EMPLOYMENT TRIBUNALS

Claimant: Mr M Harvey

Respondent: Stephenson College

Heard at: Leicester

On: 18 December 2017

Before: Employment Judge Faulkner (sitting alone)

Representation
Claimant: In person
Respondent: Mr T Perry (Counsel)

JUDGMENT

The Claimant was not dismissed by the Respondent. Accordingly, his complaint of unfair dismissal is not well-founded.

REASONS

Complaint

1. The Claimant confirmed at the start of the Hearing that his complaint was of unfair dismissal only.

Issues

2. As notified to the parties at the outset, the issues to be decided as to liability were:

> 2.1. Was an act or omission, or acts or omissions, of the Respondent a cause of the Claimant's resignation?
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> 2.2. If so, did the act(s) or omission(s) amount to a fundamental breach of the Claimant's contract of employment such as to entitle him to resign without notice? The Claimant relies on a breach of a term, either express or implied by custom and practice, that he would not be required to teach more than 22.5 hours per week, and/or on breach of the implied duty of trust and confidence due to the Respondent's conduct as he perceived it over a number of months, culminating in events at a meeting shortly before his resignation.

2.3. Did the Claimant affirm the contract of employment, whether by delay in resigning or otherwise?

2.4. If not, such that the Claimant was dismissed, has the Respondent shown the reason for dismissal and was it a fair reason within section 98 Employment Rights Act 1996 ("ERA")?

2.5. If so, was dismissal for that reason fair within the meaning of section 98(4) ERA?

3. As to remedy, the Claimant confirming that he would seek compensation only and the amount of the basic award being agreed, the issues to be decided in relation to the compensatory award would be:

3.1. The measure of the Claimant's pension loss;

3.2. Whether he had complied with the duty to mitigate his losses generally (section 123(4) ERA);

3.3. Whether compensation should be reduced under the principle set out in **Polkey v AE Dayton Services Ltd [1987] ICR 142**;

3.4. Whether compensation should be increased or decreased in accordance with section 207A Trade Union and Labour Relations (Consolidation) Act 1992 (failure to comply with the ACAS Code on Disciplinary and Grievance procedures).

Facts

4. The parties produced an agreed bundle of documents; I made clear that it was for them to draw my attention to any document on which they sought to rely. The Claimant, Mrs M Mendes (HR Advisor for the Respondent) and Mrs V Scales (the Respondent's HR Director) produced written statements and gave oral evidence. The Claimant also produced short signed statements from three former colleagues, Mr Glyn Stenson, Mr Paul Clarke and Mr Wayne Murphy; none gave oral evidence which as the Claimant accepted meant less weight could be attached to their evidence. Both parties also made closing submissions. The findings of fact below are based on this material; page numbers refer to the agreed bundle.

5. Before hearing any evidence I informed the parties that I had a fleeting and historic professional connection with the Respondent, as it was for a few years a client of a law firm for whom I worked until January 2016. It is unknown to me whether the Respondent is still a client of that firm, though it is not involved in any way in this litigation. I can recall no involvement at all in advising the Respondent until around 4 years ago when a senior colleague left the firm and I was asked to attend a meeting at the College to introduce myself as a new senior contact for employment advice. I have little recollection of the meeting, though I believe I met the Principal, may have met Mrs Scales and that we discussed then current work. I do not recall subsequently giving any advice to the Respondent directly, though for a brief time I supervised a junior colleague who was doing so. I have no recollection of that work and who I had contact with, though Mrs Scales' name was certainly known to me.

6. I explained that I was happy to hear any objection to my hearing the case because of this connection, that if either party objected but I nevertheless decided to hear the case, their having objected would have no adverse consequence. I also made clear that if they did not object it would be difficult for them to raise any objection at a later

stage. Both parties stated that they saw no reason why I should not proceed. I agreed, on the basis that my association with the Respondent was fleeting, was now some years ago, and was through a firm for which I no longer work. I was satisfied that this did not give rise to any suggestion or appearance that I could not deal with the matter in anything other than a completely impartial way.

Liability

7. The Claimant was employed by the Respondent from 4 September 2013 until his resignation effective from 7 June 2017, as Lecturer – Commercial Motor Vehicle, based in its training and assessment centre in Coalville. The Respondent is a further education college. The Claimant had previously worked in lecturing roles elsewhere, and indeed for the Respondent prior to 2013. His duties as lecturer centred around teaching people sent to the Respondent by local employers.

8. It is agreed that the relevant contract of employment was that at pages 37 to 54. Relevant provisions to note were as follows:

> 8.1. Clause 3.1, headed "Duties", stated, "You will be employed as Lecturer – Commercial Motor Vehicle in which capacity you will be required to perform such duties consistent with your position as may from time to time be assigned to you".
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> 8.2. Clause 4.2 (following clause 3.1 and therefore incorrectly numbered), stated, "Your duties are those as specified in your Job Description and will include, but will not be limited to formal scheduled teaching, tutorials and student assessment, management of learning programmes and curriculum development, student admissions, educational guidance, counselling, preparation of learning materials and student assignments, marking of students' work, marking of examinations, management and supervision of student visit programmes, research and other forms of scholarly activity".
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> 8.3. Clause 4.4 stated, "You are expected to work flexibly and efficiently, to maintain the highest professional standards and to promote and implement the policies of the Corporation".
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> 8.4. Clause 10, under the heading, "Working hours" stated: "10.1. You will be expected to work such hours as are reasonably necessary for the proper performance of your duties and responsibilities, with a normal working week of 37 hours … //10.2. The days upon, and the times at which, you are required to work will be in accordance with your teaching timetable for the relevant term, a copy of which will be supplied to you. Such timetables will be determined at the absolute discretion of the College".
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> 8.5. Clause 34.1, under the heading, "Prior and subsequent agreements" stated: "This Contract of Employment and any documents expressly incorporated herein constitute the entire terms and conditions of your employment. They cancel and are in substitution for any previous letters of appointment or contracts of employment and all other agreements and arrangements (whether express, implied or deriving from any collective agreements) relating to your employment by the Corporation".

