EMPLOYMENT TRIBUNALS

Claimant: **Mr S Niscoveanu**

Respondent: **Cardiff Central Sport and Recreation Ltd t/a Cardiff Central Youth Club**

Heard at: **Cardiff** **On:25th, 26th and 27th September 2019 and on 25th, 26th and 27th February 2020**

Before: **Employment Judge A Frazer**
Members:
Mr M Pearson
Mr A Fryer

Representation

Claimant: Ms H Niscoveanu (Claimant's wife)
Respondent: Mr M Jackson (Counsel)

JUDGMENT

1. The unanimous decision of the Tribunal is that the claimant's claims for constructive (unfair) dismissal, unpaid wages and racial harassment are not well founded and shall be dismissed.

REASONS

Introduction

2. By way of an ET1 dated 17th May 2018 the Claimant brings claims for unfair constructive dismissal, racial harassment and unpaid wages arising out of his

employment with the Respondent between 1st January 2012 and 27th December 2017. The Claimant was employed as a gymnastics coach. His original title was 'Head boys Coach' but this was subsequently changed to 'Performance Coach'. The events pleaded span the time period between 6th November 2017 and 27th December 2017, which was the date of the Claimant's resignation. The Respondent resists the claims in their entirety.

The Issues

Constructive (Unfair) Dismissal

3. The breach of contract alleged is one of the implied term of trust and confidence. At the start of the hearing Ms Niscoveanu on behalf of her husband clarified that the issues which went to the breach were those set out at paragraph 2 on page 15 of the ET1. These are listed as follows:

a. Mr Hine's conduct towards the Claimant during the meeting of 6th November 2017.
b. The Claimant's role being demoted by the Respondent from Head Coach to Performance Coach.
c. The Respondent publicly speaking with coaches and gymnasts in regards to the Claimant's alleged conduct.
d. The Respondent failing to pay the Claimant the correct wages during the suspension.
e. The Respondent informing the Welsh Gymnastics association of the alleged conduct, prior to informing the Claimant of the allegations.
f. The Respondent's treatment of the Claimant and his family during his suspension and
g. The Respondent subjecting the Claimant to bullying and harassment. Ms Niscoveanu explained that this was a catch-all.

4. I queried with Ms Niscoveanu whether there was a last straw and explained what this was. It was stated that the Respondent's agenda was primarily motivated by their desire to protect the business from a leakage of gymnasts. On behalf of the Respondent Mr Jackson clarified that the potentially fair reason, if there was found to be a dismissal, was conduct. Mr Jackson raised Polkey and contributory fault as issues which could be determined at the liability stage.

Unpaid Wages

5. The allegation as pleaded is that the Claimant was not paid what was owing to him during his suspension between 26th November 2017 and 27th December 2017. The Claimant claims that since he worked an average of 23 hours per week he was underpaid by an average of 25 hours for the month. The issue for us, therefore, was what the Claimant was contractually entitled to be paid.

Racial Harassment

6. The Claimant is a Romanian national. The allegation related to the allegation at paragraph 2 of the claim form that during the meeting on 6th November 2017 Mr Hine stated to the Claimant 'he was not in Romania any more' and that 'the Claimant ought to have changed by now'. Limitation was raised by Mr Jackson on the basis that it was out of time.

The Hearing

7. At the start of the hearing it was agreed that should be a Rule 50 Order in respect of the publication of the names of any children. Mrs Niscoveanu raised some issues about disclosure of documents and stated that some of the documents were not in the hearing bundle. We indicated that we were prepared to allow the parties some time to sort this out but also advised that we wanted the parties to assist us in focusing on what was relevant. Mrs Niscoveanu also enquired whether she could assist her husband while he was giving his evidence so that he could explain himself properly. We indicated that if she or the Claimant felt that they needed an interpreter then it was open for them to apply for an adjournment so that the Tribunal could engage one. We indicated that otherwise the Claimant had to give his evidence independently. Mrs Niscoveanu decided to carry on.

