EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE SPENCER**

MEMBERS: **MR D SCHOFIELD**
MR D EGGMORE

BETWEEN: **MR J LENTON** **CLAIMANT**

AND

SAM CORPORATION LIMITED **RESPONDENT**

ON: **10-14 JUNE 2019**

Appearances

For the Claimant: In person
For the Respondent: Mr. M Egan, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

(i) The Claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010 and his claims under sections 13, 15, 19, 20, 21 and 26 of the Equality Act are dismissed;
(ii) The Claimant's claim of victimisation fails and is dismissed.
(iii) The Claimant was unfairly dismissed.
(iv) The Claimant's claim for breach of contract in relation to the non payment of bonus fails and is dismissed
(v) The Claimant's claim for pay in lieu of holiday accrued but not taken will be considered on 30th August 2019
(vi) The Claimant was wrongfully dismissed and is entitled to damages for the period of his notice.
(vii) The issue of remedy (and holiday pay) will be determined at a hearing on **30th August 2019**. Issues of Polkey and contributory conduct will be determined at that hearing.

REASONS

Background and Issues

1. The Respondent in this case is a tennis and golf facility based in Chiswick, London and trading as Dukes Meadows. The Claimant, Mr James Lenton, was employed by the Respondent as Director of Tennis. Dukes Meadows currently employs some 67 staff and 34 self-employed sports coaches. It has a turnover in the region of £3.2 million per annum. Dukes Meadows is owned by Mr Stephen Marks who is also its sole director. Mr Marks is also the Chairman and Chief Executive of French Connection UK Limited.

2. The Claimant was employed by Dukes Meadows on 1 December 2008. Before that he worked with Mr Marks as a tennis coach at a tennis venue in North London. Mr Marks and the Claimant had a long history together and until the events of 2017 had got on very well and were friends.

3. The Claimant was dismissed without notice or pay in lieu of notice by Mr Marks on 18 January 2018. He now brings complaints of:

    a. Unfair dismissal;
    b. Disability discrimination (direct disability discrimination, indirect disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability).
    c. Victimisation
    d. Unauthorised deduction from wages in respect of holiday alleged to be accrued but not taken;
    e. Breach of contract in respect of bonus; and
    f. Wrongful dismissal (notice pay).

4. The issues are set out in a case management order of EJ Grewal, which appears at the bundle at page 47 and is set out (in abbreviated form) in the Schedule to this Judgment for ease of reference.. The disability relied on by the Claimant is depression. Disability remained in issue at the start of the hearing.

5. Following a request for further and better particulars the Claimant has clarified, in respect of the victimisation complaint, (51) that the protected act relied on is the letter he wrote appealing the outcome of the disciplinary decision, and that the detriments alleged to be acts of victimisation were:

    a. the refusal to appoint an alternate chair for the disciplinary appeal hearing;
    b. failure to delay the disciplinary appeal hearing; and
    c. upholding the disciplinary outcome.

Evidence

6. The Tribunal heard evidence from the Claimant. On behalf of the Respondent we heard from Mr Thomas Maguire, Financial Controller, from Mr. Stephen Marks, and from Ms Kate Roberts, PA to Mr Marks. We also had a significant bundle of documents running to in excess of thousand pages

Was the Claimant a disabled person?

7. The definition of a disabled person is set out in section 6 of the Equality Act 2010 which provides that *"A person (P) has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities".* This definition is supplemented by the provisions of Schedule 1 and the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" issued by in April 2011 (the Guidance).

8. The time at which to assess whether a person has a disability is the date of the alleged discriminatory act. In this case during the disciplinary process.

9. Paragraph 2 of Schedule 1 provides that:

> "(1) *The effect of an impairment is long-term if—*
> *(a) it has lasted at least 12 months;*
> *(b) the period for which it lasts is likely to be at least 12 months; or*
> *(c) it is likely to last for the rest of the life of the person affected.*
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."*

10. In considering whether an effect is likely to recur for the purpose of paragraph 2(2) the House of Lords has determined that likely means "could well happen" rather than "more likely than not". (*SCA Packaging Ltd v Boyle* [2009] IRLR 746.)

11. The word 'substantial' has been defined in the Guidance as being "more than minor or trivial" reflecting "the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people."

12. Paragraph 6 of Schedule 1 provides that in considering whether or not an impairment had a substantial adverse effect on the ability of a person to carry out normal day to day activities, the effects of medical treatment should be ignored, and it is necessary to consider the normal day to day activities which the individual will not be able to undertake without the medical treatment, see also *Goodwin v Patent Office, [1999] ICR 302*

13. In Royal Bank of Scotland plc v Morris 2102 EqLR 406 the EAT said that: "In cases where the disability alleged takes some form of depression or cognate mental impairment, the issues will often be too subtle to allow [the

Tribunal] to make proper findings without expert medical assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly form the way the statute is drafted."

14. It was the Claimant's case, set out in his ET1, that he suffers from depression and that this had been with him since childhood. In evidence the Claimant referred to a traumatic experience in his childhood but said that he did not want to tell people that he suffered from depression.

15. The Tribunal had very limited medical evidence to support the Claimant's case that he met the definition of a disabled person. The Claimant's disability impact statement (54) did not engage with the relevant legal tests, specifically the duration, or likely duration, of his depression or the impact of his depression on his day-to-day activities.

16. The Claimant was suspended on Wednesday 3rd January 2018. He visited his GP on Monday 8 January 2018. His GP issued a fit note signing the Claimant off work for one month. The stated reason is "depressed".

