Booth's stated views of Mr Pickup exhibited bias. The respondent also failed to deal with the points raised by Mr Smith in his appeal and failed also to provide independent consideration of his Grievance when much of what Mr Smith complained of is the action of Mr Booth. To that extent there has been a failure to comply with the code and this should be reflected in the award to Mr Smith. I take into account that the respondent is a small club with volunteer board members in this finding but it was within the respondent's ability to provide a fair hearing.

81. Turning now to holiday pay. No records were available as to what holiday Mr Smith had taken during his employment. The respondent blames Mr Smith for that. Mr Smith says there were no holiday forms available that he was required to complete and indeed the respondent has produced none for this hearing. What the respondent has produced is a calendar on which Ms St John has noted when Mr Smith is not at the club. This is not however necessarily the same as him being on paid holiday and there was no evidence in the tribunal from Ms St John in relation to that. Further, the respondent has produced a large number of records as to the claimant's entry fob being used on various dates and not used on others. Again, this does not mean that the claimant was on holiday when he was not shown as entering the premises using a fob as it is quite potentially the case that he may have entered without or have been working at other sites or at home. The claimant's duties included the promotion of the club at universities and schools and with businesses etc.

82. I do not believe that the claimant had taken any paid holiday and I accept his evidence in that respect. In my finding it is not inconceivable that he took no leave because it is often the case that employees do not take holidays before the spring or early summer period. In addition, Mr Smith's partner was expecting a baby the following October. It is conceivable that an employee in this situation may save his leave although Mr Smith does not put forward that as an explanation. It means that it is not inconceivable as the respondent submits.

83. Therefore, the claimant is entitled to paid holiday. The sum claimed is £370.02 outstanding as the claimant calculates and is not disputed, namely 8 days holiday pay accrued from 1 January 2018 – 19 July 2018.

84. I have disregarded as inadmissible a letter sent by the respondent to the claimant as it is within the scope of section 111A Employment Rights Act 1996. The parties agree that it is inadmissible save in circumstances where there is improper conduct by the party sending it. There is no evidence in this case that this is so. I specifically asked the parties if they objected to me conducting the hearing the claim having considered the content of that letter and they expressly did not. I have not taken it into account in my findings.

85. I have taken into account the submissions of the parties in making the above conclusions.

86. I have accepted the claimant's submissions in relation to the section 111A letter. I accepted the submissions in relation to the effect of the disciplinary sanction as it stood at the time of the appeal hearing. The claimant submits that the claimant's conduct should be judged seriously because it took place in a family tennis club where it is seen by two young members of the club and it is clear that others pass by when it happened on 11 May. I agree with that submission and have attached weight to the claimant's conduct as above because of it. I have also found as the claimant submits that the only allegation by Mr Smith against Mr Pickup on 11 May was that he had called him arrogant and disgusting which could not realistically justify Mr Smith's response. It was not in my finding necessary to interview the two club members from whom Mr Smith had obtained statements because they added nothing further to it. I do believe that Mr Booth did take them into account. I agree that Mr Booth did show bias in his view of Mr Pickup as the respondent submits. It showed to Mr Smith that he was unlikely to have a fair hearing. However, the response of respondent is proportionate by the appeal stage save for the reduction in duties for which the respondent accepts there is no express contractual power.

87. There is as the respondent submits no remorse on Mr Smith's part and indeed that remained his position at the time of the hearing in the Tribunal. The respondent was entitled to take that into account. I have agreed with the claimant's submissions as to the club membership issue, the stringing of t rackets issue and the grant issue. I disagree about Mr Pinder's conduct as explained above. I have agreed with the claimant's submissions as to holiday pay.

88. The claimant submits that the claimant's clean disciplinary record means that the sanction applied by the respondent was not justified. I have taken that into account but find as above that save for the change of responsibilities the sanction was justified as it was at the end of the appeal. Mr Smith's conduct was an objectively important issue and needed to be addressed. The respondent justifiably found aggressive conduct by Mr Smith and I have explained above why I have found that. I find that the CCTV recording does show aggressive conduct by Mr Smith and do not accept the claimant's submissions that h there was no such evidence.

89. I find that there was, contrary to the claimant's submissions, no attempt by the respondent to unsettle Mr Smith. They rightly addressed issues with him as they affected the club's proper operation as I have explained in my findings above. The grant, academy members fees and racket stringing fees were objectively important issues as was the need to monitor Mr Smith's performance and they were not in my finding pursued in any way unreasonably save for Mr Pinder's use of language.

90. I have made findings against the remainder of the respondent's submissions and indeed many of the claimant's. A remedy hearing will be arranged if the parties are unable to agree this in the light of my findings.

Employment Judge Trayler

Date: 12 June 2019