8. The Claimant was called to give evidence. During his evidence the Claimant produced covert recordings of the meetings that took place on 30th October and 6th November which he had made on his phone. The case was adjourned and Mr Jackson was provided with the recordings so that he could listen to them. These had not been disclosed by the Claimant before. Mr Jackson was concerned because the metadata indicated that the file was created on 20th November 2017, which was after the Claimant had been suspended. Mrs Niscoveanu represented that at this time the Claimant was seeking legal advice so this could explain the later date as they were attempting to send the files to their advisers. Mr Jackson was concerned that there was an apparent change in the wave length in the recording and would seek to rely on expert evidence. We adjourned to consider the matter and decided that it was fair for the Tribunal to allow the Claimant to rely on this evidence. If the Claimant had disclosed the files at an earlier stage then the Respondent would have had the opportunity to call evidence in response. We found that it was only fair for the Respondent to have the opportunity to call any evidence in response now. We therefore made the decision to adjourn the hearing to allow the Respondent an opportunity to fully consider the disclosure and call any evidence in response. Our directions in relation to the additional evidence are set out in the Case Management Order dated 27th September 2019.

9. The case came back to the Tribunal on 25th February 2020. The Claimant was re-called to give evidence. We received transcripts of the audio files from 30th October and 6th November. There was an issue raised by Mrs Niscoveanu as to whether the transcripts fairly reflected what was said in the meetings so we agreed to listen to the audio files in open court while reading through the transcripts. It seemed to us that save for some overtalking and misspelling of

Welsh place names, the transcripts were accurate and in line with the audio recordings.

10. We heard evidence from the Claimant again and on his behalf, from Mrs Niscoveanu. For the Respondent we heard evidence from Mrs Coray, Mr Hine and Mr Holdsworth. All witnesses confirmed that they wished to rely on their witness statements as their evidence-in-chief. They were cross-examined. In closing we heard submissions from Mr Jackson for the Respondent who submitted some additional Written Submissions and the authorities of **Richmond Pharmacology v Dhaliwal [2009] ICR 724** and **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13/LA**. We heard oral submissions from Mrs Niscoveanu. During submissions Mr Jackson made the point that the racial harassment claim was out of time. We decided to hear from Mrs Niscoveanu on the issue of why the claim was not presented in time. Mr Jackson cross-examined her. He requested an adjournment on the basis that Mrs Niscoveanu was making an allegation of a mistake or omission to advise on time limits on the part of her legal advisers. Her case was that she had given all of the information at the time to DAS and they had put the claim in. She had already waived privilege by stating what she had been advised notwithstanding the warning that had been given. We determined not to adjourn on the basis that this ought to have been explored before submissions and on the basis that we had already heard the evidence. We determined to consider the time point as part of our overall deliberations on the issue. We reserved our decision on liability as there was insufficient time to deliberate and promulgate a decision within the allocated hearing time.

The Law

Constructive Dismissal

1. Under s.95(1)(c) of the Employment Rights Act 1996 there is a dismissal when an employee terminates the contract of employment, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. In order to successfully claim constructive dismissal an employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

2. The House of Lords set out the definition of the implied term of trust and confidence in the leading case of **Malik v BCCI SA [1998] AC 20 (HL)** which was that 'an employer will not without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.

3. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a last straw incident even though the last straw does not by itself amount to a breach of contract. In **Omilaju v Waltham Forest London**

Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct. It must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a last straw. This must be judged objectively. This rationale was upheld in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**.

Racial Harassment

4. Under s.26 Equality Act 2010 a person (A) harasses another (B) if they engage in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Unpaid Wages

5. Under s.13(3) Employment Rights Act 1996 where the total amount of wages paid on any occasion by an employer to a worker is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Submissions

Respondent's Submissions

6. On behalf of the Respondent it was submitted that there was no fundamental breach of contract either separately or cumulatively. In relation to the 6th November meeting the Claimant had given a continually changing story. When it was put to him that the recording demonstrated that there was no comment made by Mr Hine about Romania he suggested that after the meeting he went back inside to pick up some items and that it was said at that point. He gave no context to the incident. The Claimant's case was always that Mr Hine was the perpetrator. The recording demonstrated that Mr Hine did not swear at the Claimant and was not aggressive. Mrs Coray swore but the allegation was not against her. This is shown by the recording. The Claimant did not indicate that he would not be in work on 7th November, saying that he needed to think about things overnight. He was then absent without leave. There was a lack of clarity about the allegation that Mrs Coray lined up gymnasts and asked them to comment on the Claimant and no evidence as to when it happened. There was no case put to the Respondent's witnesses. There was no substance to the allegation about Mrs Griffith. Under cross-examination Mrs Niscoveanu was unable to say that something improper had taken place. Anything that took place after 1st January was post resignation and therefore irrelevant. As for the alleged demotion, the Claimant's evidence was that he worked without protest for a year in the changed role. The Respondent's case is that the change of title was agreed. He agreed that nothing had changed other than his job title. There were strict statutory and non-statutory safeguarding duties on any club or sports facility working with or for the benefit of children. There was evidence or reports