17. The Claimant's GP medical notes from 1 January 2015 to 1 November 2018 record only one visit (on 8th January 2018) to the GP for depression or other mental health issues, though he did have a telephone consultation on 11th January 2018, in which the Claimant asked to be referred for private psychotherapy. This was agreed and a referral made, but in the event when the Claimant was dismissed his private health cover was cancelled, so he did not take this forward.

18. The Claimant had an NHS telephone assessment on 20th February, following which he was referred for "guided self-help". The analysis from that telephone assessment was that the Claimant was "*experiencing anxiety and depression symptoms due to work and relationship issues related to a recent divorce. This is impacting his day-to-day functioning and his sleep. Some suicidal ideation but no plans or preparations.*" The Claimant canceled the first appointment, failed to attend at the second, and then informed the service that he had moved to Dubai to find work.

19. The Claimant also provided a brief letter from a psychotherapist identifying that he had consulted a psychotherapist on one occasion in 2016. We have had no further details. The Claimant accepts that the Respondent was not aware of any issues relating to depression until they received his fit note in January 2018

20. The Tribunal accepts that in January 2018 the Claimant was "depressed" as stated in his GP fit note and that, at that time, the depression was likely to have a substantial adverse effect on his day-to-day activities, namely concentrating and dealing with his problems. However, we are not satisfied that the impairment in January 2018 was long-term. The legal test requires that the impairment has either lasted for 12 months or, at the relevant time was likely to last for 12 months. There was no evidence that the Claimant had been depressed at the relevant time for 12 months or was likely to last more than 12 months or (as per paragraph 2(2) of Schedule 1 above) likely to recur. In his witness statement the Claimant does not suggest that prior to

December 2017 he was depressed; rather he says that the non-payment of his bonus caused him to break down and that it was from that time he started to have nightmares, insomnia and depression (paragraph 17).

21. We have therefore concluded that the Claimant has failed to establish that he was disabled by reference to his depression. The medical evidence before the Tribunal suggests that the Claimant was suffering from an adverse reaction to events at work, (his suspension and the non-payment of his bonus) coupled with the fact that the Claimant had recently been involved in distressing divorce proceedings and was experiencing financial difficulties. This is supported by the assessment by Haringey NHS mental health services (753).

Disability related claims

22. It follows that all the Claimant's claims of disability discrimination (i.e. direct disability discrimination, indirect disability discrimination, failure to make reasonable adjustments, discrimination arising from disability and harassment related to disability) must fail.

Unfair dismissal, victimisation, breach of contract and holiday pay.

Facts relevant to the remaining issues.

23. As we have said the Claimant was employed as Director of Tennis. His history with Mr Marks predated the establishment of the Dukes Meadows facility. He was a long-standing and senior employee, reporting directly to Mr Marks. In evidence Mr Marks told us that his position was equal to that of Mr Stockford, who was the General Manager of Dukes Meadow, both the tennis and golf facility. He was on a salary of £70,000, plus private healthcare and other benefits, worth £6,800. Each year since his employment began, he had had a bonus. The amount varied each year. In 2016 his bonus was £14,000 gross. There was no written bonus scheme.

24. The Claimant says that he has an implied contractual entitlement to a bonus arising from a meeting which the Claimant had with Mr Marks in October 2013. At that meeting the Claimant asked for a salary of £100,000. He says that at that meeting "It was agreed that my salary would be increased to £70,000 and in addition Mr Marks would make an additional payment in the form of a Christmas bonus. This bonus would give me the chance to earn my requested annual sum of £100,00." The Claimant's salary was at that time increased from £60,000 to £70,000 and he continued to receive his other benefits. His bonus in the following years fluctuated but his total remuneration package has never amounted to £100,000.

25. The Claimant was in charge of the development and running of the tennis program. He was responsible for preparing and implementing annual tennis program, including creating timetables for adult and junior tennis players, selecting staff, setting staff rotas, managing court allocations and bookings, devising various tennis Academy course syllabuses and selecting players. He was also responsible for liaising with the LTA to secure funding, and for a schools outreach program. He was required to attend tennis tournaments with junior players and to represent Dukes Meadows in adult tennis tournaments,. He delivered a significant amount

of coaching on court, but his duties also included administrative matters as set out above. The Claimant estimated that spilt as 50/50.

26. Mr Marks's style of management was informal. He would meet with the Claimant once a week or so to discuss the tennis programme, and he expected to be informed of progress, problems and any significant matters. There were no formal appraisals and almost no written instructions.

27. Mr Maguire joined the Respondent in 2012 as Financial Controller. In 2013 he realised that a number of employees at the Respondent did not have written contracts. He therefore prepared contracts for those employees, including the Claimant. Although the Claimant denies having ever been given a written contract, we accept that Mr Maguire prepared a letter of employment for the Claimant (57) and that he gave it to the Claimant in August 2013. The Claimant took the contract but neither signed nor returned it, and he was not chased. That letter is short and says very little about his duties. It set out his salary (which at that time was £60,000). At clause 10 it states that "The company does not operate a formal bonus scheme. However discretionary bonuses may be paid to individuals depending on personal and company performance."

28. The Respondent also has a Staff Handbook, which is referred to in the Claimant's employment letter as being contractual. The Claimant was aware of the existence of the Staff Handbook as he had from time to time referred to it when managing junior staff.

29. It was his case, however, that the terms of the Staff Handbook did not apply to him. We find that many of its terms did not reflect the Claimant's working arrangements at any time, and could not have been intended to apply to him.

