EMPLOYMENT TRIBUNALS

Claimant: Mrs S Hathaway

Respondent: Blackpool Council

Heard at: Manchester **On:** 4-7 February 2020 and in chambers on 29 May and 10 August 2020

Before: Employment Judge McDonald
Ms C Bowman
Ms S Khan

REPRESENTATION:

Claimant: Mr Hathaway (Husband)
Respondent: Mr Ali (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint that she was constructively dismissed by the respondent and that that dismissal was unfair fails and is dismissed.

2. The claimant's complaint that she was directly discriminated against by the respondent because of age in breach of s.13 and s.39 of the Equality Act 2010 fails and is dismissed.

3. The claimant's complaint that she was indirectly discriminated against by the respondent because of age in breach of s.19 and s.39 of the Equality Act 2010 is dismissed on withdrawal.

REASONS

1. The claimant claimed that she was constructively dismissed by the respondent and that that dismissal was unfair. She also claimed that the respondent had directly discriminated against her by treating her less favourably because of her age in breach of section 13 of the Equality Act 2010 and indirectly because of age in breach of s.19 of that Act.

Preliminary Matters

2. Mr Ali had prepared a draft List of Issues. After discussion on the first day of the hearing we made the following changes to the List of Issues:

- The addition of a further incident of alleged age discrimination and/or incident going to breach of contract by the respondent, namely the exclusion (as alleged by the claimant) of the claimant from working group consultation meetings which had taken place in November 2017 and February 2018. This was added as issue 2(1) in the List of Issues.

- The removal of the indirect age discrimination complaint. This complaint was withdrawn after the Employment Judge (with Mr Ali's consent) explained what was meant by indirect discrimination in s.19 of the Equality Act 2010.

3. The final List of Issues, amended to reflect those points, is annexed to this judgment.

4. We heard evidence from the claimant in support of her claim. For the respondent we heard evidence from Ms Lisa Arnold (Head of Parks, Leisure and Catering Services), Mr Martin Cardwell (at the relevant time Senior Facilities and Operations Manager) and Ms Toni Worley (Centre Manager for Moor Park Leisure Centre). Each witness had a signed written witness statement and gave oral evidence. They were all cross examined and answered questions from the Tribunal.

5. One of the issues raised in the List of Issues was whether some of the incidents relied on as being acts of direct age discrimination claim were out of time. If they were, we needed to decide whether it was just and equitable to extend the time for bringing those claims. That in turn meant we needed to make findings about the claimant's and Mr Hathaway's (as her representative) knowledge about those time limits. The claimant gave oral evidence about this and, with Mr Ali's consent, we also heard brief evidence from Mr Hathaway about these issues. Mr Ali was offered the opportunity to cross examine Mr Hathaway but did not feel it necessary to do so.

6. There was an agreed bundle of documents ("the Bundle") but a number of documents were added to it during the hearing by agreement. In brief, they were:

- Pages 181A to 181D – current and proposed exercise class timetables for Moor Park. It was agreed that these were the correct attachments to an email sent by Mr Cardwell to the claimant on 12 July 2018 .

- Page 178A – an email from Ms Worley to the claimant on 20 June 2018 in response to the claimant's email stating she was dropping the Wednesday Pilates class that she taught.

- Pages 221A to 221Q – an exchange of emails between Mr Hathaway and Rachel Green, the respondent's in-house solicitor. They related to requests for disclosure of documents made by Mr Hathaway and Ms Green's response.

7. References in this judgment to page numbers are to pages in the Bundle unless otherwise stated.

8. At the end of the evidence we heard submissions from Mr Ali and from Mr Hathaway. We also gave the parties the opportunity to make further written submissions which Mr Hathaway did on 25 February 2020. We have not set out those submissions in full in this judgment but took them into account in reaching our decisions and have referred to them where relevant to specific disputes.

9. The Tribunal was not able to meet to deliberate and make its decision until 29 May 2020 and met again on 10 August 2020 to finalise its decision. The Employment Judge apologises to the parties that his absences from the Tribunal has led to a delay in this judgment being finalised and sent to them,

The Law

<u>The age discrimination complaint</u>

10. The complaint of direct age discrimination, is brought under the Equality Act 2010 ("the 2010 Act"). Section 39(2)(d) prohibits discrimination against an employee by subjecting her to a detriment.

11. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".**

12. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

13. If the protected characteristic is age, s.13(2) provides that it is not direct discrimination if the respondent:

> **"can show the treatment of [the claimant] to be a proportionate means of achieving a legitimate aim"**.

14. It is well established that where the treatment of which the claimant complains is not overtly because of a protected characteristic (in this case age), the key question is the "reason why" the decision or action of the respondent was taken.

The Burden of Proof in cases under the 2010 Act

15. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

Remedies for claims under the 2010 Act

16. Where a claimant succeeds in a claim of discrimination, s.124 of the 2010 Act gives the Tribunal three options (though not mutually exclusive) when deciding on an appropriate remedy for a claimant:

- to make a declaration as to the rights of the complainant and the respondent (s.124(2)(a));
- to order the respondent to pay compensation to the complainant (s.124(2)(b)), and/or
- to make an appropriate recommendation (s.124(2)(c)).

17. Most commonly the Tribunal will award compensation, the amount of which corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (s.124(2)(b) and (6) combined with S.119(2) and (3) of the 2010 Act). This means that there is no upper limit on the amount of compensation that can be awarded for discrimination, unlike, for example, compensation for unfair dismissal. Compensation can include compensation for injury to feelings and personal injury in addition to compensation for financial loss.

Time limits in cases under the 2010 Act

18. A claim concerning work-related discrimination must usually be made to the Tribunal within the period of three months beginning with the date of the act complained of (S.123(1)(a) of the 2010 Act). However, The Tribunal may accept a claim outside that usual time limit if it is made within such other period as it considers just and equitable. The three month time limit is also extended in some circumstances to take into account compliance with the Early Conciliation procedure.

19. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) of the 2010 Act, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

20. In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. Those factors are in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

21. In **Southwark London Borough Council v Afolabi [2003] ICR 800, CA**, the Court of Appeal confirmed that, while that checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly. It went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

22. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. Section 123(1)(a) of the 2010 Act says:

> **"(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

23. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal confirmed that in deciding whether there was a continuing act:

> "The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which officers … were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts."

24. In considering whether separate incidents form part of a continuing act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents' **Aziz v FDA 2010 EWCA Civ 304, CA**.

25. Acts which the Tribunal finds are not established on the facts or are found not to be discriminatory cannot form part of the continuing act: **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19**.

The unfair dismissal complaint

26. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by his employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

27. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

28. If the employer shows a potentially fair reason or dismissal then whether the dismissal is fair (having regard to that reason) will depend on 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 sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case (s.98(4) ERA).

29. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken".

Remedy for unfair dismissal

30. S.118(1) ERA says that:

> **"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of —**

(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).”

31. The basic award is calculated based on a week’s pay, length of service and the age of the claimant.

32. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

33. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd** referred to above).

34. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

35. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Constructive dismissal

36. Section 95(1)(c) provides that “an employee is dismissed by his employer if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct”. This is known as “constructive dismissal”. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**.

37. The claimant says that the incidents at para 2 of the List of Issues either separately or together amount to a breach of the implied term of trust and confidence. The existence of that implied term of mutual trust and confidence was approved by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**. It confirmed that the obligation on each party is that it will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

38. The question is whether, objectively, there has been a breach of the implied term. For the implied term to be breached the conduct must be such as, objectively,

is calculated or likely to undermine the duty of trust and confidence and must be conduct for which there is, objectively, no reasonable and proper cause (**Bradbury v BBC [2015] EWHC 1368 (Ch)** and **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**).

39. If the employer is found to have been guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

40. A breach of that implied term can result from the cumulative conduct of the employer rather that one repudiatory act. In many cases there can be a final act or "last straw" before the resignation.

41. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that that "last straw" need not itself be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach

42. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55:**

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term?
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

43. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp1978 ICR 221, CA**, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues

for any length of time without leaving, he will lose his right to treat himself as discharged".

Findings of Fact

44. We set out our findings of fact under the following headings:

- Background facts
- The review process up to 6 March 2018
- Events from 6 March to 18 April 2018
- Events from 19 April 2018 to 9 May 2018
- Events from 10 May to 12 July 2018
- 12-13 July and the claimant's resignation
- Additional findings relevant to the age discrimination claim

We have not set out all the evidence we heard in making our findings of fact. We have, however, referred to the evidence where there was a particular dispute of fact between the parties.

Background facts

45. The claimant worked for the respondent as a fitness instructor. We find she was very well qualified (pp.207-221) and that the respondent had no concerns about her performance in the role.

46. Although the respondent's ET3 suggested that there was a dispute about when her continuous service started, Mr Ali at the start of the Tribunal hearing confirmed that it was accepted that her employment began on 29 March 2001. She resigned with immediate effect by email dated 15 July 2018. That email was acknowledged by Mr Cardwell of the respondent on 16 July 2018. It was agreed that the effective date of termination was 16 July 2018 although nothing turns on whether it was 15, 16 or (as suggested in the claimant's claim form) 18 July 2018.

47. The respondent is a unitary Local Authority. Of relevance to this case, it runs three Leisure Centres. Blackpool Sports Centre ("BSC"), Moor Park and Palatine Leisure Centre ("Palatine"). The claimant's claim arose from a review of the exercise classes being provided at the three centres which led to her hours being reduced.

48. Before the changes resulting from that review were made the claimant taught classes at Moor Park and BSC totalling 6½ hours per week. They were as follows (all classes counting as one hour unless shown otherwise):

- Wednesday at Moor Park:

i. 9.30 a.m. Body Combat

ii. 10.30 a.m. Pilates.