that the claimant had threatened his son with violence, laid hands on children causing them pain, threatened other children with violence and left a child unattended at a national competition when he had supervisory responsibility. It was also alleged that he used racially insensitive language around children and had made his son train contrary to medical advice. The Respondent did not make any findings or come to any conclusions on whether the Claimant was in fact guilty of any of the conduct alleged. He resigned before it had an opportunity to investigate. It was reasonable and necessary for the club to investigate. It was duty bound to do so. As for the suspension, Mr Holdsworth and his colleagues had to ensure that they did not endanger any safeguarding investigation by the local authority. Mr Holdsworth had regard to the ACAS Code of Practice. The Respondent is a small club which had limited HR assistance from DAS. In the absence of a disciplinary policy it was reasonable for the club to have followed the ACAS Code. In an ideal world the Claimant ought to have been informed of his suspension before he learnt about it from Welsh Gymnastics. Mr Holdsworth gave a coherent rationale as to why he took the action he did as the British Gymnastics Safeguarding Procedures required it. This is not a breach of contract. The Claimant only handed in a doctor's note on 14th November. At this point he would have had the opportunity to resign. He stated that he did not do so because he was waiting for a letter to clarify the situation, however he said that he was concerned because there were no time limits to the suspension in the letter yet he did not resign at that point. It was a month and a half later that he received the letter inviting him to an investigation meeting. It is not until he received that letter that he decided to resign. It was clear in response to his wife's questions that he had other jobs to go to. He left the club in order to avoid being scrutinised in respect of the allegations. If the last straw was the end process of the investigation the Respondent was doing the best it could by taking advice and acting upon it. The Claimant accepted that he had waived a number of actions prior to the last straw. The last straw was entirely innocuous and in keeping with the Respondent's statutory duties. The racial harassment allegation was unfounded and without context. The Claimant has failed to raise a prima facie case. The claim is out of time in any event. The claim for unpaid wages was unfounded. The Claimant was not contractually guaranteed the Rate 1 and Rate 3 work. He was only paid for the hours that he actually worked. This is how the contract operated for years. There was no additional entitlement.

Claimant's Submissions

7. On behalf of her husband Mrs Niscoveanu submitted that as concerned the unpaid wages claim, Mr Hine had attempted to manipulate the contract and sent texts to prevent him from receiving what he was entitled to. Mr Niscoveanu had consistently asked about his hours. In the November payslip they were there but in the December payslip they weren't. As for the 6th November meeting Mr Hine admits that the comments alleged were made. There were threats to the Claimant's position. Whatever the Claimant said was met with aggression and unacceptable language, for example he was referred to as 'someone like you', indicating that he was of less importance. The Respondent's conduct of this meeting led him to leave the facility and inform his employer that he was not fit for work. He proved his sickness absence with

phone calls and correspondence. He went on to be suspended while he was off sick. The Respondent has not provided any evidence that the suspension was in fact warranted. The claim of 'new evidence' was unfounded and concerned the Claimant's own son. It is suspected that the claims are fictitious because of the way the Respondent carried out the suspension. There was no evidence of the Claimant using inappropriate techniques. The Claimant was not absent without leave. He self-certified and contacted Welsh Gymnastics. The Claimant was scapegoated for the loss of gymnasts and there were no grounds for suspending him. The Respondent asked the children to demoralise the Claimant, the person who had been coaching them, in front of him. The Respondent made no attempt to inform the Claimant of his suspension, contrary to what they had asserted. They had no idea that he would be absent that day. It was coming towards the end of his period of self-certification. They had no desire to inform the Claimant. Their sole purpose was to prevent him from working with gymnasts. The real reason for the suspension was that Mr Hine believed that the Claimant was moving to another club. There was no disciplinary procedure and the club's structure was such that there was no impartiality as the managers were also trustees. The club itself did not have an adequate safeguarding record as some coaches did not have DBS checks. The Claimant was not informed of the progress of the suspension. The club made it difficult for his wife to pick up the children from the club. The Claimant was paid incorrectly and was forced to resign due to stress and depression. He was forced to leave a job that he had a passion for. He had been employed longer than the Respondent's witnesses. There were allegations of inappropriate training techniques but the Respondent had no issues with his technical ability. This was in evidence. The claim was put in by DAS Law. It was not known that the racial harassment claim was out of time.