30. Working hours. During his time at Dukes Meadow, the Claimant had no formal working pattern. He was required to attend for all on court sessions, to attend tournaments with junior players and to represent the club but for the remaining time he had no set pattern of attendance. In the disputed contract it states "As discussed your normal hours of work will be 40 hours a week. Your schedule of work will be agreed with the General Manager." No such schedule was agreed.

31. In December 2016 Mr Arnot had sent an email to Mr Maguire and Mr Stockford (99) with a rota of the hours that the two coaches "would need to be on site to reach their 40 hours a week. It purported to show hours both on and off court, but it was not sent to the Claimant.

32. From the spring of 2017, Dan Arnot, the tennis manager, responsible for court bookings, became concerned that the Claimant was not around at Dukes Meadow when he was not teaching. (185, 205). Mr Marks gave evidence that Mr Stockford, the General Manager had told him that the Claimant was "never around", that he had not believed this at first but that subsequently whenever he visited Dukes Meadow *"everyone, including the coaches, was telling me that James was never around".* Mr Marks sad that he spoke to the Claimant about this in August saying "James you haven't' been around and you need to get your act together". Beyond that

comment Mr Marks took no further action to require the Claimant to attend at Dukes Meadow.

33. While some of those who worked at Dukes Meadow in the late spring and summer of 2017 were querying where the Claimant was, no one, other than Mr Marks in late August, mentioned this to the Claimant. There are a number of emails in the bundle in which the Claimant's absence is noted, none of which are referred to or copied to the Claimant.

34. When asked why no-one had spoken to the Claimant about his non-attendance, Mr Maguire told the tribunal that it was not his place to do so and that he thought that perhaps Mr Stockford might have raised it with the Claimant. There is no evidence that he did so.

35. In his witness statement (para 116) Mr Maguire says that all "on court activity" is recorded on a system called Clockworks. His witness statement also said that Clockworks recorded "all the activity that takes place." In cross examination he went further and maintained that the Clockworks system was also used to record the Claimant's physical attendance at Dukes Meadow. He told the tribunal that Clockwork would load 8 hours a day for the Claimant, differentiating between "time on and off court, based on the rota that Mr Arnot had sent to Mr Stockford and Mr Maguire. While there was no clocking in or clocking out system at Dukes Meadow, the office would record when the Claimant was in attendance. He said that if the Claimant did not attend, the time which had been loaded by Clockworks "would be adjusted by the tennis office". The office would notice if he was on site.

36. Mr Maguire said that he did not know if the Claimant was aware that this was being done, although he had "said to the Claimant I would expect 25 hours to be on court and 15 off court."

37. The Claimant's evidence was that Clockworks was used simply to book on-court time. He said that his attendance for other work had never been monitored. The tennis office would not always know whether or not he was on-site. He often worked in the cafeteria. In any event outside of court bookings he had no pattern at all, "I simply did what was required to run the tennis programme".

38. We have had no hesitation in preferring the Claimant's evidence in this regard. There are no emails which suggest that the Claimant was expected to be in work at any particular time. The various emails grumbling about the Claimant's absence do not suggest that he was expected to be in at any particular time. The "rota" sent by Mr Arnot to Mr Maguire and Mr Stockford does not suggest that the Claimant must work these hours. He says *"Based on the hours of court they will be doing next term I have put together a rota of what when they would need to be on site in order to reach their 40 hours a week".* However, the Claimant was senior to Mr Arnot, and only Mr Marks could require the Claimant to work to a rota. The fact that the document was not sent to the Claimant is implicit recognition of that fact.

39. Some time in December Mr Marks asked Mr Maguire to look into the Claimant's attendance. It is not clear exactly what he was asked to do and

there was no email trail. In evidence Mrarks said that he asked Mr Maguire "to verify the accusation that everyone was saying that he was never around."

40. In response to that request Mr Maguire produced what purported to be a calculation of the Claimant's hours from data retrieved from Clockworks. (SB4-18). That calculation is divided into three columns headed Private, Squad, and Academy. Private refers to private coaching (which the Claimant was permitted to do in his own time), squad refers to squad coaching and academy to academy coaching. There was no column devoted to administrative or off court time.

41. In response to a question from the Tribunal as to how and where administrative hours were recorded Mr. Maguire accepted that there was no separate field for administrative work or off-court activity but said that it was "up to the tennis office" how to allocate those hours as between Squad and Academy. The system did not record time spent at tournaments, visiting schools to encourage junior players, time away on holiday or on sick leave. It was for that reason that in calculating the Claimant's hours Mr Maguire had added into the calculation days on which the Claimant was known to have been at tournaments, on holiday, sick or injured.

42. Mr Maguire also accepted that the system could only record in whole hours (consistent with a booking system), that there were a number of entrances to the Dukes Meadow grounds, and the Claimant did not always have to pass through the tennis office if he was in attendance. He was not expected necessarily to work in the tennis office and might also be working in the cafeteria or elsewhere in the grounds. When asked how the tennis office would know that the Claimant was not on site, Mr Maguire said that if the tennis office tried to get hold of him and couldn't find him, they would know he wasn't around.

43. All of the above indicates that Clockworks was not a system used to record the Claimant's off court activities. Both Mr Maguire and Mr Marks must have been aware of this

44. <u>Holiday.</u> It was accepted that the Claimant's holiday entitlement was 28 days a year. Clause 4 of the (disputed) contract, states that the Claimant's holiday entitlement is 28 days a year and that "holidays must be agreed in advance with your manager". Mr Marks accepted in evidence that the Claimant was not in fact required to obtain his permission before booking holiday, although Mr Marks did expect to be informed. He also trusted, and expected, that the Claimant would organise his holiday in such a way so as not to disrupt or inconvenience the running of the tennis facility.