- Thursday at BSC:

i. 5.30 p.m. Body Pump

ii. 6.30 p.m. Abs Blast (1/2 hour)

iii. 7.00 p.m. Pilates

- Friday at Moor Park

i. 9.30 a.m. Spin

ii. 10.30 a.m. Body Pump

49. In 2017 the respondent decided that it needed to carry out a wholesale review of its exercise class programme. It had not carried out such a review for a number of years and we find it was concerned that there had been a decline in performance over the previous 12 months. We find there were 3 main drivers for the review.

50. The first was concern about poor "class capacity" at BSC and Palatine. Class capacity is the percentage of available slots in any one particular class that are filled when the class takes place. If a class has a maximum capacity for 30, then 20 people attending gives a class capacity of 66%. We find that class capacity of between 70-80% is regarded as industry standard. We accept Mr Cardwell's evidence that class capacity at Palatine and BSC for 2017-2018 was significantly below that. The respondent accepted, however, that class capacity at Moor Park was meeting that 70-80% industry standard.

51. The second was a concern that the current programme was not meeting the needs of actual and potential customers and was not keeping up with industry trends in terms of the classes was being offered. That was relevant both to the respondent's need to attract paying customers to its centres and to its obligations as a public authority to meet the needs of its community as a whole.

52. The third was a concern that since the last wholesale review of the class timetables new classes had been added to each centre's timetable without a clear overall strategy. That had led to there being too many classes. That in turn "diluted" the class capacity for each class, especially at Palatine and BSC, i.e. there were too many classes which a member could choose to attend reducing the numbers at each class.

53. In summer 2017 Mr Cardwell, the 3 leisure centre managers (including Ms Worley) and the gym supervisors from each centre attended a workshop with Dave Alsted of Les Mills (a company specialising in the provision of workout classes) to learn more about current industry approaches (p.77C). That workshop informed the

creation of the new timetables as did a review of the classes being offered by other local exercise class providers (pp. 80-86).

54. Although we did not have class capacity figures for the claimant's classes at BSC, the Bundle did include class capacity figures for Moor Park for January-March 2018 (pp.103-108). They show that 3 of the 4 classes which the claimant taught at that centre easily exceeded the industry standard class capacity of 70-80%. Her 10.30 a.m. Pilates class on Wednesday had over 90% class capacity. Her 9.30 a.m. Body Combat Class on Wednesday did have a lower class capacity (56% in January rising to 77% by March) so on average (68%) just below the industry standard for those months. However, there was no evidence (and no suggestion from the respondent) that the claimant's classes were underperforming compared to others.

The review process up to 6 March 2018

55. In October 2017 Ms Arnold as Leisure Services Manager prepared a Project Brief for the exercise class review (p.88-89). That set out a timescale for the review (p.89). The aim was to launch the new timetable in March 2018. To do that, Ms Arnold's timeline envisaged:

- Establishing a staff working group by mid-November 2017
- Holding customer focus groups by the end of November 2017
- Developing a draft timetable by mid-January 2018
- A "consultation and recruitment period" in January to March 2018.

56. Ms Arnold sent the Project Brief to the 3 centre managers (copying in Mr Cardwell) on 19 October 2017 (p.90). She asked them to start to consider how the outcomes listed in it could be achieved. She also asked them to start progressing the agreed actions in the timelines. The outcomes referred to were to develop an exercise class programme that:

- Would meet the needs of existing and future customer profile
- Could be delivered to a consistent high standard through appropriately qualified and experienced staff
- Could be grown and developed in line with membership through a large pool of appropriately qualified and experienced staff
- Reflected Sports Blackpool's aims and objectives of improving the health and wellbeing of local residents through innovative programming
- Ensured consistency across sites and ensured a service wide approach
- Reflected industry trends and best practice

- Was high performing with a ratio of members to classes of between 35-45 at each site.

57. The first step on Ms Arnold's timeline was to ask the class instructors to volunteer to form a staff working group. Class instructors were invited to do so by an email from Mr Cardwell dated 3 November 2017 (p.93). It asked for volunteers to join a staff working group to "help us shape and review our current class timetables which will hopefully give us a high quality class programme that meets the needs of the customers, reflects industry trends and enhances the overall performance of the sties". The claimant responded to that email on the same day indicating that she would be keen to take part (p.95).

58. We find that Mr Cardwell was disappointed with the response to his call for volunteers. Other than the claimant, only 2 other instructors replied. In an email to Ms Worley and others on 15 November 2017 Mr Cardwell noted that all three "have a lot of experience" and that he was expecting more responses and "maybe more of a mixture in terms of age" (p.96). Mr Cardwell's email suggested another two instructors who might be interested and could be approached to join the working group. His view was that that group of 5 would give a "good mix in terms of classes they teach" but also included "some very strong characters who may potentially clash". We accept Ms Arnold's unchallenged evidence that this last comment referred to one of the other proposed participants rather than the claimant.

59. We accept that the respondent wanted a broader representation of staff on the working group than the initial response to Mr Cardwell's email provided. The claimant's case is that the subsequent meeting of that working group was moved deliberately to exclude the claimant because of her age. That meeting was set up by an email dated 29 November 2017 from Laura Ivinson, the manager of BSC. It was sent at 2.48 p.m. on Wednesday 29 November 2017 and set up the meeting for 4 p.m. the following day, Thursday 30 November (pp.101-102). However, at 12.55 p.m. on the 30th Ms Ivinson sent an email postponing the meeting "due to the short notice to arrange the meeting" (p.101). The meeting was rearranged for Thursday 7 December 2017 (p.101). The claimant could not attend on that rearranged date because she was on leave.

60. It does not seem to us that anything in Mr Cardwell's email of the 15 November 2017 (p.96) suggests he wanted to exclude the claimant because of her age. Rather, he wanted to include others to broaden the ages represented in the group. The first meeting of the group was set up two weeks after his email and was due to take place on a date when the claimant could attend. If, as the claimant suggested, the respondent wanted to exclude her it seems surprising that that initial meeting was set on a date she could attend. As Mr Ali submitted, there was also no evidence that the respondent had checked employee records to make sure that the postponed meeting would take place on a day when the claimant was unavailable. We find it more plausible that the meeting was postponed because Ms Ivinson had not given those invited enough notice of the initial meeting. We find Ms Ivinson had to hold the postponed meeting the following week because she wanted it to take place before the focus group meeting with customers due to take place in the week

of 11 December 2017 (p.101). We do not find that that first meeting was postponed to exclude the claimant.

61. The claimant's evidence was that there was a further "working group" meeting proposed for 20 February 2018 which she also volunteered to attend. However, that meeting was moved at the last minute to 22 February 2018 which meant the claimant could not attend because she was due to visit her son at university and could not change the date of that visit at the last minute. There was no evidence about that proposed second working group meeting in the Bundle. We find that meeting was intended to take place but did not. There was no evidence from which we could conclude that it was moved or cancelled to exclude the claimant.

62. In early 2018 there was a series of meetings and email exchanges in which Ms Arnold and the respondent's 3 Centre Managers including Ms Worley discussed and agreed the approach to reviewing the exercise class timetables. It was agreed the review should aim to result in a 70/20/10 mix between "core", "subsidiary" and "service" classes. The respondent would identify 7 core classes which would be the same across all 3 centres. Not all centres would provide all 7 core classes – BSC had lower membership so would probably only provide 4-5 of those core classes. The respondent's view was that taking that approach would allow consistency in terms of class provision and quality across the centres. Each centre would then also offer 2-4 "subsidiary" classes which might be unique to it. Moor Park and BSC also identified a need to attract more male customers which their data showed were underrepresented in current class users. It was also agreed that the total number of classes should not increase unless membership had grown to support that (pp.124-125).

63. Ms Worley gave evidence about the process she followed in deciding how to revise the timetable for Moor Park, the centre she managed. She explained (paras 8-17 of her statement) that she and John Chew (the Fitness Supervisor at Moor Park) had taken a "blank sheet" approach to designing the new timetable. Rather than starting from the current timetable and tweaking it, they had drawn up the ideal timetable based on what would meet the outcomes required by Ms Arnold's Project Brief and taken into account the criteria referred to in our previous paragraph. They then compared that with the current timetable for Moor Park to decide which classes to retain.

64. For Moor Park, Ms Worley and Mr Chew decided that the core classes would include Yoga. Core classes were to be held 4 or more times a week. Prior to the review there was only one Yoga class per week so to add more there had to be a reduction in other classes. The decision was to reduce the Pilates classes at Moor Park. Prior to the review there was at least one Pilates class every day so removing 2 of those to make room for Yoga classes would still leave enough Pilates classes in the weekly programme to satisfy demand.

65. The impact of this on the claimant was that her 10:30 a.m. Pilates class on Wednesday would be replaced by a Yoga class taught by a different instructor. As to why the claimant's Pilates class was removed rather than anyone else's, we accept Ms Worley's evidence that doing so fitted best with the availability of the Yoga

teacher and the balance of the timetable in terms of the other days and times when Yoga classes were available.

66. Other proposed changes meant the claimant would "lose" one of her classes on Friday morning. Ms Worley's evidence, which we accept, was that she intended that that lost class would be replaced by a new Pilates class taught by the claimant on Friday morning. She also gave evidence (which, again we accept) that she also intended to replace the claimant's other "lost" hour (i.e. the Wednesday morning Pilates class) by offering her a Body Pump class on Tuesday morning.

67. We did not hear evidence from Ms Ivinson but it was accepted that the result of her proposed revised timetable for BSC was that the claimant would "lose" her 0.5 abs blast class (p.141) but retain her other 2 hours of classes at BSC.