9. The Claimant says in his statement (paragraphs 2 and 3), "My contract of employment was to teach 900 hours per year, over a 40-week (36) (sic) year, within a 37-hour week. //My understanding of the contract was that within that 37-hour week, lecturers should not exceed 22.5 hours per week class contact. The other

hours were for lesson preparation, workshop and task setting up, marking, quality control, curriculum development etc". His colleagues' statements focus on this point, Mr Stenson for example saying that lecturers would "not normally" be expected to exceed 22.5 hours per week, and Mr Clarke saying this should only be in "exceptional circumstances, for example to cover sick leave or bereavement … [and then only] for a very short period".

10. The Claimant was not able to point to any reference in the contract to his being required to teach no more than a stated number of hours per week or year. He goes on to say in paragraph 4 of his statement however that his understanding "came from the college's correspondence and discussions regarding restructuring of the organisation with new working conditions and contracts which were introduced in 2013 following draft terms and contracts which were sent to staff in May 2013". This is a reference to pages 59 to 62, a copy of a letter from the Principal, apparently sent to all of the Respondent's lecturers and trainers on 30 May 2012 (during the Claimant's previous employment). It concerned in part a proposed new contract which was to be consulted upon, and in relation to teaching stated that in order to grow the Respondent's commercial income streams it was necessary to increase workforce flexibility by increasing the number of teaching weeks across the year. It said, "With the number of available teaching weeks harmonised at 40 weeks, the proposed harmonised annual contact hours is 900. Overall this will mean a slight increase in weekly contact hours from 22 to 22.5 hours."

11. The Claimant also refers in his statement to the job description at pages 63 to 64. This refers to a schedule being prepared detailing specific areas of work and programmes for which lecturers will be responsible, which schedule will be amended "as and when it is necessary to meet the demands of the Corporation and to maintain flexibility within the Faculty. This will be done in such a way as to fairly distribute the workload amongst all Lecturers". He accepts that there was no mention of a cap on teaching hours in this document.

12. The Claimant accepts that the May 2012 letter did not include any explicit reference to not exceeding the stated teaching hours, though an enclosure at pages 66 to 67, which is a table comparing then current and proposed contracts headed "Contract of Employment", referred to annual contact hours of 900 or 22.5 per week over 40 teaching weeks. He says that everyone expeced their teaching hours to vary, that therefore it was reasonable to expect that sometimes they would teach more than 22.5 hours in a week, but that management should not have planned teaching loads on this basis unless the particular programme demanded it. The 22.5 hours was therefore not absolute. Mrs Mendes refers in her statement (paragraph 4) to a variety of teaching arrangements, including some where lecturers teach for three weeks and then have three weeks off, whilst in evidence she said that whether the flexibility required of lecturers would be distributed over the year or be required at particular peak times depended on the subject needs at the time. She thus says that the requirement at clause 10.1 of the employment contract to work "such hours as are reasonably necessary" reflects the requirement to work flexibly to meet those needs, though both she and Mrs Scales also accept that the requirement to be flexible was not without limit. The Claimant himself says that when he was Deputy Faculty Head, he sometimes front-loaded teaching hours, meaning that lecturers would teach more than 22.5 hours, to give time to mark work at the end of term. He agrees that this somewhat contradicts paragraph 6 of his statement which says that he had to keep teaching hours to 22.5 per week except in unexpected situations such as absence cover – "I could not plan for it over a number of weeks". In fact, he says that there were times when he arranged for staff to teach 25 hours per week, probably for no more than a month at a time, and that whilst this would lead to grumbling from staff it was not in his view a breach of their contracts. He therefore

accepts that 22.5 hours is an average, its purpose being (in his words) to "protect lecturers", i.e. to give time for preparation and other responsibilities. He accepts that staffing shortages could be an exceptional circumstance requiring more than the usual contact time.

13. At pages 137 to 141 is a record of the Claimant's teaching load from 5 September 2016 to 6 June 2017. It is uncontested that it is not quite a complete record in that from September 2016 to January 2017 the Claimant worked around 80 additional hours visiting various student workplaces. The Claimant does not challenge the assertion that from September 2016 to January 2017 his teaching time was mainly well below 22.5 hours per week, though he says that he was also doing other work such as developing courses, which I accept.

14. The record at pages 139 to 141 is accepted as essentially correct from January 2017 onwards. The Claimant accepts that in that period his preparation work was less than might normally be expected as he was largely teaching the same material to the different groups of students assigned to him, establishing the students' needs by way of an assessment when they first arrived. He did though change some of the practical work if the same company sent different students on consecutive days, which was an hour or two of work, and also altered some aspects of course delivery. Mrs Mendes says in her statement (paragraph 19) that at the time of his resignation in June 2017, the Claimant had taught 521.75 hours from September 2016. Even adding on the 80 hours when he visited workplaces, this would still be proportionately less in the year, by about 90 hours Mrs Mendes says, than would be produced by the 22.5 hours per week average. The Claimant accepts that, but focusses his complaint about the Respondent's conduct on the period from February to June 2017, when he says that the teaching he was required to carry out did not leave sufficient preparation time for the proper performance of his duties.