45. The Staff Handbook states that no holiday entitlement may be carried forward to the next year, but the Claimant had for many years carried forward unused holiday entitlement without objection. We find that by custom and practice this was something he was entitled to do. In addition where the Claimant worked weekends, at tournaments etc, he had been entitled to days off in lieu. Mr Marks's management style was very "hands

off", and he trusted the Claimant to work unsupervised for the benefit of the tennis facility.

46. On 15th December 2017 Mr Maguire queried with Mr Marks the Claimant's 2017 holiday entitlement (519). "Has James mentioned to you about his holidays? According to the holiday tracker he is claiming 51 days holiday this year." This included 8 days in lieu and 15 days carried over. Mr Marks's response was to ask if the Claimant had days to carry over. We find that this indicates an acceptance that the Claimant was allowed to carry over holidays into the next year.

47. Financial concerns. By August 2017, Mr Maguire was reporting concerns about the finances of the tennis program (567). By the end of August the tennis programme was £30,000 down. Mr. Maguire met the Claimant and Mr Stockford about this in mid-August. On 27 August Mr Arnott reported to the Claimant that the tennis program was 59% down on the previous academic year and that the daytime academy was down to 8 players, 4 of whom would leave in December. Mr Stockford and Mr Maguire felt the Claimant was not engaging with this problem. A number of discussions took place between the Claimant, Mr Stockford, Mr Maguire and Mr Marks about the way forward. There were discussions about distributing flyers to schools, about offering discounts, giving away free racquets, and promotions for the Mini Red programme.

48. Over this period numerous emails were sent from Mr Stockford querying the Claimant's whereabouts and commitment. Strikingly none of these were sent or shown to the Claimant at the time.

49. Mr Marks met the Claimant and Mr Maguire on 27 September 2017. By then Mr Marks was concerned that the autumn tennis program was down by £45,000 and numbers of children attending the daytime programme were significantly down. The Claimant believed that provided a quality tennis program was delivered, the finances would follow and that it was for Mr Maguire to worry about the finances.

50. Other issues. In November the Claimant accompanied one of the junior members of the Academy to a tournament in Liverpool. During the tournament it came to Mr Marks's attention that the Claimant had taken his partner to the tournament. Mr Marks spoke to the Claimant about this. Although Mr Marks's evidence was not wholly consistent about exactly what he said to the Claimant and when, we accept that broadly the message was that he did not want her at Dukes Meadow or to be there while he was working. "The Claimant asked "what about after business hours" and Mr Marks said that would be OK.

51. The Claimant's evidence was that he was not told that he could not take his partner on trips. He says that Mr Marks said that the Claimant could not "play tennis with her during his regular office hours as it gave the impression that I was not working", but we prefer the evidence of Mr Marks that the instruction went further than this. His evidence is supported by Ms Roberts who came across as a straightforward and honest witness and who says that Mr Marks had told her at the time that he "had categorically

laid down the law and said that he did not want partners to go on trips". As seems to be Mr Marks's style, nothing was recorded in writing.

52. On 6 December 2017 the Claimant and Mr Marks attended a meeting with the LTA. Mr Marks was unhappy because the Claimant had not informed him of, or invited to, the LTA meeting. Mr Marks had found out about it independently and insisted that he attend with the Claimant. At the meeting a document was discussed which the LTA said they could not give directly to the Claimant or Mr Marks. However, they offered that it could be photographed. The Claimant photographed the relevant sections of the document. Mr Marks asked the Claimant to make sure that he sent the photos of the documents to him. The Claimant did not do so.

53. In early December Mr Marks asked Mr Maguire to provide him with more information about the Claimants working hours during 2017 (see above).

54. Bonus. In the meantime, the Claimant wrote to Mr Maguire on 15th December 2017 enquiring about his bonus. Mr Maguire responded that general performance overall and the tennis was down this year and Mr Marks had already told him that bonuses would not be the same as last year. The Claimant responded by making representations that the year had been a good one from a tennis perspective. On 18th December Mr Maguire told the Claimant that Mr Marks had sad that there would be no bonuses paid at Christmas.

55. The Claimant was upset by this. He emailed Mr Maguire to say that he was financially dependent and could not survive without the bonus. He tried to telephone Mr Marks and, when he was unsuccessful in connecting with him, sent an email of some length asking Mr Marks to reconsider (531). He telephoned both Mr Maguire and Ms Roberts in an angry and upset frame of mind. Mr Marks responded to the Claimant's email saying that he was surprised the Claimant didn't understand the financial position which had been discussed over the previous months and the tennis was down £125,000 on last year and that, in addition, as previously discussed, he felt the Claimant's personal performance had not been up to par. His position as to bonus remained unchanged.

56. Miami. From 8th to 18 December 2017 the Claimant attended a tennis tournament with 2 junior star players in Miami. His partner accompanied him to the tournament. He returned to the UK on the 18th but then emailed Ms Roberts on 20th December 2017 informing her that he would now be taking 11 days holiday, returning on 4th January 2018. Ms Roberts responded that Mr Marks was surprised that he had not notified Mr Marks or the tennis office about this.

57. In fact, the Claimant had notified the tennis office that he would be taking leave immediately after the tournament, but not of the precise dates, (as he was not sure when the junior players would cease to be involved). He immediately responded to that effect to Ms Roberts. The Claimant then flew back to Miami.