Events from 6 March to 18 April 2018

68. Ms Arnold requested that each of the Centre Mangers send her their proposed revised timetables by 5 March 2018 (p.128). Ms Worley sent hers for Moor Park on 6 March (pp.135-137). In the covering email she acknowledged that there were more classes than in the previous timetable but explained this was because there were more ½ hour and 45 minute classes replacing hour long classes in the current timetable.

69. On the 7 March 2018 Ms Worley sent Ms Arnold a table summarising the impact of the proposed new timetables on staff at all 3 centres. That table (p.140) showed the current and proposed hours for each instructor. It showed the claimant's hours at Moor Park reduced from 3 to 1 and at BSC from 2.5 hours to 2. In the "outcome" column for the claimant for Moor Park it said "Option of new classes on Tuesday and Thursday at similar times".

70. It was accepted that the table at p.140 correctly reflected the total proposed reduction in the claimant's hours as a result of the new proposed timetables. However, as Mr Hathaway pointed out, there was an apparent anomaly in that document. It was accepted that on 11 April 2018 the claimant stopped teaching her 9.30 a.m. Wednesday Body Combat class. It was accepted that the claimant had given notice of doing so by an email dated 15 March 2018 to John Chew, the Fitness Supervisor at Moor Park. There was no suggestion that that email had been copied to Ms Worley. That seemed to mean that as at 7 March 2018 when she sent the table at p.140 to Ms Arnold, Ms Worley would not have known that the claimant was reducing her hours at Moor Park from 4 to 3 by dropping Body Combat. However, the table at page 140 showed the claimant's hours at Moor Park as 3 rather than 4. Ms Worley was not able to explain that anomaly.

71. We find that the most plausible explanation for this anomaly is that the version of the table in the Bundle was one dated later than 7 March 2018. It had clearly been updated at some point after 15 March 2018 so it accurately reflected the claimant's hours at Moor Park after she dropped her Body Combat class. In relation to that particular document, we do not think the change is a sinister one. The update ensured that the table accurately reflected the hours being worked by the claimant. We do find, however, that this means that the document in the Bundle at p.140 was

not the version of the table sent to Ms Arnold on 7 March 2018. We do not think anything turns on that – there was no suggestion that the claimant saw that Table before her resignation and no suggestion it contributed in any way to a breach of the implied term of trust and confidence by the respondent.

72. Mr Hathaway submitted that this anomaly was an example of a wider problem with documents included in the Bundle as attachments to emails (and specifically with versions of the revised exercise class timetables for each centre) so it is convenient to deal with that point here. We find there is merit in his submission that the respondent itself seemed confused as to which document belonged with which email and which version of the revised timetables was which. For example, as we noted at para 6, the respondent conceded at the Tribunal hearing that the documents included at pp.173-174 were not the correct attachments for the email sent to the claimant by Mr Cardwell on 12 July (pp.181B-181C were the correct ones).

73. Mr Hathaway went further and submitted that some of the timetables in the Bundle might have been altered after the event deliberately for the purposes of the litigation. Specifically, he submitted they might have been altered to show the claimant having different classes in the revised September timetable than the versions she was shown on the 12 and 13 July 2018 (see paras 117 onwards below). He submitted that since previous versions of the timetables would have been overwritten when each timetable was revised there should only be one "final" version of each timetable. Any anomalies in copies in the Bundle could only have arisen from those documents being amended after the event. We find that the more plausible explanation is that poor version control on the respondent's part led to a proliferation of versions of the timetable rather than anything more sinister. We find that particularly plausible in this case where various iterations of the timetables were being emailed between colleagues. We do not accept Mr Hathaway's submission that the timetables had been altered after the event to put the respondent's actions in a better light. However, we do find that in reaching our decision we need to be alive to the risk that documents included in the Bundle as attachments to emails might not be the contemporaneous versions sent with the relevant email. That relates particularly to the timetables involved in the incidents on 12 and 13 July 2018 (see paras 117 onwards below).

74. As mentioned above, on 15 March 2018 the claimant gave notice to John Chew that she would no longer be teaching her Body Combat class at 9.30 on Wednesday at Moor Park. The evidence was clear that it was the claimant who wanted to drop Body Combat and that was because she did not want to pay for the next "package" of materials (such as playlists) which she would have had to pay for herself in order to maintain her Body Combat qualification. There was never any suggestion that the respondent had forced her to give up that class. However, Mr Hathaway did put it to Ms Worley that at the time when the claimant "dropped" her Body Combat class, Ms Worley would have known that she was likely to be losing some of her other classes at Moor Park. Although it is not one of the incidents relied on by the claimant as contributing to a breach of the implied term, Mr Hathaway asked Ms Worley whether it would not have been fairer to tell a longstanding employee that instead of dropping a class, she should maintain the status quo for the

time being pending the outcome of the review. We accept Ms Worley's evidence that she did not do so because it would have meant her telling (or at least hinting heavily) to the claimant what the impact of the exercise class review might be on her before other instructors were told the impact on them.

75. We find that by March/April 2018 the respondent had agreed the proposed revised timetable for each of the 3 centres. The revised timetables meant a potential reduction for the claimant of 2.5 hours of classes. By then, having dropped the Body Combat class, she would have been reduced to 1 hour (on Friday morning) at Moor Park and 2 hours on Thursday at BSC.

76. We have found that Ms Worley's intention was to find the claimant another 2 hours of classes in the new timetable for Moor Park which would have made her net loss of hours 0.5 hours (effectively the Abs Blast class at BSC). However, the approach adopted by the respondent was we find a two stage one. Stage one was to take classes away from instructors whose classes were being removed from the timetable. Stage two was to then allocate any untaken classes to those instructors who had lost classes. Although Ms Worley had ideas about classes which the claimant could take up to "offset" her loss, the position at the end of the first stage of the process was that the claimant was going to be losing 2 hours of classes at Moor Park and 0.5 at BSC.

Events from 19 April 2018 to 9 May 2018

77. On 19 and 21 April 2018 the respondent held group consultation meetings at BSC with all the exercise class instructors to report on the outcome of the review of the exercise class programme. At those meetings Mr Cardwell gave the same presentation explaining why the respondent had decided that changes were necessary. From the brief (non-verbatim) notes of the meetings (pp.155-156) it is clear that the focus of Mr Cardwell's presentation was on why the review was necessary. The proposed revised timetables for the 3 centres were not part of the presentation nor were they made available to the instructors at those meetings. Instead, Mr Cardwell explained that the impact on each class instructor would be set out in a letter which each would be handed at the end of the meeting. Mr Cardwell also explained that one to one meetings would be held with any instructors who wanted them over the following few weeks to answer specific questions and to allow each instructor to view the proposed revised timetable.

78. The claimant attended the meeting on 19 April and the letter she was given at the end of the meeting (p.157) told her that she was going to be losing 2.5 of her hours. Since the claimant at that point only worked a total of 5.5 hours (having dropped her Wednesday Body Combat class at Moor Park on 15 March 2018) that represented nearly a 50% cut in her hours. Mr Cardwell, in whose name the letter was sent, said that he was happy with the content of it. However, we find that the letter was, at best, confusingly worded. It is obviously a standard letter into which some details relevant to the claimant have been inserted. It is headed "Formal Consultation" and thanks the recipient for attending one of the consultation meetings "regarding the group exercise review we have carried out recently". Having

explained who carried out the review and what was involved in it, the letter goes on to say that:

> "As part of the review, class instructor contracted hours may have been affected in either a positive or negative way and some have seen no changes at all."

79. It then says:

> "With regard to your specific situation, your contracted hours will decrease by 2.5 hours per week following the review."

80. The letter does not say anything to the effect that "the current proposal" is that the contracted hours will decrease by 2.5 hours per week. Instead, it seems to us to state definitively that the hours will decrease.

81. The next paragraph says that where the recipient has been negatively impacted by the review:

> "You now have one week to consider this and put forward any alternative solutions. Following this consideration period, a one-to-one meeting with [Mr Cardwell] and Christine Lancaster from Employee Relations will be arranged to discuss your options further. If you do not wish to attend a one-to-one meeting please advise me at your earliest opportunity via email."

82. That paragraph seems to suggest that the "consideration period" was the period of one week after the letter was received (after which a one-to-one meeting would be held unless the claimant said she did not want to attend such a meeting). In the claimant's case, one week after the letter was received would be 26 July 2018.

83. However, the next paragraph says:

> "At the end of this consideration period, which we expect will be week commencing 30 April, you will be given one month's notice of the reduction."

84. That seems to suggest that the "consideration period" will be longer or end later than suggested in the preceding paragraph.

85. The letter goes on to say that there will be no entitlement to pay protection on the loss of any contracted hours and that:

> "Be aware that there may be options to pick up additional hours in other classes following the review and this can be discussed during the one-to-one meeting."

86. The respondent's witnesses suggested that it was clear that this letter was the start of a consultation process. It seems to us that is true only in a limited sense. The wording of the letter seems to us to make it clear that the decision to change the timetable and "lose" some classes is not something being consulted about – that decision had already been made. Our view is supported, it seems to us, by the fact

that at that point the instructors were not shown the new proposed timetable. They could not, therefore, propose any "alternative solutions" in terms of changes to that proposed timetable. What we find there was scope to do (and what in fact happened) was to propose mitigating measures by the instructor picking up unallocated classes in the revised timetable to make up for the ones lost. However, that could only be done once an instructor saw the proposed timetable at their one to one meeting - until then they would not know which unallocated classes were on offer.