15. The Claimant's record of his class contact hours from week commencing 20 March to week commencing 29 May 2017 is at page 136. The Respondent's figures, taken from the printout at pages 137 to 141, differ somewhat. The hours were as follows (with the Respondent's figures in brackets): 32 (30), 40 (37.5), 32 (30), 33 (31); there was then a week of annual leave; 32 (30), 31.5 (29.5), 41 (38), 16 (15); there was then another week of annual leave; 29 (27.5). I do not find it necessary for the purposes of deciding this case to determine which figures are correct, given their overall broad similarity. The Claimant says in his statement (paragraphs 15, 16, 20 to 22) that some of his working days became very long, particularly where he was required to travel. He says that he knows of no other employee of the Respondent who was expected to carry out such intensive teaching activity for more than a couple of weeks consecutively. Mrs Mendes view is that the Claimant's hours in this period were reasonable given the exceptional circumstances of the team being a team member down, which she said in evidence means a lecturer "may have to take on slightly more". She nevertheless accepts the Claimant's case that in weeks when he was teaching 35 hours or more, he would not be able to carry out in that week, within 2 hours, those aspects of his duties related to management of programmes, marking and preparation of learning materials and assignments.

16. The requirement to teach these hours principally arose from the departure of the Claimant's teaching colleague, Mr Wayne Regan-Clarke, in February. He had not been replaced by the time of the Claimant's resignation. The Claimant's manager, Jon Ablewhite, had also resigned, Ms S Royle, the Respondent's Director of Resources, thus becoming temporarily responsible for the Claimant's work. The Claimant accepts that these were exceptional circumstances. On 1 February, he emailed Mrs Scales (page 101) to say he was "finding [his] position within the College intolerable currently" because of a lack of information about the future of the

Training and Assessment Centre in view of the resignations. He was concerned that he would be the only person working in the Centre a month from then, stating "I don't think it unreasonable for the management to foresee that this might cause considerable anxiety resulting in stress, and I have to admit that this is beginning to take its toll". Mrs Scales replied to say she would be happy to meet, and whilst she was away from work for a few days had asked Mr Ablewhite to meet with the Claimant. On 10 February (page 100), the Claimant emailed Mrs Scales to say, "If the meeting arranged earlier in the week was to help inform me about what was happening, then it has certainly helped, and alleviated the problem; thank you … //Whilst I thank you for the opportunity to discuss further, as a consequence of the meeting I no longer feel the need to …". The Claimant says he was happy with what he had been told, namely that a recruitment advertisement was in hand and the Centre was not going to shut. Mrs Scales confirmed (page 100) the Claimant should contact her again if he would nevertheless like to meet. The job advert posted in February 2016 (pages 102 to 103) sought to recruit on a 0.5 FTE basis as Mr Regan-Clarke informed the Respondent that he did not believe there was enough work to justify a full-time appointment. It did not result in any recruitment. It is accepted on reflection that it was not drafted to attract the sort of person the Respondent was looking for.

17. The Claimant next contacted Mrs Scales on 19 May 2017 to express concerns about the lack of recruitment and the effect this was having on him. He did not raise any such concerns between 10 February and 19 May, except by way of general complaint to colleagues. He says for example, and I accept, that at one point he spoke to a colleague who was responsible for booking in students for the Centre, asking why more work had been accepted when he had previously shared with her his concerns about his workload. She replied that she had shared the Claimant's concerns with Ms Royle, who had said courses should continue to be booked. Otherwise he "just knuckled down" to do the work until he felt it became too much.

18. The Claimant's email to Mrs Scales of 19 May is at page 111. It reads: "I am concerned at the amount of class contact hours I have been required to cover over the last months, which are way above my contract. I have tried my best under the circumstances to fulfil the College's obligations, but the prospect of this continuing for weeks or months moving forward is just unacceptable and in breach of contract. //My average teaching/assessing week seems to range from 32 to 40 hours, which leaves no or little time for records, paperwork or preparation, and I understand that with a 900 hour per annum contract, that I should not be expected to exceed 24 (sic) hours teaching in any one week. Perhaps you could confirm this. I am having to stay late to try and keep up, which is leaving me exhausted and frustrated at not being able to do things that need doing". He added that he had always been willing to "cover the expected and unexpected … but this position we find ourselves in now is totally predictable if not planned." He went on to express concerns about the failure to recruit and the time it would take to do so by way of the re-advertising which he understood was now in hand, stating that this left "little prospect of respite from the relentless workload in the foreseeable future". He concluded, "Needless to say that this is having an effect on me, which the college's stress management policy should have already identified", and that he would be happy to discuss the matter but was now away on holiday until 30 May.

19. Mrs Mendes acknowledged the Claimant's email on 26 May in Mrs Scales' absence (page 112), said that she would speak with the Claimant's new manager, Sundeep Kalsi (who is no longer employed by the Respondent), and revert to the Claimant by Friday 2 June. The Claimant replied on 30 May (page 113) after returning from leave to say this would "have given you 14 days since I brought the situation to the attention of HR, so I expect a solution (or not) on [2 June], not further

discussion. I have nothing further to add. //I am advised that continuing under the present over hours workload will constitute acceptance of my conditions of employment, which I do not …".

20. The meeting between the Claimant, Mrs Mendes and Mr Kalsi took place on Monday 5 June. Mrs Mendes says that the purpose of the meeting from her perspective was to understand the Claimant's concerns. There are no notes of the meeting in the bundle, though at page 114 is a copy of Mrs Mendes' email to the Claimant following the meeting, in which she set out the key points of the discussion as follows:

> 20.1. Mr Kalsi would speak with a colleague regarding support with completing paperwork, including preparing assessment materials;
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> 20.2. A re-worked advert would be placed within 48 hours for a full-time Lecturer;
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> 20.3. Mr Kalsi would discuss with Ms Royle the possibility of recruiting an agency worker;
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> 20.4. No further courses would be booked for June, July or August. Of the next 13 weeks, the Claimant would be on annual leave for 4, and otherwise the number of booked teaching days were, consecutively: 2, 3, 5 (1.5 being provisional and so Mr Kalsi would speak with the relevant employers to check whether their staff would be attending), 4, 4, 4; this would be followed by two weeks' leave; 3, 4 (apparently all provisional); this would be followed by two more weeks' leave; 3 (apparently 2 of which were provisional). If any provisional bookings did not proceed, they would not be replaced. The Claimant accepted in evidence that it is normal for courses to be booked several months ahead of time.
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> 20.5. The Claimant and Mr Kalsi were to "regularly review the upcoming bookings together so that any issues and support can be identified in advance".