58. On 3rd January 2018, at 3.30 pm (UK time) the Claimant emailed from Miami to say that he would not be back in the office on 4th January as

intended; and that he had some health and divorce issues to deal with. He would return on the 8th.

59. On 3rd January 2018 Mr Maguire sent a number of emails to Mr Marks with information about the Claimant.

    a. a summary of the meeting held on 27 September 2017 (562)

    b. a document collated from information on Clockworks (SB 4-16), purporting to show that the Claimant had been absent from work for 819 hours or the equivalent of 102 days.

    c. the Claimant's holiday records

    d. details of the Claimants salary and benefits

    e. a summary of the meeting which took place in mid-August (567)

60. The same day at 4.20 p.m. Mr Marks sent the Claimant an email suspending him from work "pending a disciplinary investigation". (577) No information was provided as to the content of that investigation or why he had been suspended. The Claimant acknowledged receipt and asked for an explanation as to the grounds of his suspension

61. On 5th January 2018 the Claimant was sent a letter inviting him to a disciplinary hearing to take place on 11 January 2018. Mr Marks was to conduct the hearing. The disciplinary charges were broadly as follows: –

    a. Attendance at work during 2017. "You will be asked to answer the allegation that you have been absent from work, or your time cannot be accounted for over a number of days during 2017". The Claimant was told that the meeting was to discuss the time which could not be accounted for and *that "At the disciplinary meeting, and subject to your explanation of your absences I will consider whether any accounted absence amounts to gross misconduct, by fraudulently obtaining payment for your contracted hours while failing to attend work".*

    b. Unscheduled annual leave. The Claimant was referred to his email of 20th December regarding leave to 4th January 2018. The purpose of the meeting was "to discuss your explanation for failing to seek clearance for this annual leave from me prior to booking it, rather than simply notifying Kate Roberts on 20 December".

    c. Failing to comply with management instructions. The purpose of the meeting was "to discuss the reason that you disregarded my express instruction and apparently travelled to Miami on a work-related trip in the company of your girlfriend."

    d. Other issues relating to trust and confidence.

62. In relation to the Claimant's attendance at work the Claimant was sent Mr Maguire's analysis of Clockworks. The Claimant was told that, based on that analysis, the Respondent could not account for 102 days (816 hours). He was also sent his unsigned employment contract, extracts from the staff handbook, the disciplinary procedure and a number of emails sent between 29th June and 26 October which raised issues as to where the

Claimant was at that time. The letter referred to section 3h of the Staff Handbook which states, inter alia, "you must ensure that you arrive at work on time" and "persistent poor timekeeping ..will be treated as a disciplinary offence".

63. As regards the "other issues relating to trust and confidence" the letter raised 3 further issues.

    a. That as the individual responsible for the tennis program, revenue was down by £125,000 and the Claimant had "failed to have proper regard to and take adequate steps to address and rectify this loss of revenue within Tennis".

    a. The mother of RS, one of the Respondent's start junior players wanted to change coach. "as you are our most senior coach and R is our star junior tennis player, this apparent loss of confidence in your coaching is of concern to me" and that the Claimant had not reported issues which had arisen in November 2107 respect of another star player, S.

    b. That at the LTA meeting the director had shown them a copy pf the contract and permitted the Claimant to photograph it. The Claimant had failed to forward Mr Marks a copy of the document and that this was "a further indication of your lack of interest and commitment to your duties."

64. On 8th January 2018 the Claimant acknowledged receipt and asked if he could be accompanied at the disciplinary hearing by his legal representative. The Claimant was told that he could be accompanied by his lawyer.

65. The Claimant's solicitors wrote to the Respondent on 10 January 2018 stating that the Claimant was clinically depressed, that he qualified as a disabled person under the Equality Act, that he would cooperate with a reasonable disciplinary hearing, but he would be unable to attend on 11th January due to his health. They requested that the disciplinary hearing be rescheduled as a reasonable adjustment. They also sent a fit note signing the Claimant off work for one month. The reason given is "depressed".

66. On receipt of that letter Mr Marks wrote to the Claimant. He said that although the Claimant had been suspended on full pay pending the disciplinary hearing, he had now been signed off sick and would be placed on SSP. It is accepted that the Claimant had never before been placed on SSP if absent for sickness or injury.

67. Mr Marks also agreed to reschedule the disciplinary hearing until 17 January 2018. (He had considered whether to postpone until the expiry of the fit note but had decided not to.) He informed the Claimant that if he was unable or unwilling to attend the rescheduled hearing he could provide a detailed written response to the allegations, but that the disciplinary hearing would not be rescheduled again and Mr Marks would make a decision on the 17th based on the material available to him at time.

68. There was further correspondence between the Respondent and the Claimant's solicitors with the Claimant solicitors again requesting further

time to respond to the allegations and stating Claimant was medically unfit to prepare a response to the allegations in writing. Mr Marks declined to reschedule the disciplinary hearing.

69. The Claimant's solicitors provided a "brief response to the allegations" in a letter dated 17th January (686). He said that the Clockworks system did not provide an accurate record of his attendance. He could not account for so much time in such a short period.

70. On 18 January 2018 he wrote to the Claimant dismissing him with immediate effect. He concluded that ;

    a. The Claimant was "guilty of gross misconduct by fraudulently obtaining payment for your contracted hours while failing to attend work"

    b. That in relation to his annual leave the Claimant had been guilty of gross misconduct for "failure to observe company rules, regulations or procedures"

    c. That the Claimant was "guilty of gross misconduct for failing to carry out a management instruction" not to take his girlfriend on work related trips.

    d. That the Claimant had failed to take proper step to address and rectify the serious loss of revenue from tennis;

    e. that he had failed to respond to his comments regarding a loss of confidence in his coaching

    f. that he had not responded to the allegation regarding forwarding a contract from the LTA and that this was a further indication of his lack of interest and commitment to Dukes Meadow.