87. The claimant opened and read her letter at the end of the group consultation meeting at BSC on 19 April 2018. Her evidence (corroborated by Ms Worley) was that she was very upset by it. We can fully understand why. The respondent accepted that she was a very valued employee and as we have said her classes were well attended. We find it was a great shock to the claimant to find out she would be losing nearly half her classes.

88. Immediately after the meeting the claimant spoke to Ms Worley who attempted to reassure her that the decisions being made were no reflection on her individual performance. We find that she also tried to reassure her that she would be able to add classes to make up for the ones she was losing. What Ms Worley was not able to do was explain to the claimant which classes she had lost and which she might be able to pick up. We accept that that was because their conversation took place at the first of the two meetings with instructors. That meant that not all the instructors would have had their letters about the impact of the review on their hours so Ms Worley could not go into details about the new timetables. We do however accept Ms Worley's evidence that she did tell the claimant that it was her Moor Park classes rather than those at BSC which were being reduced. She had to explain that because the letter (p.157) gave no indication about which of the claimant's classes were being removed or why.

89. In her witness statement the claimant said that she also spoke to Mr Cardwell at the end of the meeting on the 19 April. Her evidence was that Mr Cardwell said that she only did the classes for the love of it rather than for money. The claimant was not asked about this in cross examination. When Mr Cardwell was asked about it in evidence he denied saying what was alleged and said it was not the kind of thing that he would say. Ms Worley did not recall the words being said but also said that she might not have been party to the conversation between Mr Cardwell and the claimant.

90. We prefer the claimant's evidence on this point. Mr Ali submitted that she was certainly an honest witness but that she was not always a reliable one, i.e. she could not on occasion recall what had happened with any certainty. He suggested that this applied to the remark which she alleged Mr Cardwell had made. We found the claimant to be a credible witness. We accept that at times she could not recall what had happened but we find that when that was the case she accepted that that was so. We also find it plausible that Mr Cardwell might have made the alleged remark in an ill-judged attempt to lighten the mood when the claimant was clearly upset. Although we find the remark was made we do not find that it had a significant impact on the claimant. We accept she may have found it patronising but she did not refer to

it either in her email later that evening setting up her one to one meeting (p. 160) nor at that meeting itself.

91. The claimant's one to one meeting was arranged for Wednesday 25 April 2018. She asked Mr Cardwell for a copy of the new timetable in order to prepare for it. He confirmed by email that it would be shared with her at the meeting itself (his email of 23 April 2018 p.159).

92. We accept that there were three respondent representatives at the "one-to-one" consultation meeting. We accept the claimant's evidence that she felt intimidated at that meeting. We find, however, that the claimant was (or should have been) aware that there would be three people attending before the meeting took place. The letter handed to her on 19 April refers to Christine Lancaster from Employee Relations being present at the one to one meetings (p.157). In the email exchange the claimant had with Mr Cardwell setting up the one to one meeting he said he needed to "ensur[e] Toni [i.e. Ms Worley] and Christine (HR) are available too)" (p.160).

93. We did find it surprising, given that the respondent is a public authority so presumably used to dealing with trade unions or employee representatives, that it did not in the letter of 19 April offer the claimant the opportunity of being represented at that meeting. However, the claimant did not ask whether she could be accompanied and as we have said, the claimant was aware that there would be three people at the meeting so it was not a case of her being "ambushed" on the day.

94. The notes of the one to one meeting are brief (p.162). Based on them and the evidence we heard, we find that Ms Worley showed the claimant the revised timetable for the first time and explained why it had not been possible to share it before. We find that the claimant did feel intimidated and told Ms Worley and Mr Cardwell how stressed and upset she was about what was happening. We find that she expressed her confusion about why her classes were being removed when they were successful and that Ms Worley and Mr Cardwell explained that the changes were to revive the timetable as a whole.

95. We also find that Mr Cardwell said that one purpose of the changes was to attract new customers. The notes of the meeting do not explicitly refer to Mr Cardwell saying, as the claimant alleges, that the claimant's classes were being changed to attract a new demographic. However, Mr Cardwell in his witness statement confirmed that he explained the reasons for the review and as we have found, one of those reasons was to attract underrepresented groups like younger men to Moor Park. We find that Mr Cardwell did say that classes were being changed to attach a new demographic. We find, however, that he would not have said that the claimant's classes specifically were being changed for that reason. The notes of the meeting record that he told the claimant that the changes were not a reflection of individual performance.

96. As we said, we accept that the claimant found the meeting intimidating. However, she accepted in evidence that no one at the meeting behaved in an intimidating way. It is clear from the subsequent email exchanges that she and Ms

Worley and Mr Cardwell were able to have discussions about and reach agreement about potential options of classes she could take on to replace those she was going to be losing when the new timetable took effect.

97. Mr Cardwell confirmed the options at BSC and Palatine in an email he sent after the meeting (pp.164-165). These included a 6 p.m. Pump class or a 6 p.m. Spin class on Friday at BSC and 6 p.m. Monday and a 7 p.m. Wednesday abs blast session at Palatine. The claimant responded to that email explaining she was not available Monday or Friday evening but that having looked at the revised Moor Park timetable she could do the Pump class on a Tuesday at 10.30 a.m. (p.164). There was a further email exchange and on 27 April 2018 the claimant emailed Mr Cardwell to confirm that she understood her Moor Park classes would in the future be 10.30 a.m. Body Pump on Tuesday and 9.30 Pilates and 10.30 Spin on Friday (p.163). We note that those are the classes which the claimant is shown as teaching on the timetable at p.173 in the Bundle though there was no suggestion she was sent that timetable at the time.

98. Mr Cardwell's response on 30 April was that he had passed the claimant's email to Ms Worley to confirm. He also asked the claimant whether she had had a "think about abs at [Palatine] to gain back the 0.5 you have lost at BSC?" (p.163). Mr Cardwell's evidence, which we accept, was that the claimant did not come back to him on that point.

99. We find that by the end of April 2018 the position so far as the claimant was concerned was that matters had been resolved. She thought she had an email agreement with Mr Cardwell about the classes that she would pick up to replace the ones that she was losing. She would still be teaching 3 classes at Moor Park (10.30 a.m. Body Pump on Tuesday, 9.30 a.m. Pilates and 10.30 a.m. Spin on Friday) and 2 at BSC. She would be losing 0.5 hours of the 5.5 hours she was then working rather than the 2.5 hours she was due to lose according to the letter dated 19 April 2018.

Events from 10 May to 12 July 2018

100. The claimant was in the category of instructors who had lost hours as a result of the proposed changes to the timetable. As a result she was included in the list of recipients for emails the respondent sent out in May asking for expressions of interest to pick up classes on the proposed new timetable not yet allocated to instructors. Those emails were sent on 10 May 2018 (pp.167-168), and 23 May 2018 (pp.170-171) by Chris Knight. Each set out a list of classes at the 3 centres which still needed an instructor. The claimant did not respond to those. We find that perfectly understandable given that she thought her position had been substantially sorted at the end of April. However, we find it suggests that she was not overly concerned about replacing the 0.5 hours she was going to be losing.

101. Ms Worley did not confirm the position as Mr Cardwell's email of 30 April suggested she would (p.163). On 19 May 2018 the claimant asked Ms Worley when the new timetable was going to come into effect but at that point Ms Worley was not able to confirm the date. We find that was because there was during the period April – June 2018 a constant toing and froing "behind the scenes" as the respondent tried

to finalise the ideal timetable for each centre and allocate classes to instructors who had lost classes (as evidenced by the emails from Chris Knight).

102. On 19 June Mr Cardwell wrote a letter to the claimant confirming a reduction in her hours by 0.5 (p.177). It is a short letter which gives notice of a reduction in contracted hours as required by clause 5 of the claimant's contract of employment (p.70). the letter gives no information about which classes the claimant was going to be teaching in the new timetable. The claimant said in evidence that she could not remember having received it. However, her claim form (p.7) refers to the reduction by 0.5 hours being confirmed in writing and in submissions Mr Hathaway accepted that it was clear that the letter had been received although it was not clear when it had been received.

103. Mr Cardwell was not able to specifically confirm whether the letter would have been delivered by hand but said that that was how the letters were delivered. Ms Worley for her part said that she could not remember delivering that letter specifically to the claimant. She did say that such letters were sometimes delivered by the Duty Managers at centres, so it may well be that she herself was not directly involved with it. The letter has no address on it which suggests it might have been delivered by hand.

104. We find that that letter was received by the claimant but that she had not received it at 4.10 p.m. on 20 June 2018 when she sent an email to Ms Worley giving notice that she would no longer be teaching the Wednesday Pilates class after her 27 June 2018 class (p.178). We say that because that email says that "despite the verbal agreements with you and [Mr Cardwell] about the changes the only thing I have in writing is the original letter informing me that I was losing 2.5 hours". The claimant in that email also told Ms Worley that she had found continuing with classes very stressful since April, that she was still bemused that busy classes were being removed from the timetable and that the lack of information had added to her anxiety.

105. Ms Worley responded to the claimant's email half an hour later (page 178A) She explained that it was only that week there had been confirmation that the timetables would change on 23 July 2018 to an interim timetable with a full new timetable being launched in early September. She confirmed that until Monday of that week (which would have been 18 June 2018) the timetable was still being tweaked and finalised. She also said that in the revised final version the claimant's Wednesday Pilates class was going to be retained (contrary to what had previously been said). She said that she appreciated that the claimant had now found alternative employment and would no longer be able to teach it but that the Wednesday Pilates class was available for her if she wanted it. The claimant was not able to take up that offer.