21. The Claimant says that he cannot recall what he said at the end of the meeting, as he was "flabbergasted". In his statement (paragraph 25) he says he left the meeting "in despair". Mrs Mendes by contrast says that the Claimant said to Mr Kalsi that things were moving in the right direction. The Claimant denies that, and on balance I find that it was not said, as if it had been, I believe it would have been mentioned in Mrs Mendes' statement; it wasn't. The Claimant says (paragraph 28) that Mrs Mendes' email was "the straw that broke the camel's back" as "it was clear that the college had no intention or plan to lower my workload, and I completely lost faith and trust in the college finding a solution". The Claimant replied to Mrs Mendes on 6 June, accepting that these points were discussed, but stating that "none of them address the fundamental problem of planned excessive workload and class contact hours in my timetable". He noted that there were four consecutive weeks when the planned contact was 4 or 5 days, which he estimated worked out at an average of 36.75 hours. He went on, "I believe that exceeding the 900 hour, 24 (sic) hours per week guideline (as is custom and practice throughout the college), other than in exceptional circumstances, to be excessive. This is not exceptional, it is planned. //Unfortunately, based on the above, I will not be accepting the outcome".

22. The Claimant says that what he expected at the meeting was an acknowledgement of excessive hours and an agreement to "cancel a course or two" – a typical course being two or three days. There was no practical alternative to

cancellations as far as he was concerned. It was Mrs Mendes' evidence that it was a manager's duty to ensure lecturers were not overloaded with teaching commitments. She herself did not have authority to agree to cancellation of courses; as she puts it, this was an operational matter. Cancellation of courses was not raised by the Claimant or otherwise discussed at the meeting, though Ms Mendes says that she understands Mr Kalsi explored this possibility after the meeting. The Claimant agreed at the meeting that there should be a new job advertisement and later helped Mr Kalsi to write it, though he also says the Respondent should have advertised for a replacement for Mr Regan-Clarke as soon as the latter handed in his notice in November 2016, which I accept he mentioned to Mr Ablewhite and separately to Ms Royle when Mr Ablewhite himself resigned. This was on the basis that it takes several months to get a replacement in post.

23. In the Claimant's view, the Respondent's only concession was the agreement to take no more bookings. He accepts that some courses were provisionally booked, but says they were rarely cancelled and none had been cancelled in the weeks leading up to the meeting. The Respondent says that the teaching record shows that there had been cancellations previously, for example at page 139 on some dates in January and February 2017. The Claimant explained this by saying he probably forgot to take the class register on those occasions. I do not accept that explanation, both because the document is essentially agreed as an accurate record and because the Claimant seems likely to me to have been meticulous in ensuring matters such as the class register were attended to, particularly when he was less busy. As for administrative support, the Claimant says that this was not the issue, though Mrs Mendes says that whilst by itself it would not have reduced the Claimant's teaching hours it could have assisted with his preparatory work. He says he also knew the Respondent would not be able to find anyone suitable to work on an agency basis, though Mrs Mendes says and I accept that this was not stated at the meeting, and that in fact the Respondent obtained some agency worker CVs and shortlisted two candidates though this was not progressed further after the Claimant resigned. It was partly the Respondent's history, as the Claimant saw it, of not dealing with matters such as recruitment in a timely manner which accounted for his lack of confidence that it would address matters appropriately in June 2017. He does not recall saying at the meeting that nothing that had been suggested would help, though he also says that the Respondent did not ask him to suggest a solution.

24. Mrs Mendes replied to the Claimant's email later the same day (page 116) to say that "there is no further teaching requirement for the remainder of this week [this meant 2 teaching days were booked] and that at present 0.5 days have been confirmed for next week". As far as the latter was concerned, the Claimant had booked two days off for surgery on his hand and therefore says (paragraph 30 of his statement) that he did not see this as a "concession or effort to reduce the work" by the Respondent. Mrs Mendes went on to say, "Sundeep is available first thing tomorrow and would like to meet with you to go through the upcoming courses and what the detail of the diary looks like over these weeks". The Claimant says that he did speak with Mr Kalsi, which I accept; in his view however, there was nothing Mr Kalsi was able to do to help.

25. On 7 June (page 117), the Claimant sent another email to Mrs Mendes which read as follows: "Melissa, //You have had ample time to offer solutions and resolve the situation since I first brought the problem of breach of contract to your attention. You had 14 days. //During our meeting, you refused to even acknowledge or discuss with me the core problem of over contractual hours, and the 900 hour/weekly equivalent loading. //I have tried to explain my position and ask for a resolution, and with the prospect of none forthcoming due to you missing the point and not concentrating on the contractual issues, it is with regret and great sadness that I am

forced into giving you my resignation, without notice, with immediate effect. //I will be involving ACAS and offering you the opportunity for Early Conciliation prior to taking the grievance to a tribunal. //In the meantime, or during the conciliation process, you have a change of mind (sic), and are prepared to talk about the maximum planned weekly workload, and put in place safeguards to ensure that I will never be put in this position again, then I would be happy to return to work should you consider it, without a break in service. //Kind regards, Mike". In paragraph 31 of his statement he says, "The prospect of continuing for another 2 months or more at this pace, and lack of a solution was unbearable".

26. The Claimant says that he pursued the informal stage of the Respondent's grievance procedure (pages 30 to 31) by his email to Mrs Scales of 19 May and the meeting on 5 June. Once the meeting did not conclude to his satisfaction, a formal grievance was an option but he had been advised that pursuing it would affirm the contract of employment (I assume on the basis that he would have thus continued in employment). He says that this, combined with what he saw as the Respondent's lack of action, pushed him to resign even though he did not wish to leave his job.