71. On 26 January 2018 the Claimant's solicitors appealed the termination of his employment. The grounds of appeal were, essentially, that the Claimant had been denied an opportunity to defend himself in the disciplinary hearing, that he had been unwell and that it was unreasonable to fail to postpone the hearing. He had not been able to respond to the allegations because of his poor health. The unreasonable refusal to postpone indicated a closed mind. The assertion that he had committed theft was defamatory and the Claimant had never had set hours.

72. By letter dated 31st January 2018 (660) the Claimant was invited to an appeal hearing on 8th February. Mr Marks said that he would be conducting the appeal as there was no-one else at director level who could hear the appeal. He would consider the issues afresh "in the light of the fact that you do not consider you have yet provided a full response to the allegations against you. Mr Marks said he would be accompanied by Mr Maguire, Ms Roberts to take notes and by his solicitor.

73. In this letter Mr Marks also raised a significant number of new issues. These were

    a. issues with the Claimant's attendance at work on 29th June, 22nd August and during the last 2 weeks in August 2017.

b. new issues about the Claimant's girlfriend attending while he was at work,

c. the Claimant's failure to wear Dukes Meadows uniform at tournaments and while working,

d. failing to deal with a complaint,

e. failing to keep the courts in good condition

f. a complaint from the mother of RS one of the star junior layers about the Claimant's behaviour on the Miami trip and his failure to report a stolen iPad of another player

g. his alleged failure to deal with and report an incident with a junior player in February 2017

h. feedback from parents of former juniors (BH and NZ) about the Claimant's behaviour.

74. Additional email material and other documents were attached. The Claimant was invited to provide documentary evidence related to the charges by 6th February 2018, including evidence as to his movements on the days in question. He was asked to confirm that he would attend

75. On 2nd February the Claimant's solicitors responded asking Mr Marks to appoint an independent consultant with experience of disciplinary matters chair to hear the appeal. They said the Claimant would not attend if Mr Marks did not confirm by close on 6th February that he was willing to engage an independent chair as it would be "pointless".

76. In response Mr Maguire emailed at 17.12 on 7th February saying that he understood the Claimant would not be attending and the meeting was cancelled. The Claimant was invited to provide a written response by close of business the following day.

77. A letter dated 12th February was sent to the Claimant dismissing the appeal. (697) Mr Marks concluded that his own decision to dismiss had been reasonable and that, amongst other matters, the Claimant had "apparently been absent from work for over 100 days without explanation."

Law - unfair dismissal

78. In a case of unfair dismissal is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Misconduct is a potentially fair reason for dismissal.

79. If the Respondent can establish that the principal reason for the Claimant's dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

80. It is now trite law that in cases of misconduct employers are not required to ascertain beyond reasonable doubt that the employee is guilty of the misconduct charged. However, the employer must establish its belief in that misconduct on reasonable grounds and after reasonable investigation and conclude on the basis of that investigation that dismissal is justified (*British Home Stores v Burchell* [1980] ICR 303.)

81. The Claimant must also be given a fair hearing and a chance to state his case. The ACAS code of Practice on Disciplinary and Grievance procedures provide practical guidance to employers for handling disciplinary situation. A failure to follow the code does not necessarily make a dismissal unfair but will be taken into account when considering the issues.

82. In unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. The question is whether the decision to dismiss fell within the band of reasonable responses for an employer to take with regard to the misconduct in question. However, it is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer. (see *Post Office v Foley* 2000 IRLR 827 ,*London Ambulance Service NHS Trust v Small* [2009], [2009] IRLR 563,and *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* 2012 IRLR 759). The band of reasonable responses test applies as much when considering the reasonableness of the employer's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* 2003 IRLR 23.)

Submissions on unfair dismissal

83. The Respondent submits that the dismissal was for conduct and was fair. The Claimant had not participated in the disciplinary process and many matters were raised for the first time in the Tribunal. In particular his assertion that the Clockwork system only applied to on-court time was raised for the first time during the Tribunal hearing. Mr Maguire's evidence should be preferred.

84. There were significant concerns about the Claimant's attendance at work. Further, he had taken unscheduled annual leave and had taken his partner to Miami. Despite this being the simplest allegation to respond to the Claimant had not denied being given this instruction during the disciplinary process. The Claimant was also responsible for the loss of revenue of the tennis programme

85. It was reasonable to refuse to postpone the disciplinary hearing a second time. He had had ample opportunity to respond to the allegations via his solicitors.

86. It was reasonable for Mr Marks to hear the appeal. There was no one else at the same level at the Respondent and, in any event, it was a rehearing. It was not predetermined.

87. The Claimant submitted that the decision to dismiss him was predetermined and motivated by Mr Marks's preference for a younger coach with whom he played golf. The reliance on the staff handbook was an indication of bad faith as Mr Marks was aware it did not apply to him. Equally, as Mr Marks was aware, there was no clocking in and out system at Dukes Meadow and Clockworks did not record off-court activity

Conclusions

Unfair dismissal

88. What was the reason for the Claimant's dismissal? The reason for dismissal is "a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee."

89. We find that Mr Marks had lost trust in the Claimant. This had nothing to do with another coach (as the Claimant believed.) He believed that the Claimant had not been devoting sufficient time and attention to his duties at Dukes Meadows. Mr Marks's belief was based on what others had told him, but he did not believe that, on the basis of Clockworks, the Claimant had not attended work for 816 hours or 102 days.

90. He also believed that the Claimant had flouted a direct instruction not to take his girlfriend to the Miami tournament. He considered the tennis revenue was down and that, as head of tennis, the Claimant was responsible. However, Mr Marks was not minded to enquire too closely into what factors were at play in that down turn, and whether the Claimant was at fault. In evidence, when asked about the cause of the decline, Mr Marks simply said that he was head of tennis and was responsible for the falling numbers. Broadly, these are reasons which relate to conduct. All these factors played a part, but we are satisfied that the principal issue that led him to dismiss the Claimant was his belief that the Claimant was failing to devote sufficient time and attention to his duties. This is a reason which relates to conduct.

91. However, Mr Marks belief was not based on reasonable grounds after reasonable investigation. More fundamentally we are satisfied that Mr Marks had decided to dismiss the Claimant by early December and the decision to dismiss was predetermined.

92. First some of the charges were in bad faith. The Clockworks system was never designed or intended to produce a record of the Claimant's working hours, and both Mr Marks and Mr Maguire knew this.

93. The table produced by Mr Maguire did not indicate that the Claimant was not at work for 102 days. It may be, (as suggested in the disciplinary invite letter) that the Respondent did not know where he was but the Claimant had never been required to account for his time in the way that was

suggested in the disciplinary letter. Mr Marks had trusted the Claimant to do his job, and as long as the tennis was performing well, he did not enquire how or where the Claimant worked. The Claimant was not required to keep a diary of work or to work set hours.

94. For the Claimant to have been told, after the event, that he was required to account for 816 hours of his time, was manifestly unfair, given the way that he had always been permitted to work. The Claimant could never have accounted for 816 hours of his time so long after the event, and Mr Marks knew that. To suggest that this unaccounted absence amounted to "fraudulently obtaining payment for your contracted hours by failing to attend work" was a charge that Mr Marks knew was unjust. It was also dishonest to set out in the letter inviting him to a disciplinary hearing an extract from the Staff handbook which referred to a requirement to attend work "on time". The Claimant had no fixed hours beyond court time. He had been trusted to do what was necessary. Mr Marks had now ceased to trust him, but to jump from that to suggesting that the Claimant should account for 816 hours was plainly unfair.

95. Secondly, in relation to the charge that the Claimant had taken unscheduled annual leave, the Claimant had in fact notified the tennis office at the end of November that he would take leave after the tournament. He told Ms Roberts this in his email of 21st December (535) and Ms Roberts acknowledged in cross examination that she had followed this up with the tennis office who confirmed that this was the case. He had therefore not "simply notified Ms Roberts of his leave on the 20th December". Mr Marks must have been aware of this. Mr Marks accepted in evidence that the Claimant did not need to get permission to take leave but that "James would always tell me when he was going on holiday" and that it "was just a general chat". Given the previous relaxed approach Mr Marks had taken with the Claimant, to now suggest that his failure to get advance clearance was gross misconduct for "failure to observe company rules, regulations or procedure" was another manifestation of bad faith and a mind that was predetermined.

96. In relation to the loss of confidence in his coaching abilities it was not clear from the letter asking the Claimant to attend a disciplinary hearing on what basis Mr Marks believed that the mothers of RS and S had lost faith in him as a coach. In his witness statement Mr Marks said that RS mother had called him to complain about the Claimant's behaviour in Miami. At the start of the hearing the Claimant produced some texts from RS's mother denying that she had said any such thing. Although RS' mother was not there to be cross examined we note that the letter inviting the Claimant to a disciplinary hearing says that Mr Marks "was informed that RS mother had stated she wanted to change coach", which is different from the subsequent witness statement saying that she had telephoned Mr Marks directly. On the balance of probabilities we find that she had not indicated after Miami that she had wanted to change coach (though there had been an earlier "blip" in August which had been rectified).

97. A dismissal based on charges which Mr Marks knew to be based on a false premise is unfair.

98. The Tribunal was troubled by the fact that the Claimant had neither attended the disciplinary hearing, nor sent any meaningful representations in answer to the charges, but given our finding that many of the charges were known to be wrong or misleading and that the outcome was predetermined, the fact of his non attendance made no difference.

99. We have accepted however that (i) the Claimant had ignored Mr Marks's instruction that he should not take his girlfriend on trips and (ii) that he had failed to send Mr Marks the LTA document that he had requested. These are factors which may have a bearing on remedy. We considered whether we could make a finding on the extent of any contributory fault or on any Polkey deduction (what would have happened had the process been fair) in this Judgment, and the parties had made some submissions on contribution and Polkey during the hearing. However, we consider that the parties should be able to make further submissions on this issue, once they have had the benefit of reading the findings of this Tribunal on liability in full and these issues are deferred to the remedy hearing.

Bonus

100. We are satisfied that the Claimant had no contractual right to a bonus. It is clear in the written contract that it is discretionary and that was reflected in the practice over the years. As the Claimant accepted, the amount of the bonus had varied from year to year, and there was no formula for its calculation. Nor can there be said to be any implied right to "some bonus". Such a term would be too uncertain to found a contractual right.

101. It is now accepted law that when exercising a discretion with regard to a bonus payment an employer must not act in a manner which is irrational or perverse. (Clark v Nomura International plc 2000 IRLR 766). Mr Marks's decision not to pay the Claimant a bonus could not be said to have been irrational or perverse in circumstances where the tennis revenue was significantly down and there had been question marks over the Claimant's commitment to his job.