106. We find that the position at the beginning of June 2018 in relation to Moor Park was that the claimant was teaching the following classes on Friday:

- 9.30 a.m. Spin
- 10.30 a.m. Body Pump

107. We find that the claimant assumed from Ms Worley's email on 20 June 2018 (p.178A) that when the interim timetable came into force on 23 July 2018 the classes she would be teaching at Moor Park were those agreed with Mr Cardwell in the email exchange at the end of April (p.163). They were as she understood it:

- Tuesday:
    i. 10.30 a.m. Body Pump.
- Friday
    i. 9.30 a.m. Pilates
    ii. 10.30 a.m. Spin

108. Our finding that the claimant thought that matters had been settled by the end of April is supported, it seems to us, by her decision to resign from her Wednesday Pilates class on 20 June 2018. It seems to us that she had clearly (and understandably) taken the view that since that class was going to be lost once the new timetable came into effect she needed to find alternative work to cover it. We do find that Ms Worley's response to that resignation (p.178A) was a considerate one, apologising for the upset caused to the claimant but also trying to explain the complexity of the process the respondent was undertaking.

12-13 July and the claimant's resignation

109. At 15:21 on 12 July 2018 Mr Cardwell sent new timetables to all the instructors by email (p.181A). In the email Mr Cardwell said "please find attached the new class timetables starting Mon 23 July 2018". He went on to say that there was going to be a "soft launch" from 8 September 2018 "then from Mon 10th Sept the official timetables will start".

110. There were 3 attachments to that email, one Excel document for each of the 3 centres. Each Excel sheet consisted of 2 tabs. One tab was the "interim" timetable for that centre from 23 July until September and the other tab was the "new" September timetable. As we said at para 6 the respondent accepted that the correct attachment for that email for Moor Park was at pages 181B-181C and not at pages 173-174 as it had originally suggested.

111. The "interim" timetable tab for Moor Park (p.181B) showed the claimant teaching Spin at 9:30 a.m. and Body Pump at 10:30 a.m. on Friday which we find accurately reflected the classes she was teaching by then. It showed Lili teaching Pilates on Friday at 9:30 a.m.

112. The "September" timetable tab for Moor Park (p.181C) showed the claimant teaching Body Pump at 9.30 a.m. on Friday and then either teaching Spin or Pilates at 10:30 a.m. on Friday. Both classes are shown at 10:30 a.m. with the claimant's name and a question mark in each.

113. Neither timetable showed the claimant teaching Body Pump at 10.30 a.m. on Tuesday. Both showed Naomi teaching a Body Pump class at 9.30 a.m. and Anna teaching a Zumba class at 10.30 a.m. The only difference on Tuesday morning was that the interim timetable (p.181B) had Mandy teaching a Pilates class at 12.30 p.m. while the September timetable (p.181C) had that same class at 11.30 a.m.

114. The claimant's cross examination evidence, which we accept, is that she looked at Mr Cardwell's email on her phone on the way into work on the 13 July 2018. She said she saw the options she was given on Friday and at 8.06 a.m. emailed Mr Cardwell from her phone to say that he appeared to be offering her the choice to do Pilates or Spin at 10:30 a.m. and she would prefer to do Pilates (p.181E). It is clear therefore that the claimant had seen the September timetable (p.181C) before she went to Moor Park to teach her classes on Friday 13 July.

115. Mr Ali asked the claimant in cross examination why she had not in her email to Mr Cardwell queried why she was not down to teach the 10.30 Body Pump class on Tuesday. The claimant's evidence, which we accept, was that she was looking at the timetable on her phone and had only seen the part of it relating to Friday. The timetable is an Excel spreadsheet and we accept that it would have been difficult to see it all on a phone screen (it was difficult enough to read at A4 size in the Bundle). As we said at para 90 we found the claimant to be a credible witness. We find it plausible that her focus when briefly looking at the timetable on her phone on the way to work would have been on the classes she was currently teaching (i.e. those on Friday) and accept her evidence that she did not at that point look to see whether she had been allocated the Body Pump class on Tuesday in addition to those classes.

116. We find, therefore, that when she arrived at Moor Park on the morning of Friday 13 July 2018 to teach her classes the claimant thought that the new Moor Park timetable for September confirmed that she would be teaching Body Pump at 9.30 a.m. on Friday and Pilates at 10.30 a.m. on Friday. That was different to what had been agreed at the end of April but did mean that the claimant would be teaching two classes on Friday, one of which would be Pilates. The differences were that instead of Pilates at 9.30 a.m. she would be teaching Pilates at 10.30 a.m. on Friday and instead of Spin at 10.30 a.m. she would be teaching Body Pump at 9.30 a.m. We find that was acceptable to the claimant.

117. We find that by 9.30 a.m. on the morning of the 13 July 2018 Ms Worley had put up A3 paper versions of the interim and September timetables up in the centre so that customers would know what changes were happening to the exercise class timetable. Ms Worley's evidence is that the timetables she put up were those at pp.173-174 in the Bundle. The versions in the Bundle were A4 rather than A3 versions of the documents, i.e. they were reprinted rather than being copies of the A3 versions actually put up by Ms Worley on 13 July 2018. As we have said at para 73 we need to exercise caution in relation to the various versions of the timetable given the respondent's own confusion about which was which.

118. We accept that the version of the timetable for Moor Park at p.174 is the Interim timetable. It shows the claimant teaching:

- Friday

    i. 9.30 a.m. Spin

    ii. 10.30 a.m. Body Pump

119. That version of the interim timetable also shows Naomi teaching a Body Pump class on Tuesday at 9.30 a.m. and Lili teaching Pilates at 9.30 a.m. on Friday. It is identical to the interim timetable (p.181B) which Mr Cardwell sent to the instructors on 12 July.

120. The version of the September timetable at p.173 of the Bundle shows the claimant teaching:

- Tuesday:

    i. 10.30 a.m. Body Pump.

- Friday

    i. 9.30 a.m. Beginner Pilates

    ii. 10.30 a.m. Spin

121. That version is different to the September timetable (p.181C) which Mr Cardwell sent to the instructors on 12 July. The p.173 version reflects what had been agreed between the claimant and Mr Cardwell at the end of April. In her email to Mr Cardwell at 3.44 p.m. on 13 July 2018 (p.182) Ms Worley confirms that the interim timetable he sent out (i.e. p.181B) was correct. However, she says that the September tab (p.181C) had times on it which she had not updated. Ms Worley confirmed that it was this tab which the claimant had looked at on her phone.

122. Ms Worley goes on in that email to refer to the respondent having asked the claimant the previous week which classes she would prefer to teach on Friday morning "but the reply received was along the lies [presumably "lines"] of 'none of this is ideal' and she didn't specify a preference." We heard no other evidence about that exchange but accept that it did happen as described by Ms Worley.

123. Ms Worley then goes on to say that because the claimant did not specify a preference "I elected to keep it the same as it is now". She acknowledged that "[the claimant] did reply to you this morning with a different preference, but everything has now been put out for customers so would be very difficult to change again" (p.182).

124. The only preference by expressed by the claimant that morning was to teach Pilates at 10.30 a.m. on the new September timetable. We find therefore that the "it" which Ms Worley was talking about in her email was the September timetable. What she was telling Mr Cardwell was that because the claimant had only that morning expressed her preference for teaching Pilates rather than Spin at 10.30 a.m. it had not been possible to incorporate that change into the September timetable published in A3 form to customers. Instead, Ms Worley had carried forward into the September

timetable the classes for Friday as they were then being taught, i.e. with the claimant teaching Spin at 9.30 and Body Pump at 10.30 with Lili teaching Pilates at 9.30 a.m. That is what is shown in the final, formatted and published timetable for Moor Park (p.204). Ms Worley's evidence about why she decided to retain the timetable on Friday as it was for September was not challenged and we accept it. We find she had had to make a decision one way or another about what to do about the Friday classes so she could "publish" the timetables to customers and decided the line of least resistance would be to simply leave them as they were. That would cause least disruption to customers and to the claimant.

125. What that does mean, however is that the timetable at p.173 cannot be the September timetable which Ms Worley put up on 13 July 2018 because it shows the claimant teaching Beginner Pilates at 9.30 a.m. and Spin at 10.30 a.m. As noted already, p.173 instead seems to us to reflect what was agreed between Mr Cardwell and the claimant at the end of April.

126. That finding is also, it seems to us, consistent with what we find happened after the claimant arrived at Moor Park on the 13 July. As we have said, her understanding of what she was going to be teaching in September was based on her email exchange with Mr Cardwell that morning and on the timetables she had seen on her phone that morning. Based on that, we find that she told at least one customer that she was going to be teaching Pilates at 10.30 a.m. She did so, we find, because she had just confirmed that with Mr Cardwell.

127. Mr Cardwell emailed the claimant and Ms Worley later that day (p.183) referring to confusion about when Pilates was switching from 9:30 Friday to 10:30 Friday. A customer had rung Mr Cardwell because he had been told that the switch to 10:30 a.m. was to start from the following Friday. Mr Cardwell had clarified that that change would happen from September. We find that at that point, therefore, Mr Cardwell also thought that the claimant would be teaching Pilates at 10.30 a.m. from September and did not know that Ms Worley had decided to keep Pilates at 9.30 a.m. taught by Lili. That would not have been clear to him until Ms Worley's email at 3.44 p.m. that day (p.182).

128. However, we find that by the time the claimant arrived at Moor Park on 13 July some of the customers had seen the A3 timetables put up by Ms Worley. The claimant was told by at least one class participant that classes which she thought she was teaching would in fact be taught by other instructors. Specifically, she was told she would not be teaching Pilates on Friday morning because the September timetable put up by Ms Worley showed Lili teaching that. We find that the claimant was upset by this and she therefore spoke to Ms Worley after her classes that morning. Neither the claimant nor Ms Worley gave clear evidence about what was said during that conversation but there is email evidence about what happened.