Findings of Fact

8. The Claimant is a former international gymnast and circus acrobat by profession. He was introduced to Cardiff Central Youth Club by his wife in around 2006. He volunteered at the club and then completed his level 2 coaching qualification. In 2011 the Council closed the gym and the facility was taken over by the Respondent. The Claimant was issued with a contract which is at pages 45 to 47 of the bundle. The contract states that the Claimant was employed as a 'Head boys coach' and that his continuous employment began on 1st January 2012. There was reference within the Contract to the 'Employee Handbook'. The Claimant says that he received a handbook that was primarily concerned with health and safety. There is a copy of the 'Employee Safety Handbook' at p.52A, which is indeed primarily concerned with health and safety.

9. The Claimant coached the Elite boys squad. Historically there had been a number of concerns raised about the Claimant's coaching style in that it was negative and that he would push them too hard. There are some records dating back to 2012 and 2013 in the bundle. There was a complaint generated by parents in 2016 which resulted in Ms Coray, Head Coach, giving the Claimant a period of monitoring and feedback.

10. The Respondent is required to conform to the British Gymnastics rules on safeguarding. A club is required to appoint a Welfare Officer which in this instance was David Holdsworth, who was also a trustee. We were provided with several British Gymnastics policies to include 'Safeguarding Children: Safe Environment', 'Good Practice Guidelines on the use of Social Networking Sites by British Gymnastics Clubs and Club Members' and 'Safeguarding Children: Recognising and Responding to Abuse and Poor Practice'. British Gymnastics provide guidance on the what a club should do in accordance with the nature of the disclosure. There is a flow chart which summarises the steps that might be taken depending on the nature of the disclosure at page 89M. Where it is considered that the disclosure could be child abuse there is a requirement to escalate to social services and the police. Where it is alleged poor practice or breach of the British Gymnastics Standards of Conduct the guidance is that the matter is reported to the Welfare Officer and that a report is sent to British Gymnastics. To that extent there is an overlap between the internal disciplinary mechanisms that may be adopted by a club and the requisite regulatory requirements of British (or Welsh) Gymnastics.

11. On 27th September 2017 the Claimant was training his son in the gym. He had sustained a concussion during training. Ms Coray advised him that his son could stretch but not train or use any apparatus owing to the risks to his health. David Holdsworth, Welfare Officer, observed the Claimant's son training on a pommel and accordingly made an incident report (p.106). Mr Holdsworth spoke to the Claimant and his son and gave the Claimant some brief counselling over the incident. There was another similar incident that was recorded to have been observed by another coach, Maria, on 2nd November 2017 which was also relayed to Mr Holdsworth (p.127).

12. In October Sam Rees, Junior Boys Coach, relayed a disclosure to Mr Holdsworth about his observations of the Claimant's threatening conduct towards his son at the gym and his son's disclosure of physical abuse at home. He also made an allegation that he had heard the Claimant's wife threatening the daughter when he had been in a car with them and that the Claimant had used inappropriate handling techniques with boys during training. Mr Holdsworth contacted Cardiff Social Services and Welsh Gymnastics. Cardiff Social Services attended the gym and spoke to the Claimant and his son. They decided to take no further action. The matter was also referred to Cardiff and Vale Social Services as concerned the domestic allegations and they also took no further action. The Respondent acted properly in view of the nature of the allegations.