27. The promised re-worked advertisement was placed in early June 2017 after the Claimant's employment terminated. Mrs Mendes says the post had not been re-advertised sooner as Ms Royle wanted to assess the staffing requirements within the team. The Claimant's case is that the Respondent would not even accept that there was "an issue" with his hours; Mrs Mendes' evidence is that she explained at their meeting that it was accepted the Claimant had concerns, which were being taken seriously. I accept that uncontested evidence. The Claimant asserts that in effect he was being expected to teach 35 hours a week over a 16-week period. Mrs Mendes says that she is not aware of any other lecturer having to teach at that level for that length of time and Mrs Scales also accepts that it was unusual. She nevertheless describes the Claimant's resignation (paragraph 8 of her statement) as "precipitous" saying that "he did not give the College time to resolve his concerns" as raised in his email to her of 19 May.

Remedy

28. In his separate mitigation statement, the Claimant says that in July 2017 he made contact via LinkedIn with Skillnet, a Leicestershire company specialising in the training and assessment of HGV apprentices. After several telephone conversations and a pre-planned holiday, he decided not to pursue the opportunity though he is confident Skillnet would have made him an offer. It would have been a full-time appointment, carrying out workplace-based assessments, on a comparable salary to that paid by the Respondent. The key differences to his employment as a lecturer were that it would have required substantial travel throughout the East Midlands and also entailed a sales element.

29. Instead, the Claimant pursued a plan to set up in business himself as a training and assessment centre. He preferred this option principally because he liked the opportunity of "being in control" and building up his own business, taking the view that most employers would see him as too old (he was 63 at the date of termination). It also entails less travel and greater flexibility. He has been paying himself for the last two months, approximately £2,000 net, it taking him two months prior to that to get fully accredited. He has not yet covered the expenses of starting the business, but plans to earn around £14,000 net per year and possibly more.

30. The only other possible role the Claimant considered was at what was then The Manchester College, but he heard nothing from them following an enquiry. He says he could find nothing else suitable for him to apply for on other college websites.

31. The Claimant has been in receipt of a pension of £500 per month from the Teachers' Pension Scheme ("TPS") since he previously left the Respondent's employment, though since he returned to its employment further contributions have been made to the TPS, 16% of salary by the Respondent and 8% by him.

Law

32. Section 95(1)(c) Employment Rights Act 1996 ("ERA") provides that an employee is dismissed for unfair dismissal purposes if "the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". Widely known as "constructive dismissal", the test for establishing dismissal in these circumstances is that given in ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***. It is not necessary to refer to this and subsequent approving authorities in detail. It is sufficient to say that they make clear that in order to establish constructive dismissal there must be a repudiatory breach of contract by the Respondent – in other words, conduct going to the root of the contract or which shows that the Respondent no longer intends to be bound by it; the Claimant must have resigned in response to that breach; and if the Claimant has affirmed the contract of employment after the breach, constructive dismissal will not be made out.

33. The Claimant in this case relies on two terms having been breached by the Respondent. The first such term contended for, broadly stated, is that either as an express term of the contract, or by way of an implied term arising from custom and practice, the Claimant would not be expected to teach more than 22.5 hours per week. It is not necessary for me to recite in detail the legal principles relating to determining the terms of a contract, either express or implied. In both respects it is a question of law. I accept of course Mr Perry's submission that to imply a term by custom and practice, it must be reasonable (that is fair and not arbitrary), notorious (generally established and well known) and certain (that is clear-cut). I also accept Mr Perry's submission that one cannot imply a term that contradicts an express term, unless the express term is ambiguous and the implied term supplies the necessary clarity. As to express terms, the Claimant's son mentioned at the end of the hearing the decision of the Employment Appeal Tribunal ("EAT") in ***United Bank Ltd v Akhtar [1989] IRLR 507***. In that case there was an express term that the employer could require the employee to relocate his place of work. The EAT held that there may well be circumstances where an employer has discretions such as this under the contract but they are nevertheless not unfettered discretions which can be exercised capriciously. The employer in that case accepted and the EAT affirmed that it was under an obligation not to frustrate the employee's attempt to perform the contract, and the EAT held that the employer's discretion had to be exercised accordingly, in accordance with the duty of trust and confidence.

34. That is the second term the Claimant relies on. The existence of this term is of course undisputed by the Respondent. The term is, more precisely, a term implied into every contract of employment to the effect that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (***Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, Malik v BCCI SA (in liquidation) [1997] ICR 606***). The EAT in **Akhtar** noted, by reference to **Woods,** that there may be circumstances in which the implied duty is breached even where the literal wording of the contract might appear to justify the employer's actions.

35. Any breach of the trust and confidence term is fundamental and repudiatory (***Morrow v Safeway Stores plc [2002] IRLR 9***). Whether there has been a breach of this crucial term has to be judged objectively: in the ***Woods*** case, it was said that Tribunals must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is that the employee cannot be expected to put up with it". It is not relevant in doing so to consider whether the employer intended any repudiation of the contract – **Woods** as confirmed in **The Leeds Dental Team Ltd v Rose [2014] ICR 94.** A Tribunal's focus must be on what the employer did, assessed cumulatively and overall, and assessed objectively.

36. Where a course of conduct is relied upon, as opposed to a one-off event, it is also well-established that the matter which finally results in the employee deciding to resign (usually referred to as "the final straw"), does not have to be of itself a fundamental breach of contract, and in fact does not even have to be blameworthy behaviour by the employer at all. It must nevertheless be an act in a series whose cumulative effect is to breach the implied trust and confidence term, and must contribute something to that breach, however slight, although what it adds may be relatively insignificant. An entirely innocuous act will not be sufficient (***Omilaju v Waltham Forest London BC [2005] ICR 481***).