129. Ms Worley in her evidence suggested that the claimant's confusion arose because she was looking at the "interim" tab on her phone rather than the "September" tab. That is not consistent with the claimant's email at 8.06 a.m. on the 13th to Mr Cardwell where she elected to do Pilates at 10.30 a.m. (an option only on the "September" tab). The claimant had clearly seen the September timetable. What

we find did become apparent to Ms Worley on looking at the timetable on the claimant's phone was that the September timetable sent out by Mr Cardwell and seen by the claimant (p.181B) was not the correct version.

130. In the claimant's email to Mr Cardwell later that afternoon (p.182) she says Ms Worley told her that she was not going to be offered the chance to teach Pilates in September and instead "the classes are (after everything) remaining as they currently are. Spin at 9.30 Pilates 9.30 Pump at 10.30 with Lilli doing Pilates". Ms Worley's email of the same afternoon (p.182) seems to us to confirm that that was the position. Ms Worley does say in her email that in the conversation with the claimant that morning se "did explain and apologise for the error and tried a bit of damage control. Hopefully she will decide to stay."

131. Based on that email evidence we find that during that conversation on Friday morning Ms Worley confirmed to the claimant that the September timetable she was sent by Mr Cardwell was not correct, that Lili would be teaching the Pilates class at 9.30 a.m. on Friday and that the claimant would be teaching Spin at 9.30 a.m. and Body Pump at 10.30 a.m. We find that the claimant was upset and that Ms Worley did try and make amends by apologising for what had happened. We find that the "error" referred to in Ms Worley's email was the wrong September timetable being sent to her by Mr Cardwell. The effect of that error, we find, was to raise her expectations that she would be teaching a Pilates class on Friday. She was therefore upset on finding out (via customer and then confirmed by Ms Worley) on 13 July that that was not the case.

132. We have spent some time in focussing on the detail of what happened on the 12 and 13 July 2018. We also found it helpful to step back from that detail. To summarise the different options offered (and she assumed agreed) with the claimant for Friday at Moor Park from September:

- at the end of April 2018 the claimant thought the agreement was that she was going to be teaching 9.30 a.m. Pilates and 10.30 a.m. Spin.

- based on the (wrong) September timetable she was sent on 12 July 2018 and her email to Mr Cardwell at 8.06 a.m. on 13 July she thought she would be teaching 9.30 a.m. Body Pump and 10.30 a.m. Pilates.

- on 13 July 2018 she found out she would be teaching 9.30 a.m. Spin and 10.30 a.m. Body Pump. Those were the classes she was already teaching but meant that she would not, as she wished, be teaching Pilates.

133. The claimant sent her resignation by email at 7.09 p.m. on 15 July 2018 (p.184). She expressed her disappointment and sadness. She referred to the letter of 19 April 2018 reducing her hours by 2.5 hours as "a body blow", the manner in which the letter was delivered as "insensitive to say the least" and that the process could hardly be viewed as a true consultation process given the wording of that letter. She referred to the one to one meeting being a three to one meeting and to having been offered several compromises "none of which have materialised". She said that she was unable to continue "with such uncertainty and intolerable levels of

stress". She asked that her email be forwarded to "the appropriate department in HR as I feel your treatment of me amounts to constructive dismissal". She does not specifically refer in that email to the events on 13 July or state explicitly that it was what happened on that date as the "last straw" which caused her to resign.

134. It was put to Mr Cardwell in cross examination that his email to the claimant on 16 July 2018 was incorrect. In it he says that (page 186) that:

> "I believe Toni has spoken to you regarding the timetable sent out and explained it was in fact correct."

135. Mr Cardwell accepted that that what he said in that email was a mistake. It should have said that the (September) timetable he sent out on 12 July was incorrect. We accept Mr Ali's submission, however, that what Mr Cardwell said in his email of the 16 July 2018 could not be relevant to the unfair dismissal claim since it occurred after the claimant resigned so, by definition, could not have contributed to it.

Additional findings relevant to the age discrimination claim

136. We found (paras 60-61 above) that the claimant was not excluded from the staff working group meetings. The other alleged incidents of age discrimination relied on by the claimant were the claimant's hours being cut; and classes she had been promised being given to another instructor.

137. In relation to those incidents, the comparators relied on by the claimant were Naomi and Lili. We do find, looking at the table at page 27, that the claimant was treated less favourably than Naomi and Lili. She lost 0.5 hours. In contrast Naomi gained 2 hours and Liliana gained 1. At the end of the review process, the claimant was 57, Naomi was 26 and Lili was 46.

138. The claimant's complaint is that older instructors were treated less favourably because of their age. We decided that the appropriate age groups to use for comparison purposes were on the one hand those, like the claimant, who were aged 50 and over and, on the other hand, those like Naomi and Lili in the age group 20-49. The table at p.27 of the Bundle ("the Table") provided a "traffic light" summary of the hours lost or gained by each instructor together with their age. That table was created by the respondent and, Mr Ali submitted, it did not support the claimant's case that those in the 50 and over group had lost more classes than those in the 20-49 group.

139. The Table did not include the number of hours which the instructors had had prior to the review nor the total numbers after that review. Instead it just showed the increases, decreases or (where that was neutral, none), as a result of the review. Mr Hathaway suggested the table could not be relied on. We have found above that there was confusion about the correct version of the various iterations of exercise class timetables. We did consider whether that was enough to cast doubt on the accuracy of the Table. We have decided it is not. The Table was created at the end of the review process. It was based on the position at the end of the process and so

would, it seemed to us, be unaffected by confusion about which version of the timetable was current at different points during that review process.

140. Mr Hathaway suggested that had the respondent been obliged to disclose all the letters sent to instructors at the end of the review process it would have clarified whether the Table was accurate. We did have a brief discussion on the third day at the proceedings as to whether an application for discovery had been made. It appeared from the Tribunal file that there had been no such application, although Mr Hathaway had raised the issue about disclosures in the emails which were included at pages 221A-221Q of the Tribunal bundle at Mr Hathaway's request. The Employment Judge indicated to Mr Hathaway that it would be disproportionate to require production of all those letters at this late stage. No application for discovery was pursed.

141. In terms of evidence of the impact of the proposals, we found the Table showed no clear evidence that those in the claimant's age group were more adversely affected than those in younger groups. The Table showed a total of 37 instructors, 12 aged 50 or over and 25 aged 20-49. Of the 10 instructors shown in the Table as losing hours, 6 were in the comparator age group and 4 in the claimant's age group. In terms of the 9 who gained hours, 6 were in the comparator age group and 3 in the claimant's age group. Of the 18 who neither won nor lost 13 were in the comparator age group and 5 in the claimant's age group. The persons who gained most hours were aged 75 (3 hours gained) and 56 (3 hours). Of those who lost the most hours one was aged 56 (2 hours) and one aged 33 (1.5 hours). In terms of the net total hours gained or lost, those in the 50 or over age group gained a total of 4 hours and those in the 20-49 age group gained a total of 1.25 hours. We did not find that the Table provided a basis for finding that the review impacted less favourably on the age group 50 and over compared with the age group 20-49.

Discussion and Conclusions

142. Applying the law to the facts we found, we set out below our conclusions on the issues in the List of Issues and our reasons for reaching those conclusions.

<u>Constructive unfair dismissal</u>

143. We find it sensible to deal with the issues in a slightly different order than that in the List of Issues. Question 1 in the List of Issues is whether the respondent acted in a way calculated or likely to destroy or seriously damage the employment relationship. To answer that we needed to decide whether each of the acts at 2(1)-(8) in that list took place and whether individually or cumulatively they amounted to a fundamental breach of contract. First, we consider whether each of those incidents did happen and whether each individually (and viewed objectively) breached the implied term of trust and confidence. After considering each incident individually we then consider whether cumulatively they breached that implied term.

Did the acts set out at 2(1)-(8) of the List of Issues take place, and if so did they individually amount to a fundamental breach of contract?

Incident 2(1): The claimant being excluded from consultation meetings in November 2017 and February 2018.

144. We found that the claimant was not excluded from consultation meetings in November 2017 and February 2018. We accept the respondent's submission that it did not move these meetings to deliberately exclude the claimant. We do not find that, viewed objectively, rearranging those meetings was conduct calculated or likely to destroy or seriously damage the employment relationship. In reaching that conclusion we note that there was no evidence that the claimant raised any complaint about this at the time nor in her resignation email. She did refer to the meetings in her email on 16 July 2018 to Mr Cardwell (p.185) but that was in response to Mr Cardwell having referred to them.

Incident 2(2): The claimant being told around 19 April 2018 that her contracted hours would be reduced by 2.5 hours per week following a review.

145. We found that the claimant was told by letter on 19 April 2018 that her hours would be reduced by 2.5 hours per week following the review of the exercise class programme. We accept Mr Ali's submission that it was not a breach of the claimant's contract for the respondent to amend the claimant's working hours. The claimant's contract (clause 5 at p.70) expressly entitled the respondent to vary her hours to meet the needs of the service.

146. We considered whether notwithstanding that clause it was a breach of contract for the claimant to effectively halve the claimant's hours by reducing them from 5½ to 3. We have decided that it was not. That is because in absolute terms, what the respondent was doing was reducing the claimant's hours by 2.5 hours. It doesn't seem to us that the express terms of the contract could be overridden by an implied term not to reduce her hours by a certain percentage.