13. On 30th October 2017 one of the boys that the Claimant trained came out of a training session with the Claimant and complained that the Claimant did not praise him during sessions. This boy's mother also coached at the club. Mr Holdsworth spoke to her and she said that she was considering withdrawing the boy from the club as he was never praised and this was affecting his confidence. The mother also referred to an incident when the boy was at a recent training session supervised by the Claimant in Lilleshall in Birmingham. She alleged that the Claimant had left the child on his own until 9pm because he had needed to care for his son who had a head injury. She had found out

about this from her son and felt annoyed that she had not been contacted by the Claimant to say that he was not in attendance with her son at the time. Mr Holdsworth spoke to Welsh Gymnastics about this and decided to investigate it further. He prepared an incident report form on 4th November 2017. On 6th November the mother informed the Respondent that the boy no longer wanted to be coached by the Claimant.

14. Mr Hine (Manager) and Ms Coray arranged to meet the Claimant on 6th November 2017. We received a transcript of this meeting and listened to the recording in open court. The Claimant had covertly recorded the meeting on his phone and this was disclosed to the Respondent at the first hearing in September. The Respondent had arranged for a transcription and we listened to the audio recording while reading the transcript. We concluded that save for some overtalking and misspelling of Welsh place names the transcript was accurate. It provided us with reliable contemporaneous evidence of the conversation that took place. We found that this was an informal meeting.

15. We formed the view that the conversation that took place between the Claimant, Ms Coray and Mr Hine was frank but we did not find that Mr Hine was aggressive in the manner alleged by the Claimant. He used some swear words but not directly at the Claimant. He swore when speaking at page 4 but this was to emphasis the point that he wanted the boys to remain in the club and not to disappear. He did not swear at the Claimant. We did find that Ms Coray swore at the Claimant because she was upset that he had complained that they had been unsupportive towards him when she felt that they had given him a lot as a club.

16. The essence of the conversation was that Mr Hine and Ms Coray were concerned that the club was losing boys that the Claimant had coached and were concerned that if this continued, this would affect the reputation and viability of the service: boys were leaving before they got to a certain level. Mr Hine was concerned that the Claimant's means of motivating the children was affecting the ability of the club to retain gymnasts. He felt that the Claimant needed to be more nurturing and supportive. During the meeting there were other allegations that were discussed with him informally such as the report that he had referred to boys as 'Noodles', 'China' 'Chocolate Digestive' and 'Dark Horse' which was racially inappropriate. Mr Hine also raised an allegation with the Claimant that he had shouted at the boys in line and made them cry.

17. The Claimant, on the other hand, complained that he was not being adequately supported in that he was not being given enough time on the pit for his boys. During this conversation Ms Coray became emotional and said *'Me and Phil are running around here like blue arsed flies to have somebody like you. We are not being paid damage money I can tell you that now. To have somebody like you turn round and tell us that we are not supporting you I hardly ever get annoyed Phil, Sylv I am absolutely peeved at what you think of me and Philip at the moment, peeved with it. I have never been like that with you but I am actually feeling angry at how you talk to us as if we are pieces of shit of the fucking floor to be perfectly honest….*' Ms Coray was upset that the Claimant had complained that they were not supporting him and she left the room and

slammed the door. Mr Hine then reassured the Claimant that they were there to help him. The Claimant went on to say that he felt that he was being blamed for no reason yet Mr Hine was asking him to accept some responsibility for why the boys were leaving the club. The Claimant said that he would have the rest of the day off. Under cross-examination Ms Coray was asked what she had meant when she had referred to the Claimant as 'someone like you' and she said that she meant someone who the club had been supporting for years. There was no other evidence before us that this was meant as anything more sinister although we understood why the Claimant may have perceived it to be derogatory.

18. We noted that there was no reference in the recorded conversation to Mr Hine making any comments to the Claimant that he was not in Romania any more and that he ought to have changed by now. When the Claimant was questioned about this in evidence he said that Mr Hine made the comment shortly afterwards when he went back into the office to collect his belongings. He said that this was mentioned by Mr Hine as he walked out. The Claimant was asked whether there was a lead-up conversation to the comment being made or a prior context. He said that he was not sure. It was put to the Claimant that in fact he was taking his belongings during the recorded conversation as there is a reference on page 14 to Mr Hine saying 'what are you taking all your stuff for?'