37. As noted, if a repudiatory breach of contract has been established, it must then be considered whether the Claimant accepted that repudiation by treating the contract of employment as at an end. He must have resigned in response to that breach, though that need not be the only reason for the resignation: it is sufficient that the repudiatory breach played a part in the resignation - **Abbey Cars (West Horndon) Ltd v Ford [2008] UKEAT/0472** and **Wright v North Ayrshire Council [2014] ICR 77**.

38. It must also be considered whether the Claimant has affirmed the contract after any breach, because if he has done so, any right to accept the Respondent's repudiation of the contract by resigning and claiming to have been constructively dismissed is lost in relation to that breach. Affirmation can be express, or it can be implied from the Claimant's conduct, where he acts in a way which is only consistent with the continued existence of the contract.

39. Delay can be evidence of affirmation, but in **W E Cox Toner (International Ltd) v Crook [1981] ICR 823,** the EAT held that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Another EAT decision in **Fereday v South Staffordshire NHS Primary Care Trust [2011] EAT/0513/10** made clear that affirmation is a fact-sensitive matter, and can be implied by prolonged delay and/or if the employee calls on the employer for further performance, which is what had happened in that particular case, which also suggested that affirmation can be conditional on an employer acting in a particular way going forwards.

Analysis

40. Before analysing whether the Respondent was in fundamental breach of the Claimant's contract, it is necessary for me to determine the terms of that contract, specifically whether there was any term which provided that the Claimant, to quote from his statement (paragraph 2), "should not exceed 22.5 hours per week class contact".

41. It is clear that there was no express term of this nature. The written contract contains no reference to teaching hours at all. As stated in paragraph 4 of his

statement, the Claimant thus relies on the correspondence from the Respondent in May 2012. As I have noted, that correspondence and the enclosed table (see pages 61 and 66) do refer to annual contact hours, the former stating that the "proposed harmonised annual contact hours is 900", and that this "will mean a slight increase in weekly contact hours from 22 to 22.5 hours", and the latter repeating those figures and being headed "Contract of Employment". Moreover, this was clearly something the Respondent was consulting about with the recognised trade union. Nevertheless, the provisions of clause 34.1 of the employment contract are clear. Any letter of appointment – and therefore certainly the terms of any letter (and enclosures) from the Respondent outlining proposed terms – was superseded by the terms of the contract itself, and the same applied to any arrangement deriving from collective negotiation. That is not to say that the 900 or 22.5 hours arrangements were of no significance – the Respondent acknowledged that it would not expect the 900 hours annual figure to be exceeded and thus appears to have had an understanding with the union to that effect. What the Claimant contends for however is an express term that his teaching hours should not exceed 22.5 per week. It is clear on my analysis that no such express term existed.

42. Even in the absence of clause 34.1, I would not have been prepared to determine that there was an express term along these lines, given the inconsistencies in the term contended for by the Claimant. I refer in particular to his emails to the Respondent of 19 May and 6 June 2017 in which he asserted a maximum weekly teaching commitment of 24, as opposed to 22.5, hours. An express term must be certain, and looking at the Claimant's case overall, what he sought to assert in this regard was not.

43. The question is therefore whether the term the Claimant relies upon can be said to have been implied by custom and practice (there was no argument, nor could there have been in my view, that the term could be implied otherwise, for example on the basis that the contract was unworkable without it). As I have said, the Respondent clearly had an understanding with the relevant union, and therefore with its teaching staff, that teaching hours would not exceed 900 per year, though as I have also said, the evidence before me did not support the Claimant's case that this had in some way become an express contractual term. The Claimant does not dispute that he could be required to teach for 900 hours per year; his case is that he could not be required to teach for more than 22.5 hours per week. To be implied by custom and practice, such a term would need to be reasonable, notorious and certain. Putting aside at this point whether clause 34.1 would have excluded any implied term, as it purported to do, I agree with Mr Perry that this test is not satisfied in this case, essentially for the reasons he gave.

44. In deciding this issue, I bear in mind that I am concerned with the contract that applied at the relevant time to all of the Respondent's teaching staff. As to reasonableness therefore if the Claimant were right, an employee who taught fewer than 22.5 hours in any particular week could not subsequently have been required to catch up even a few additional hours. That would not have been fair to the Respondent in its quite proper endeavours to meet the requirements of its varied teaching programmes. It would also have been inconsistent both with the provisions of clause 10.1 of the written contract which required flexibility as to weekly hours of work, and with the general (though like clause 10.1 not wholly unfettered) flexibility as to duties reflected in the other contractual provisions I have highlighted. Further, it would very arguably have been inconsistent with the understanding that teaching staff would teach for 900 hours per year. As for the requirement to be notorious, I accept Mr Perry's submission that the 22.5 hours limit the Claimant contends for was not widely applied, if at all. His own practice as a manager during his earlier employment with the Respondent was to build in more than 22.5 hours per week,

over a period of several weeks, when the needs of a course required it, and he did not challenge the Respondent's case that in other parts of the college the same practice was routinely adopted. Finally, as to certainty, I have already indicated that the Claimant's case was not wholly consistent in the cap on hours he contends for. Moreover, as Mr Perry pointed out, the Claimant essentially accepts that the cap could be exceeded in "exceptional circumstances". In his statement he said that this would only be to cover staff absences, but rowed back from that in his oral evidence to agree that staff shortages such as were relevant in his case could also be an exceptional case. Although therefore, when baldly stated, the term contended for by the Claimant was clear-cut, his own evidence introduced considerable uncertainty as to the nature of the term. For all of these reasons, I conclude that there was no implied term such as the Claimant sought to rely on.

45. That is by no means the end of the matter however, because the Claimant has also consistently sought to rely on the duty of trust and confidence. It is against that implied term that I now turn to analyse the Claimant's case that he was dismissed.