147. It seems to us that the claimant's case was as much about the way that the respondent went about reducing the claimant's as the decision to reduce her hours. As we made clear in our findings of fact, we found that the letter handed to the claimant on 19 April 2018 could have been better worded. It was confusing when it came to the "consideration period" and put the onus on the employee to come up with alternative proposals while not providing access to information such as the proposed new timetable which would have assisted them in doing so. We found that, although contemplating a certain amount of further consultation with the instructors, it made it clear that the decision to take away 2.5 hours was one that would not be revisited. On the other hand, it did include a consideration period and provide an opportunity for the employee to discuss the impact of the reduction and explore ways to mitigate that impact at a one to one meeting. We do not doubt it might have been handled better and accept it had a significant impact on the claimant. Viewed objectively, however, we do not think that that letter in itself amounted to conduct by the respondent calculated to or likely to destroy or seriously damage the employment relationship with the claimant.

Incident 2(3): The claimant being told the respondent wished to amend her timetable to "attract a new demographic".

We found that the claimant was told at the one to one meeting that one of the reasons for the changes to the timetable was to attract a new, underrepresented demographic, namely younger male customers. We found that she was told this in relation to the review and changes to the timetable generally and not in relation to her specific classes. We find this was part of Mr Cardwell and Ms Worley's attempting to explain to the claimant why, despite her classes performing well, it was necessary to remove some of them "for the greater good". We can fully understand the claimant's upset and confusion about her classes being cut. She must have felt that she was being penalised without having done anything wrong. However, we also accept that the respondent had to make difficult decisions in terms of rejigging the timetable which had a number of "moving parts". We do not find that, viewed objectively, explaining to the claimant that changes were being made to the class timetable to attract a new demographic was conduct calculated or likely to destroy or seriously damage the employment relationship.

Incident 2(4): The claimant being offered a one to one meeting but turning up to find a panel of three by which she felt intimidated.

148. We found that there were three people at the "one-to-one" consultation meeting. We also found, however, that the claimant was aware (or should have been) aware from previous email exchanges that there would be three people attending. We do not accept that the claimant was "ambushed" by the respondent. The claimant also accepted that no one at that meeting behaved in an intimidating manner. We do accept that the claimant felt intimidated at that meeting. Viewed objectively, however, we do not think that the respondent's conduct was either calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant.

Incident 2(5): The claimant being told she was losing 0.5 hours of work a week.

149. We accept that the end result of the review process was that the claimant lost 0.5 hours of the hours she was teaching when the new timetables came into effect. We find that the letter of 19 June (which we find the claimant did receive) confirmed that she was losing 0.5 hours. As we have explained in relation to incident 2(2) we do not consider that the reduction in hours per se was a breach of the claimant's contract of employment. We note that the letter did not set out which classes were being lost. By the time of that letter, however, the claimant and Ms Worley and Mr Cardwell had been discussing which classes were to be lost. We find that confirming the reduction in hours in writing, viewed objectively, did not in itself amount to conduct calculated or likely to destroy the relationship of trust and confidence between it and the claimant. That finding is, it seems to us, confirmed by the fact that the claimant did not object to the reduction in hours by 0.5.

Incident 2(6): The claimant in fact losing more than 0.5 hours of work a week and also losing classes that had been promised to her.

150. We take this incident to refer to the fact that the claimant had, by the time the new timetables came into force on 23 July 2018, lost a total of 2.5 hours of the 6.5

hours she was teaching at the start of 2018. We found, however, that it was the claimant who decided to give up her Moor Park Body Combat class for reasons unconnected with the review (see para 74).

151. It was also the claimant who decided to give up teaching her Pilates class on a Wednesday. We found that she did so because she thought it was inevitable that she would lose it anyway because it had been removed from the proposed new timetable. We accept that, as Mr Hathaway submitted, had the respondent told her earlier that that class on Wednesday was, after all, going to be retained, she would not have lost it. Equally, however, we can understand that the respondent was trying to be fair to all its instructors finding (where possible) classes for instructors who had lost classes in the review. We accept that it would not have been fair to others to tell the claimant that there was a good chance that the Wednesday Pilates class could be retained until the revised timetables had been finalised. We found that did not take place until the week of 18 June 2018.

152. When it comes to classes "promised to the claimant" being given to others, we find that is not an accurate characterisation of what happened. We do accept that at two particular points the claimant assumed that she had reached agreement with the respondent about which new classes she would be teaching at Moor Park when the new timetable took effect. The first was at the end of April 2018 (para 99) and the second was on the morning of 13 July 2018 (para 114).

153. In relation to the end of April, there was no evidence that Ms Worley had confirmed what had been discussed by email between Mr Cardwell and the claimant. We find that understandable because Ms Worley could not give that final confirmation until the new timetable had been finally agreed which did not happen until 18 June. We do accept that the claimant assumed that the classes she would be teaching would be those she had discussed in the email exchange with Mr Cardwell. She herself knew that that remained to be definitively confirmed, however, because she chased Ms Worley about when the new timetable was coming out in May 2018 and was told it was not yet finalised.

154. In relation to 13 July we found that Mr Cardwell sent out the wrong September timetable. We found that was a genuine mistake. This led the claimant to understand she had been offered the choice of what to teach on Friday morning (para 99). When she stated her preference Mr Cardwell's response was to say he had forwarded her email to Ms Worley. He did not promise that her preference would be honoured although, again, we find the claimant assumed it would be. Ms Worley confirmed that it would not be in the conversation with the clamant later that morning in which she explained the Friday lessons would be staying as they were.

155. We do not, therefore, accept that at any point the respondent "promised" the claimant certain classes. What we do accept is that the claimant assumed at the end of April and on 13 July that she would be teaching certain classes in the new timetable. Each assumption was based on email exchanges with Mr Cardwell. With hindsight it might have been better if the Mr Cardwell had been clearer that (as seems to us to be the case) any final decision as to what the claimant would be teaching would have to be confirmed by Ms Worley. However, we find that neither

his failure to do so nor the respondent's conduct in relation to this incident, viewed objectively, amounted in itself to conduct calculated or likely to destroy the relationship of trust and confidence between it and the claimant.

Incident 2(7): Some of the claimant's existing classes being given to younger instructors.

156. It seems to us that this incident overlaps with the previous incident. We do not find that any of the claimant's existing classes were given to younger instructors. The September timetable confirmed that the Moor Park classes which the claimant had not stopped teaching, i.e. the Friday Spin and Body Pump classes, were still going to be taught by her. What we accept was the case was that the Friday Pilates class which the claimant thought she would be taking over in September was instead still be to be taught by Lili and the claimant was not going to be taking over the Tuesday Body Pump class from Naomi. What that did was to preserve the claimant's existing classes as they were. We do not find that, viewed objectively, that was, in itself, conduct calculated or likely to destroy the relationship of trust and confidence between it and the claimant.

Incident 2(8): The claimant learning from class participants and a centre manager that classes she had been promised had been given to another instructor.

157. This refers to events on 13 July 2018. As we have said above, we do not accept that the claimant had been "promised" classes which were given to another instructor. We do accept that the because of her email exchange with Mr Cardwell earlier that morning the claimant thought that she would be teaching Pilates on a Friday from September. When she arrived at Moor Park she found out from a customer (and Ms Worley in her conversation with the claimant confirmed) that she would not be. In terms of the conduct complained of we do not see how the customer's conduct could contribute to a breach of the implied term by the respondent. In terms of Ms Worley's conduct, we found that what she did was to try to make amends for the confusion caused by the wrong September timetable having been sent out by Mr Cardwell on the 12 July. We do not find that her conduct, viewed objectively, in itself amounted to conduct calculated or likely to destroy the relationship of trust and confidence between it and the claimant.

Did incidents 2(1)-(8) cumulatively amount to a fundamental breach of contract?

158. We have found that none of the incidents in themselves amounted to a breach of the implied term of trust and confidence. The next question is whether cumulatively they did so. We disregard incident 2(1) because we find that the claimant was not excluded from the consultation meetings in November. We start with the letter the claimant was given on 19 April 2018 informing her she was going to "lose" 2.5 of her hours. We have expressed our criticisms of that letter. We also found, however, that Ms Worley did try and reassure the claimant after she had opened the letter and was upset by it. We accept that she was constrained in the extent she could do so at the time by the need to be fair to the other instructors, some of who would not be getting the letters setting out the impact of the review on them until the 21 April. However, we find her conduct, viewed objectively, would

have gone some way to reducing any damage to the employment relationship caused by the letter.

159. We found that the claimant was given the opportunity to have a one to one meeting and although she found that intimidating, we find that viewed objectively the respondent's managers' conduct at that meeting was not intimidating. The discussions at and subsequent to the meeting were ultimately productive in identifying other classes the claimant could teach. We accept that the respondent did make genuine attempts to provide those instructors like the claimant who were losing classes with alternative classes including by sending out lists of unallocated classes (see para 100).

160. We found that by the end of April there was an exchange between Mr Cardwell and the claimant which the claimant assumed had settled which classes she would be teaching from September. We found that the respondent in the person of Ms Worley did not at that point confirm the position and could not have done so until the final timetable was agreed on 18 June 2018. We found that the claimant decided to give up two of her classes at Moor Park. We accept that because the timetable had not been finalised when she did so, the respondent could not, in fairness to other instructors, advise her not to do so. We found that Ms Worley response on 20 June to the claimant's decision to give up her Pilates class was considerate and attempted to explain why there had been a lack of communication

161. We found that it was not until July 12 that the new timetables were shared with the claimant and the other instructors. We found that in error the wrong September timetable was sent out by Mr Cardwell. That led to the claimant being upset when she found that in fact the classes she would be teaching from September would be the ones she was already teaching. We found that Ms Worley tried to make amends when she spoke to the claimant after the classes on the 13 July. We found that Ms Worley's decision to retain the status quo was in part due to the fact that the claimant had (when asked the previous week) not expressed a definite preference in terms of classes to teach (para 122).