19. We found that the Claimant's pleaded case that the racial comment was said by Mr Hine during this meeting was not established by the audio recording. When this was put to the Claimant he changed his account and stated that the comment was said shortly after when he was getting his stuff from the office. However, we find that the audio recording indicated that he was taking his belongings at the time. Further, he provided no evidence of any context or lead-up conversation to the comments being made. We did not believe his evidence. We therefore find that the Claimant has not proved that he was racially harassed by the Respondent in the manner alleged. While technically the claim is out of time because the alleged incident took place on 6th November 2017 we decided to extend time for presentation on a just and equitable basis. The allegation formed part of the factual matrix that we were required to consider for the constructive dismissal claim, so we would be hearing the evidence about the meeting anyway.

20. We accept Mr Hine's evidence that he had conversations in the past with the Claimant about his coaching techniques. He referred to having observed the Claimant push a boy into the splits on one occasion. He said that he had explained to the Claimant that in the UK it was not acceptable to touch gymnasts or push them into positions and that if that had been how he had been taught in Romania, it was not acceptable here. That was the context of the conversation and given that fact we do not find that this would have amounted to racial harassment. It was a question of Mr Hine drawing a distinction between the coaching methods in the two countries and pointing them out to the Claimant.

21. There is some dispute about whether the Claimant rang in sick on 7th November. The text message from Mr Hine at page 113 of the bundle indicates that he was unclear as to why the Claimant had not attended work and wanted to know when he would be in next. He replied saying that he needed time off to think about it. At the meeting on 6th November he had also stated that he needed to think about things overnight. We find that the Claimant had not made it clear to the Respondent how long he would be taking off work and for what reason. From what he said in the meeting on 6th November Mr Hine had a reasonable expectation that he would be in the following day. We can therefore see that the Respondent had some basis for wanting to investigate the Claimant's absence without authorisation. The Claimant claims that he phoned in on 9th November but there is no evidence that any message reached the Respondent and when this was put to Mr Hine in evidence he said that he was not aware of this. The Claimant provided a fit note on 13th November which signed him off with stress. We might add at this juncture that the Respondent had not come to any conclusions about whether the Claimant had been absent without leave but there was enough evidence in our finding to justify the Respondent investigating this matter at the very least, which is what it did. Mr Hine asked the Claimant to come in for a meeting on the Friday that week. He mentioned in the text that he had had information that the Claimant had been coaching at the Barry club. Mr Hine met with the Claimant on the Friday and explained that he was concerned about the Claimant's treatment of gymnasts, his relationship with coaches and some comments that he had made on facebook criticising the club. The Claimant was alleged to have criticised the Respondent for its lack of support in a Whatsapp group.

22. On Wednesday 15th November the Respondent suspended the Claimant and the letter is at page 132. Since the Claimant was off sick at that time the Respondent advised him that the suspension would take effect once he was signed fit to work. The Claimant was advised that the reason for the suspension was to investigate the following: emotional abuse of gymnasts and placing excessive pressure on them to perform; inappropriate training techniques with a potential to harm gymnasts; continued loss of gymnasts from the squad; unauthorised absence from work and using social media to cause reputational damage to the club. The Claimant was advised that he would be contacted to arrange an investigatory meeting. He was advised that the investigation was likely to take fourteen days but that if it was any longer the Respondent would write to him. The Claimant was advised not to visit the Respondent's premises or to contact any employees during the process unless they were attending the investigatory meeting with him. The Claimant was also advised that during the suspension he would be paid all of his contractual entitlements in full.

23. Mr Holdsworth gave evidence about the decision to suspend. He said that the Respondent did not suspend the Claimant over the social services related matters which had previously been disclosed by Mr Rees as there was some concern over the veracity of those complaints at the time. He stated that as soon as they received a more recent disclosure from David Pratt they decided to suspend. He said that this would have been on the Sunday. Mr Pratt had made a disclosure to Mr Hine. Mr Holdsworth had spoken to Mr Hine and it was decided that suspension was necessary so that they could conduct an

investigation into what had happened. Mr Holdsworth did not interview Mr Pratt and make notes until 27th November. At that stage therefore the Respondent was acting on an oral disclosure. We find nonetheless that the Respondent had some basis for suspending based on the information that it had been given and based on the other incidents that had been recorded before. There was nothing before us to suggest that this was malicious or that it was done in bad faith. Mr Holdsworth's evidence was that he had taken some advice from DAS and had done some research himself but that the Respondent did not have a disciplinary procedure.