46. First of all, I am satisfied that the Claimant did indeed resign because of his conclusions about acts or omissions of the Respondent. Mr Perry contended, based on the Claimant's resignation email, that the reason for the resignation was to force the Respondent into accepting his understanding of the contract. I am not persuaded by that: the email seems to me to reflect no more than the Claimant's reluctance to leave and his wish to resolve matters amicably in terms he was content with. At the very least, it is clear to me that the Claimant's view of the Respondent's conduct was a cause of his resignation. The crucial questions are therefore whether that conduct amounted to a fundamental breach of the Claimant's contract of employment such as to entitle him to resign without notice, and if so whether the Claimant affirmed the contract following any such breach.

47. The Claimant's case as to what acts or omissions constituted a breach of the implied duty of trust and confidence was not at all times wholly clear, though as an unrepresented litigant I do not criticise him for that – indeed, he is to be commended for his thorough preparation of his case. As I understand it, his case in this regard can be divided into three parts.

48. The Claimant criticises, first of all, the Respondent's failure to recruit a replacement for Mr Regan-Clarke, and indeed Mr Ablewhite, prior to their leaving the Respondent's employment. This is what led to his email to Mrs Scales of 1 February 2017, in which he expressed concern not about his then current workload but about the lack of information regarding replacement staff and consequently the future of the Training Centre. It is clear from his subsequent email to Mrs Scales on 10 February 2017 that the Claimant was content with what he had been told at his meeting with Mr Ablewhite which took place between those two dates – it had "helped" and "alleviated" his concerns. That was a clear and unconditional affirmation of the contract in my judgment, a conclusion which is supported by the fact that the Claimant continued to work as normal, without raising further concern or complaint about recruitment – other than in the way of general comments to colleagues – for a further three months. If there had been any breach of contract therefore up to 10 February 2017, and I do not find that there was, the contract was clearly affirmed thereafter.

49. The other parts of the Claimant's case on which he relies for his assertion that the Respondent was in breach of its duty of trust and confidence are the hours that it required him to teach from mid-March to mid-May 2017 (see page 136), and the response to his complaint about those hours and the assurances he wanted for the future, which covers the period from 19 May to 7 June when he resigned. This was

clearly the mainstay of his case, the two parts being in truth inseparable but which I will deal with in turn.

50. Dealing first with the period from mid-March to mid-May, I note again the provisions of the Claimant's employment contract at clause 10.1 and the other provisions related to his duties, for example clause 3.1. Whilst as the Respondent accepted, the work that could be expected of the Claimant was not without limit, hence the reference in clause 10.1 to what could "reasonably" be required of him, there was clearly flexibility within the terms of the contract to require him to work more than the stated 37-hour week without the Respondent being in breach of trust and confidence. Clause 10.1 is a familiar contractual provision, particularly for those in professional positions such as the Claimant held. It was not the case therefore that when he was required for example to teach 35 hours in a particular week, he would only be left with 2 hours for preparation and marking. He could reasonably be expected to do more.

51. Of course, it is how the Respondent conducted itself in practice that I have to assess, not just what the contractual terms could require, and I must do that sensibly and objectively, and looking at the facts overall. When I make that overall assessment, whilst I do not doubt that the Claimant found the hours he was required to teach for a period of several weeks very demanding, I find that the Respondent was not in breach of trust and confidence during this period for the reasons that now follow.

52. It is accepted that the Claimant had a light teaching load from September to December 2016, and indeed he made no complaint – at least not expressly – about the hours he was required to teach in January and February 2017. Whilst to take an extreme example, it is likely of course that requiring an employee to teach the annual 900 hours in one term would be a breach of trust and confidence (and it is not just extreme circumstances that could give rise to such a breach), the Respondent could quite properly expect hours to be caught up where teaching load had previously been light and where particular circumstances required it; the Claimant's own evidence was consistent with that position, not least given the steps he had himself taken to manage contact hours when previously employed in a managerial position. The duty of trust and confidence provides a safeguard for employees as to working hours (as of course does relevant legislation) but it does not altogether prevent the Respondent from requiring a heavier teaching load in a particular part of the year when needed.

53. As to the Claimant's hours, there are a number of further factors to be taken into account:

53.1. First, by the effective date of termination the Claimant had worked markedly fewer hours than could properly have been expected of him to that point according to the understanding with the trade union that hours would not exceed 900 per annum – though for the reasons I have already explored that could not by itself amount to a complete defence for the Respondent.

53.2. Secondly, it has to be taken into account that the Claimant conceded that much of his teaching did not require extensive preparation, as he was to a significant extent repeating work that he had done previously.

53.3. Thirdly, even on the Claimant's figures set out at page 136, there were only two weeks between mid-March and mid-May, namely the weeks commencing 27 March and 8 May, when the Claimant would not have had at least 7 hours left, even had he worked only the standard 37-hour week, for duties other than teaching. In one of those weeks the teaching hours were only 16.

53.4. Fourthly, annual leave meant that the Claimant did not teach these increased hours for more than 4 consecutive weeks.

53.5. Fifthly, I note that the Claimant's preferred solution once he reached the meeting of 5 June (see below) was that the Respondent would "cancel a course or two" – that was how he put it to me. On the basis of a course lasting two to three days, this would have resulted in a reduction of between two and six days of teaching over a forward period of nine weeks (not including four weeks' annual leave). This was a similar period, with similar teaching levels, to the weeks between mid-March and mid-May. I am mindful that the Respondent conceded that the Claimant's hours were unusual, and that singling out an employee improperly could breach the trust and confidence term, but the point is that a relatively small reduction in teaching over that forward period would have put the Claimant, at least in the relatively short term, at what he regarded as an acceptable level of contact hours. This suggests that the hours from March to May, whilst demanding, were not excessive in the circumstances.

54. I also take into account that the Claimant accepted that staff shortages were an exceptional situation in which a lecturer could be expected to work additional hours, and note the unchallenged evidence that Mr Regan-Clarke had informed the Respondent that he was not persuaded that he should be replaced on a full-time basis because of work levels, which puts into perspective the requirements placed on the Claimant to keep the Training Centre running.