Victimisation

102. Section 27 of the Equality Act provides that

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because–
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act–
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

> (3) Giving information or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

103. The Claimant relies on his letter of appeal against the dismissal as the "protected act". In that letter the Claimant complains about the unfairness of the charges against him and of the process. In particular he complains that it was unfair not to postpone the disciplinary hearing further as he was depressed and was not well enough to participate in the process. However to say that the process was unfair because the Claimant was depressed and could not participate does not fall within the definition of a protected act in section 27(2). The Claimant does not suggest that he is a disabled person and there is no allegation (implied or otherwise) that the Respondent has contravened the Equality Act.

104. In any event we are also satisfied that the there is no causal link between the content of the appeal letter and the outcome or the alleged detriments. Mr Marks had determined that the Claimant should go before the Claimant was suspended and thereafter he had a closed mind. While this was unfair as we have said there was not victimisation in the legal sense.

Holiday pay

105. The Claimant claims pay for holiday accrued but not taken. We heard insufficient evidence on this matter and will defer any findings as to holiday pay to the remedies hearing on 30th August.

Wrongful dismissal

106. Where an employee is contractually entitled to a period of notice, an employer who dismisses an employee without giving him or her notice will be in breach of contract. An employer is entitled to dismiss an employee without any notice, where there has been repudiatory conduct by the employee justifying summary dismissal. If an employee shows that he is not going to honour his contract, an employer is not bound to its side of the employment bargain. To amount to a repudiatory breach the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract. The degree of misconduct necessary for the employee's conduct to amount to a repudiatory breach is a question of fact for the Tribunal to decide. The issue here is whether at the time of dismissal there were in fact grounds for summary dismissal and not whether those grounds were the employer's reason for the dismissal (Boston Deep Sea Fishing v Ansell 1888 39 Ch D 339.)

107. In this case we have found that the Claimant did take his girlfriend to Miami in breach of an express instruction from Mr Marks. He had failed to send the LTA document to Mr Marks as requested. We considered whether these matters met the threshold test for a repudiatory breach of contract and concluded that it did not. The failure to send the LTA letter was relatively trivial. The Claimant's actions in allowing his girlfriend to accompany him to Miami was more serious, but given the hitherto casual nature of the working relationship between the two men, we have

concluded that this was not so serious as to amount to a repudiatory breach.

Remedy

108. The amount of any remedy due to the Tribunal will be heard on 30th August 2019. If he has not already done so the Claimant should disclose to the Respondent all post termination earnings and his efforts to find alternative work and provide an updated schedule of loss no later than 16th August 2019. Thereafter the parties shall liaise to prepare a list of the issues relevant to remedy, primary responsibility for the same resting with the Respondent.

109. The parties are encouraged to agree terms as to remedy. If they are able to do so the Tribunal should be informed at the earliest opportunity.

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Employment Judge Spencer
29th July 2019

JUDGMENT SENT TO THE PARTIES ON

12/08/2019

FOR THE TRIBUNAL OFFICE

SCHEDULE ---THE ISSUES

Taken from the case management order.

Unfair Dismissal

1.1 What was the reason for the dismissal? The Respondent contends that it was a reason related to conduct;

1.2 If it was, whether the dismissal was fair.

Unauthorised deductions from wages

1.3 Whether on the termination of his employment the Claimant was entitled to be paid for 15 days accrued but untaken holiday as opposed to the 3.5 days for which the Respondent paid him.

Breach of contract

1.4 Whether it was a term of the Claimant's contract that he would be paid a bonus at Christmas 2017;

1.5 In the alternative, if the bonus was discretionary, whether the Respondent exercised the discretion "vexatiously".

Disability Discrimination

1.6 Whether the Claimant was disabled at the material time;

1.7 Whether the Respondent knew or could reasonably have been expected to know that he was disabled at the material time;

1.8 Whether the Respondent applied a PCP that the disciplinary hearing take place on 17 January 2018;

1.9 Whether that PCP put the Claimant at a substantial disadvantage compared with persons who were not disabled because he could not attend the hearing or make written representations;

1.10 Whether the Respondent knew or could reasonably have been expected to know that it put him at that disadvantage;

1.11 Whether postponing the hearing for a certain amount of time would have been a reasonable adjustment.

1.12 The Claimant is also pursuing a complaint of indirect disability discrimination under section 19 of the Equality Act 2010. That does not add anything from the Claimant's point of view to the failure to make reasonable adjustments claim but will require him to prove additional facts. I cannot see what is to be gained by pursuing that claim.

1.13 The Claimant complains of direct disability discrimination in respect of the failure to postpone the disciplinary hearing, his dismissal and the failure have an independent person determine the appeal. I queried whether it was really the Claimant's case that the Respondent had done all those things because he had depression and that it would not have taken that course had he not been depressed.

1.14 I have some difficulty in understanding the section 15 claim. The unfavourable treatment is alleged to be the failure to postpone the disciplinary hearing. I do not understand what is alleged to be the reason arising from his disability for that unfavourable treatment.

1.15 Although the Claimant is complaining of victimisation under section 27 of the Equality Act 2010, there is no alleged protected act in his particulars of claim. I have made an order for him to provide particulars of that and, in the absence of any such act, the Claimant should withdraw that complaint.

1.16 Whether the Respondent harassed the Claimant under section 26 of the Equality Act 2010 by reducing his pay to SSP, failing to postpone the disciplinary hearing and to have someone independent to determine his appeal.

1.17 Whether the Tribunal has jurisdiction to consider any complaints that were not presented in time (taking into account the extension of time afforded by Early Conciliation).