24. Mr Holdsworth contacted Carys Kizito of Welsh Gymnastics by email on 13th November 2017. In this he refers to a further disclosure made by another coach and mentions that he spoke to Mr Hine. He indicated that he would be suspending the Claimant that evening. However he did not do so until the Wednesday. In the meantime Welsh Gymnastics contacted the Claimant before he received the Respondent's suspension letter and informed him that he was suspended from coaching. At that point, we find, he had not been informed of the suspension by the Respondent.

25. We find that the Respondent had a basis for the suspension and that there was a clear trail of allegations about the Claimant's approach to coaching and his conduct in respect of gymnasts which warranted an investigation. There were allegations that he had threatened his son with violence; had laid hands on children; had threatened children; had used de-motivating methods; had used racially inappropriate language around children; had left a child unattended and had made his son train contrary to medical advice. We do not consider that this was a malicious investigation, that the Respondent had an agenda or that it was trying to scapegoat the Claimant. There were a sufficient number of allegations with were consistent insofar as they reported a style or manner of approach that the Claimant used with the children. The Respondent was concerned about the children and was acting in accordance with the requirements of the British Gymnastics Safeguarding procedures.

26. However we do find that the Respondent's failure to suspend immediately led to the Claimant finding out about his regulatory suspension prior to his employment suspension. This would have been likely to destroy his trust and confidence in his employer at this juncture as it had not taken steps to inform him of the suspension with immediate effect. The Claimant had only learnt about his suspension after contacting Mr Hine after learning of his suspension from Welsh Gymnastics on the Tuesday. He was told that a letter was in the post. We formed the impression that the Respondent seemed relaxed about sending a letter out to him. We find that it would have assisted the Respondent and, indeed the Claimant, if it had a clear written policy on suspension and a disciplinary procedure but it did not. We also note that contrary to what the Respondent had said in its letter, it did not write to the Claimant after fourteen days to advise him of its progress with the investigation. However we find that it is significant that the Claimant did not resign immediately in response to these events. By doing so he waived any breach and affirmed the contract.

27. The Respondent conducted the investigation with Welsh Gymnastics. We found that the interviewees were advised that the contents ought to be kept confidential and that this was recorded on the notes. The Claimant's fit note expired on 26th November and Mr Hine advised him that he would then be paid in full for the period of suspension. On 8th December 2017 Welsh Gymnastics lifted the suspension that it had put in place for the Claimant but indicated that it would continue to work with the Respondent in its investigation. Mr Hine wrote to the Claimant on 8th December to inform him that he would remain suspended until notified of the investigatory hearing. On 18th December 2017 Mr Holdsworth wrote to the Claimant inviting him to a meeting at Cardiff Central Youth Club on 21st December and giving him the right of accompaniment. He was advised that depending on the outcome, the Respondent *may* (our emphasis) decide to start formal disciplinary action. Therefore it would have been clear to the Claimant at that stage that from the Respondent's point of view, disciplinary action was an outcome but not necessarily *the* outcome following the investigatory meeting. The Claimant did not get this letter and so the Respondent wrote to him again on 22nd December 2017 rearranging the meeting for 9th January 2018.

28. The Claimant resigned on 27th December 2017. It was not clear to us what the last straw was which culminated in the Claimant resigning at that point in time and not before. If it was the letter inviting him to an investigatory meeting the Claimant was aware of these allegations and that he was going to be investigated beforehand. Further, inviting him to a meeting was an innocuous act. The Respondent was acting fairly in asking him to provide his response to the allegations in a meeting.

29. At the start of the hearing it was stated that the Claimant was effectively being scapegoated because of the Respondent losing gymnasts. However the Claimant was aware that he was under suspension and being investigated in November and he did not resign at that point in time. The allegation had not yet been proved. We find that there was no identifiable last straw and that this was not apparent either from the evidence that we heard or from the case as pleaded.

30. We find that the Claimant 'jumped the gun' and resigned before the Respondent had a chance to hear his account and decide whether or not a disciplinary procedure was necessary. We did not consider that there was any extant breach of contract when he resigned. The only breach of the implied term of trust and confidence that we found was the Respondent's failure to notify him of the suspension before Welsh Gymnastics notified him. However by the time he wrote his letter of resignation he had waived this. He did not resign immediately after he was suspended and the manner of suspension was not something he resigned in response to in any event as it is not mentioned in his resignation letter.