162. At the end of the process, the ultimate result for the claimant was that she continued teaching the same classes at Moor Park on a Friday which she had been teaching at the start of 2018 less those she had given up. She lost 0.5 of her hours at BSC. We can understand that the claimant was disappointed that she was not going to be teaching the classes which she would have preferred to instead of those which she was then teaching (and which she assumed from exchanges with Mr Cardwell at the end of April and on July 12 she would be taking over from September).

163. We do agree with the claimant that from her perspective there was a lack of communication and certainty about what was happening. We found that the respondent took some steps to try and mitigate the effect of the changes on the claimant and other instructors who were losing hours. We also found that on more than one occasion (19 April, 20 June and 13 July) Ms Worley tried to make reassure or make amends for upset felt by the claimant. We accept that for her part (and that of the respondent) it was trying to finalise its timetables in a way which met its needs

but also enabled it to mitigate the impact on its instructors who had lost classes. We accept that of necessity this meant Ms Worley was limited in what she could tell one instructor about what was going on "behind the scenes" because that would potentially have an impact on other instructors.

164. Without for a moment minimising the upset felt by the claimant we remind ourselves that our focus must be on the conduct of the respondent viewed objectively. The test we must apply is whether viewed objectively the conduct of the respondent was such as to be calculated or likely to destroy or seriously damage the relationship of trust between the respondent and the claimant. We accept Mr Ali's submission that that breach is a fundamental breach and therefore not every failure on the part of a respondent will constitute a breach of the implied term. Ultimately we have decided that in this case the respondent's conduct, even viewed cumulatively, did not amount to a breach of the implied term. It was certainly not calculated to have that effect nor do we find it was likely to.

165. In the absence of a breach of contract, the claimant was not entitled to resign and treat herself as constructively dismissed. Since she was not dismissed, her complaint of unfair dismissal fails

Questions 3 – 6 on the List of Issues

166. We have decided that the claimant was not constructively dismissed. As a result we do not need to answer the remaining questions in the List of Issues relating to the unfair dismissal complaint.

Age discrimination

Who are the comparators relied on by the claimant for the purposes of her direct age discrimination complaint?

167. We found that the appropriate comparators were Naomi (aged 26) and Liliana (aged 46). They were the instructors who it is suggested gained classes specifically at the claimant's cost.

What is the claimant's age group and what is the age group of her comparators?

168. We found that the claimant was in the age group 50 and over and the comparators were in the age group of those aged 20-49.

Was the claimant treated less favourably than others by way of:

(1) the claimant being excluded from consultation meetings in November 2017 and February 2018;

169. We found that the claimant was not excluded from the consultation meetings. The claimant was not treated less favourably in relation to those meetings.

(2) the claimant's hours being cut; and

170. We found that the claimant was treated less favourably than Naomi and Lili because her hours were cut while theirs were not.

(3) classes she had been promised being given to another instructor;

171. As recorded at para we did not find that classes promised to the claimant were given to another instructor. We do accept that classes which the claimant assumed she would be teaching in September 2018 continued to be taught by Naomi (Body Pump on Tuesdays) and Lili (Pilates on Friday). There was no evidence as to whether that amounted to "less favourable" treatment than others because we heard no evidence about how the review process had been applied to others (whether her comparators or others). We did not, for example, hear evidence about whether other instructors had assumed they would be teaching classes which had then been allocated (or continued to be taught) by others. There was therefore no evidence on which we could base a finding that the claimant was treated less favourably in this respect.

Was the less favourbale treatment because of age?

172. We found the claimant was treated less favourably than Naomi and Lili in that she lost teaching time while they did not. Showing less favourable treatment and a difference in age is not sufficient for the direct age discrimination claim to succeed. The onus is on the claimant to prove facts from which we could conclude that the less favourable treatment was because of age. If she does so, the burden passes to the respondent to provide a non-discriminatory reason for the less favourable treatment.

173. As we set out in our findings at para 141 we were not satisfied that the evidence about the overall impact of the review process provided a basis for a finding that the process had a greater impact on those aged 50 or over. We also (at paras 58-61) rejected the claimant's allegation that Mr Cardwell's email about the disappointing response to his call for volunteers for the staff working group was evidence of age discrimination. We do not find that the claimant has proved facts sufficient to pass the burden of proof to the respondent.

174. If we are wrong about that however, we would have found that the respondent had provided a non-discriminatory explanation for the reduction in the claimant's hours, namely that it arose from the priorities identified in a review needed to improve the performance of the respondent's leisure centres. The decisions about which classes to remove from the timetable were made in light of the review priorities and to ensure the centres achieved the agreed aims of that review.

Jurisdiction - Are the claimant's (age discrimination) claims in time?

175. This issue does not arise because we have found that the age discrimination claim fails.

Summary of conclusions

176. We have decided that the claimant's complaints of unfair dismissal and direct age discrimination fail. That does not mean that we entirely condone the way that the respondent handled this matter. We accept that the starting point was a genuine desire to improve performance including the service that the respondent's centres provided to its community. However, it seems to us that the way this was carried out was confusing and at times insensitive. It seems to us it took little account of the potential impact of the prolonged uncertainty on long-serving employees like the claimant who had done nothing wrong. As we say there was no evidence that the decision to reduce the claimant's hours and remove some of her classes was anything to do with the performance of those classes. We stress that the respondent was entitled to make changes to the timetable but it seems to us that the need to ensure that the claimant was given very clear and prompt information about what was happening was even greater because the decision to change her hours was nothing to do with her behaviour or performance.

177. We acknowledge that there were attempts by the respondent and particularly Ms Worley to mitigate the effect of the process. We also acknowledge that the respondent had competing priorities in terms of managing a complex process fairly for all those affected, not just the claimant. However, our view as a Tribunal is that the respondent has lessons to learn from the way that it handled this matter, and in particular in terms of its communication with employees when it is making decisions which affect their livelihoods.

178. Although we have found that the decision to reduce the claimant's hours was not an act of direct age discrimination we have, we hope, made clear in this Judgment that we fully accept the validity of the claimant's experience of what happened to her. Mr Ali in his submissions suggested the age discrimination claim was "opportunistic". With respect to Mr Ali we do not agree. We can understand the claimant's upset at what happened to her and the understandable tendency which followed to seek a reason for what she saw as the respondent's unfair treatment of her. By the respondent's own case, the claimant had not done anything wrong and her classes were successful. It was natural for the claimant to ask why therefore her classes were being reduced (especially when that initial reduction was nearly 50%). In the absence of clear and consistent communication from the respondent about what it was doing "behind the scenes" to try and finalise the new timetables it does not seem to us entirely surprising that the claimant thought there must be an ulterior motive for what was happening to her.

179. We are very grateful to both Mr Ali and Mr Hathaway for the way they dealt with the case. For Mr Hathaway in particular we understand that this was a particularly stressful experience and we pay tribute to his diligence in pursuing this matter on behalf of the claimant. However much sympathy we might have with the claimant, the Tribunal's role is to make a decision in accordance with the law and it is on that basis that we find that the claimant's claim fails

Employment Judge McDonald

Date: 11 August 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 August 2020

FOR THE TRIBUNAL OFFICE

ANNEX

Agreed List of Issues

Constructive unfair dismissal

1. Was there a fundamental breach of contract (if the breach relied on is of the implied term of trust and confidence, can the claimant show that the respondent acted in a way calculated or likely to destroy or seriously damage the employment relationship)?

2. Did the following acts take place, and if so, either individually or cumulatively do they amount to a fundamental breach of contract?

   (1) The claimant being excluded from consultation meetings in November 2017 and February 2018.

   (2) The claimant being told around 19 April 2018 that her contracted hours would be reduced by 2.5 hours per week following a review.

   (3) The claimant being told the respondent wished to amend her timetable to "attract a new demographic".

   (4) The claimant being offered a one to one meeting but turning up to find a panel of three by which she felt intimidated.

   (5) The claimant being told she was losing 0.5 hours of work a week.

   (6) The claimant in fact losing more than 0.5 hours of work a week and also losing classes that had been promised to her.

   (7) Some of the claimant's existing classes being given to younger instructors.

   (8) The claimant learning from class participants and a centre manager that classes she had been promised had been given to another instructor.

3. Did the claimant resign in response to any fundamental breach of contract? Did she resign because she had found alternative employment?

4. Did the claimant affirm or waive any fundamental breach of contract?

5. Is the respondent able to establish that notwithstanding any fundamental breach of contract the effective dismissal was still fair?

6. If the claimant was unfairly dismissed:

   (1) Should there be any reduction to any award of damages on grounds of *contributory fault*?

(2) Should there be any *Polkey* reduction to any award of damages?

Age discrimination

7. Who are the comparators relied on by the claimant for the purposes of her direct age discrimination complaint?

8. What is the claimant's age group and what is the age group of her comparators?

9. Was the claimant treated less favourably than others by way of:

   (1) the claimant being excluded from consultation meetings in November 2017 and February 2018;

   (2) the claimant's hours being cut; and

   (3) classes she had been promised being given to another instructor;

because of her age (namely in order to bring in younger instructors)?

Jurisdiction

10. Are the claimant's claims in time?

Remedy

11. If the claimant was unfairly dismissed what is her entitlement to damages? Has the claimant reasonably mitigated her losses?

12. If the claimant was subjected to unlawful age discrimination what is her entitlement to damages? What is the appropriate award for injury to feelings?

13. Did either the claimant or the respondent fail unreasonably to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so, should the claimant receive an up to 25% uplift on any compensation awarded, or an up to 25% reduction on any compensation awarded?