55. For all of those reasons, whilst reiterating that I accept that the teaching load assigned to the Claimant in this period was demanding and put him under pressure, assessed objectively and overall the Respondent was not in breach of the duty of trust and confidence in this regard. Although in his email correspondence with the Respondent (for example on 19 May at page 111), he referred to the need for a stress risk assessment, the Claimant at no point suggested in evidence before me that there was any reason, medical or otherwise, to regard him as more than normally vulnerable when working to a demanding timetable. Furthermore, it was only at the end of this period that he raised any proper complaint about his work, such that the Respondent cannot be criticised for not reviewing the question of his hours sooner than it did.

56. There remains therefore the question of how the Respondent dealt with the Claimant's complaint from 19 May onwards. First of all, I do not accept the Claimant's criticisms of the time within which the Respondent convened a meeting to discuss it. He sent his email to Mrs Scales on Friday 19 May, was on leave until Tuesday 30 May, and the meeting took place on the following Monday, 5 June. In no sense therefore did the Respondent put off its responsibility to discuss the Claimant's concerns. As to the substance of the meeting, the Claimant describes the Respondent's conduct as the straw which broke the camel's back, but it is clear in my judgment that when objectively assessed the Respondent sought to positively assist the Claimant, making a number of suggestions which were intended to help alleviate the situation the Claimant had brought to its attention.

57. It may well have been that the proffered administrative support was not the Claimant's primary concern, but otherwise the Respondent's agreed actions were intended directly to address the question of the Claimant's teaching responsibilities. The attempt to recruit Mr Regan-Clarke's replacement was revived. I note that the Claimant engaged with the Respondent in this regard by assisting with drafting the new advertisement, so that although of course it might take a while to appoint someone, the Claimant clearly did not dismiss this course of action as valueless. In

the shorter term, the Respondent also offered to seek agency workers. Of course, in assessing the issues in this case I can only take into account what took place up to the date of termination, but the fact that the Respondent subsequently identified possible candidates demonstrates that this was by no means a nugatory step on the Respondent's part, despite the Claimant's pessimism. There was also the commitment to enquire whether provisionally booked courses were still required and not to replace them if they were not, and to review the situation on an ongoing basis. In my judgment these were all logical, genuine and – objectively assessed – helpful commitments on the Respondent's part.

58. Of course, the Claimant's case is that nothing short of cancelling "a course or two" was sufficient. He did not himself raise the question of cancellations at the meeting however, and although I accept that the Respondent was bound by the duty of trust and confidence to suggest positive solutions itself, its commitments as outlined above clearly demonstrate that it was engaging with the issue in this spirit, such that it cannot be said – and was not put to me in evidence – that the Respondent was opposed to or refused to consider cancellations as an option. As I have already indicated, the Claimant would have been content with between two and six days of teaching being removed from the forward schedule. Given the possibility of provisionally booked courses not taking place, and the invitation to the Claimant – repeated by Mrs Mendes in her second email of 6 June – to review the diary with Mr Kalsi, the Respondent's actions demonstrated that it was open to the schedule being managed along these lines.

59. Mrs Mendes' email also made clear that the weeks commencing 5 June and 12 June at that point entailed only two days and a half day of teaching respectively. Albeit the Claimant was to be away for medical reasons for the second of those weeks, on any objective measure the most immediate teaching load for the Claimant at that point cannot be regarded as excessive. Although as the Claimant pointed out the following four weeks had at least four scheduled days of teaching each, which again I do not say was anything other than demanding, the other measures the Respondent was seeking to implement were intended to address that issue. The situation could not be remedied immediately, but it was by no means the case, when assessed objectively, fairly and overall, that the Respondent simply left the Claimant in the position he had brought to them for resolution, expecting him to continue teaching well above average hours into the foreseeable future without adequate support or mitigating measures in place. Essentially, as the Respondent asserts, the Claimant resigned so quickly after the meeting on 5 June that he gave no opportunity for the measures identified by the Respondent to be further discussed, practically implemented and their effect assessed.

60. Whether assessing events from mid-March 2017 to the effective date of termination individually or cumulatively, for the reasons I have given I conclude that the Respondent was not in breach of the duty of trust and confidence, and not otherwise in fundamental breach of contract. It is therefore unnecessary for me to consider the question of a last straw. The Respondent thus did not dismiss the Claimant. It did not show that it no longer intended to be bound by the contract of employment; on the contrary, it sought to take steps to properly manage that contract. On that basis the complaint of unfair dismissal is not well-founded.

61. In view of the above, it is not necessary for me to decide the question of whether, as contended by Mr Perry, the Claimant affirmed the contract of employment by continuing to work without formal expression of complaint about his teaching hours from March to May, such that the only matter the Claimant could rely on for his case that the Respondent was in breach of the duty of trust and confidence was how the Respondent dealt with his complaint. For the record I would have been inclined to

say that if there had been a fundamental breach of contract as a result of the Claimant's teaching hours in the period March to May the contract was not affirmed by the Claimant working those hours. It was after all a relatively short period, at the end of which a complaint was made about the whole of it.

62. Finally, I add that in view of my conclusion that the Claimant was not dismissed, I have not summarised the law on the question of the fairness of a dismissal nor on the question of compensation for unfair dismissal. It is also clearly unnecessary for me to analyse those matters. I also add that if the Claimant has paid any tribunal fees to bring this case to hearing, he should be entitled to recover those fees as a result of the government's reimbursement scheme which followed the Supreme Court's decision in **R (on the application of UNISON) v Lord Chancellor [2017] ICR 1037**.

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Employment Judge Faulkner

Date: 11 January 2018

JUDGMENT SENT TO THE PARTIES ON

15/01/18

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FOR THE TRIBUNAL OFFICE