31. We carefully considered the Claimant's assertions of unfair treatment as set out in his resignation letter and the evidence that we heard. We did not find that these amounted to a breach of contract either cumulatively or separately.

32. There was an issue about the covering of classes. The Claimant had sought to find cover for when he was taking one boy to Lilleshall but the Respondent's position was that he had left a class uncovered. There is text evidence of the Claimant seeking cover in the bundle. We find that the Respondent probably ought to have had a written policy about cover. It is unclear to us as to how an employer who knew about an event a year in advance would not be able to ensure that there was a process for lesson cover. However this was not something that the Respondent had made any sort of disciplinary finding on against the Claimant and we do not find that this was a breach of contract either of itself or taken with the other matters complained about. It was perhaps an example of an area that the Respondent could have improved on as concerned its systems for communication as between coaches and other employees but the Respondent had not conducted itself in a manner likely to endanger trust and confidence by raising this issue with the Claimant.

33. We find that it was reasonable for the Respondent to have chosen to investigate the issue concerning the boy who had allegedly been left unattended at Lilleshall in circumstances where the Claimant was there as the boy's coach. The Respondent had made no finding on this. Concerns were raised by the parent that the Claimant ought to have communicated with her and did not. The context was that the child was upset generally about the Claimant's treatment of him. It called out for an explanation to be provided by the Claimant. The situation had resulted in the child feeling alone and his mother was concerned.

34. The Claimant alleged that he had been demoted to Performance Coach from Head Boys Coach. We do not find that this was a breach of contract. He had the same status as he trained the boys Elite team and was carrying out the same role. He was paid the same and was carrying out the same responsibilities. We do not find that this was a demotion. He had in any event agreed to the change of title and this occurred some time before the chain of events which led up to his resignation.

35. We found that there was a clear tension between the needs of the club to provide an inclusive recreational facility and the needs of the Claimant to ensure that his gymnasts were reaching their targets. He had complaints about the provision of facilities for the boys as compared to the girls. Insofar as the Respondent was ascribing some responsibility to him for the resultant loss of gymnasts, this was something that he was going to be spoken to at the investigatory meeting. It may have been the case that the Respondent decided that this was not an issue that he should be responsible for. However, the picture as far as the Respondent saw it, as we noticed from the transcript of the conversation on 6th November, was that boys had left because they were de-motivated owing to the Claimant's manner or style of coaching. This for the Respondent was not a new issue.

36. The Claimant complained that Ms Coray acted inappropriately by lining up the children and asking whether the Claimant had made them cry. We were not provided with any specifics in terms of times and dates. The allegation was general and it was not put to Ms Coray. We did not find this proved.

37. We considered whether the Claimant or his family had been treated in a way which was a breach of the implied term of trust and confidence up to the point of resignation. The Respondent had a policy that it needed to be informed if children were being collected by a person other than a parent. This is a standard safeguarding procedure. We do not consider that the Respondent deliberately engineered a situation so that the Claimant or his wife could not pick their children up. However given that the family had a lot to do with the club, we accept that the suspension may have made it difficult for the Claimant and his wife to continue arrangements for picking up children during this time. Further it is also understandable that the Claimant would have wished to watch his daughter in a competition. We find that the Respondent might have considered lifting the suspension for this purpose. However we do not find that by electing to continue the suspension the Respondent breached the implied term of trust and confidence.

38. As concerned the unpaid wages claim, we do not find that the claim for unpaid wages is well founded. The Claimant's contract provides for a weekly working week of twenty-two hours a week. The evidence that we heard in relation to his payslips was that rate 1 was adult gymnastics, rate 2 was the boys elite and rate 3 was another type of gymnastics. The Claimant was engaged to coach boys. The rate 2 was his contractual entitlement. Anything over and above this was not contractually guaranteed in our finding. We accept the Respondent's evidence, having regard to the written contract, that the payments at the other rates were in respect of additional work that he was not contractually obliged to do. Therefore we find that he was paid what he was entitled to in his last wage slip and the claim for unpaid wages is not well founded.

39. For all of the above reasons the claims are dismissed. We do recommend however that the Respondent takes on board our observations about the need for it to have a clear disciplinary procedure in place which accords with the ACAS Code of Practice.

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Employment Judge A Frazer
Dated: 16th April 2020

REASONS SENT TO THE PARTIES ON 20 April 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS