EMPLOYMENT TRIBUNALS

Claimants:	(1) Ms Amanda Booth (2) Mr Fabian Whitbread	
Respondent:	City of Oxford Swimming Club	
Heard at:	Reading	**On: 18, 19, 20,22, 25,26, 27, 28 March, 2 April, (for parties submissions) 11,12 April , (for Tribunal deliberations) 16 and 17 July 2024**
Before:	Employment Judge Gumbiti-Zimuto Members: Mrs Fiona Potter and Mrs Fiona Tankard	

Appearances
For the Claimant: Mr J Feeny, counsel
For the Respondent: Miss I Halsall, counsel

RESERVED JUDGMENT

1. The first claimant's complaint of unfair dismissal is well founded, the claimant was unfairly dismissed because she made protected disclosures.

2. The first claimant was wrongfully dismissed.

3. The first claimant was subjected to detriments because of making protected disclosures, namely suspension from membership of the City of Oxford Swimming Club and exclusion from the Special General Meeting on 1 April 2021.

4. The second claimant's complaint of unfair dismissal is well founded, the claimant was unfairly dismissed because he made a protected disclosure.

5. The second claimant was subjected to detriments because of making a protected disclosure, namely suspension from membership of the City of Oxford Swimming Club and exclusion from the Special General Meeting on 1 April 2021.

6. A remedy hearing shall take place on **9 and 10 December 2024** at Reading Tribunal Hearing Centre.

REASONS

1. In claim forms presented on the 26 August 2021 the claimants made complaints of unfair dismissal, and that they were subjected to detriments because of making protected disclosures. Amanada Booth (the first claimant) also made a complaint of wrongful dismissal. The respondent defends the claims.

2. The issues to be decided in this case were set out in a record of preliminary hearing and case summary on the 13 June 2022. There was a separate list of issues later produced setting out the issues in the constructive dismissal claim made by Fabian Whitbread.

3. The claimants gave evidence in support of their respective cases and relied on the evidence of Keith Oddy, Joanna Murphy, Julie Bryan and Ernie McDade. The respondent relied on the evidence of Sumedha Bird, Deborah Smit, Joanna Mertikas, Sarah Wordsworth, Nicholas Richmond, Nicola Brown and Annette Smith. All the witness produced written statements which were taken as their evidence in chief. The parties also provided us with a trial bundle of 2277 pages of documents.

4. Amanda Booth (referred to in this judgment as the first claimant) is a swimming coaching with 40 years experience. The first claimant is a qualified physiotherapist and sports massage therapist.

5. The first claimant's employment as Head Coach for the City of Oxford Swimming Club Limited (the respondent) commenced on 4th December 2010.

6. Fabian Whitbread (referred to in this judgment as the second claimant) was a swimming coach, his employment by the respondent began on the 1 September 2016.

7. The respondent, City of Oxford Swimming Club, is a limited company run by a committee and an executive committee. The committee and executive committee are made up of volunteers who are elected by the membership. The executive committee members are also statutory directors for the Club.

8. The first claimant's duties included timetabling and devising training schedules, management of full and part time coaching staff including coordinating staff rotas, organising weekly coaches meetings, booking pools, annual training plan and competition programme for all squads, mentoring of coaches including appraisals, writing the squad criteria, responsible in consultation with coaching team for all decisions on squad moves and allocating of coaches to squads, coaching the performance squad pool training sessions and attending competitions with swimmers.

9. The second claimant's role was to be responsible for managing and coaching three squads of swimmers and working with the coaching team.

10. The claimants are members of British Swimming Coaches Association (BSCA) a national membership organisation for swimming coaches that the respondent actively encouraged the coaches to join. It is stated in the first claimant's contract of employment that she is expected to attend the annual BSCA conference and that the respondent will cover associated expenses. Brian McGuiness at the relevant time was the Executive Director of the BSCA.

11. In September 2019 the respondent's incumbent chairman of the committee resigned and Nicola Brown became the acting or interim chairman of the committee. From 11 June 2020 she was appointed to the role of chairman of the committee.

12. The claimants contend that when Nicola Brown became interim chairman of the committee, the committee became more involved in the squads, undermining and micromanaging the coaches.

13. In January 2020, the committee decided to start asking the performance swimmers to cover the costs of the coaching staff travelling with them to overseas meets. This was done without discussing it with the first claimant. The first claimant considers that the committee should have included her in making such a decision. The first claimant raised her concerns about this in a note to Nicola Brown (p296).

14. In March 2020, the club had to close due to the national lockdown caused by the COVID-19 pandemic. The coaches set up a land programme for the swimmers. The coaches were all placed on furlough except for the first claimant and the strength and condition coach (Matt). The first claimant and Matt delivered the land programme for the swimmers. The second claimant was placed on furlough and told that he must not contact swimmers, or parents, or other coaches and that he must leave the group chats on WhatsApp whilst on furlough. The second claimant remained on furlough until August 2020.

15. The first claimant and Matt agreed reductions in their salaries during the first lock down period. To mitigate the reduction in salaries, the first claimant and Matt came up with a proposal to conduct skills camps (via Zoom) that would be made available for the membership, and for a fee to other clubs and schools. The committee agreed that the funds raised would be used to top up the first claimant and Matt's salaries.

16. The first claimant set up a subsequent skills camp in July 2020. This was the subject of contention between the first claimant and the committee concerning whether the skills camps were authorised by the committee. The issue was resolved by an agreement that the revenue from the skills

camps would be split between the two coaches and the respondent 50:50 and that before any further skills camps were set up authority from the committee had to be obtained.

17. In July 2020 the first claimant asked that her salary be returned to 100%. When this was refused she raised a grievance about salary in August 2020. A grievance meeting took place on 6 September 2020. The grievance outcome was that the first claimant's salary would not be returned to its 100% level but there would be put in place "*determiners*" to trigger a pay review: this was notified to the claimant on 18 October 2020.

18. In September 2020, the first claimant states that she "*had great difficulty in getting Nicola to agree to me having 1 week of annual leave at half term*". There was a delay with Nicola Brown only agreeing to the claimant's leave at the "*last minute*". The first claimant considers that this was an erosion of her duties as she had been previously responsible for managing the coaching team including approval of holiday dates.

19. The respondent changed its holiday approval process so that annual leave requests by the coaches instead of going to the first claimant to agree were now to be directed to the committee.

20. In October 2020 the committee agreed to the first claimant's proposal that the club be involved in a virtual swimming league known as Level X. This was introduced by Swim England as an opportunity for swimmers to get competitive racing practice in the absence of formal events with times being provided to Swim England so that they could be ranked on Swim England's website. A Level X event was held on 23 October 2020. The fixtures secretary made the arrangements on the day and the first claimant planned the sets.

21. Prior to March 2020 Nicola Brown's daughter was moved from PD Squad to P2 Squad by the coaches. In October 2020, Nicola Brown held a meeting with the second claimant and informed him that her daughter was required to remain in the P2 squad but that she would not attend all sessions, the effect of which was she wouldn't meet the training criteria of swimmers in that squad. This was an example of Nicola Brown interfering in the coaches role.

22. The second claimant considers that there was further interference from the committee and refers to an occasion when it was suggested that he play music in his coaching sessions.

23. In October 2020, the committee decided that the Club would be closed over the Christmas period.

24. A second Level X event took place on 2 November 2020.

25. On 5 November, national restrictions were reintroduced in England. During this second national lockdown, non-essential high street businesses were closed, and there were restrictions on people meeting those not in their "support bubble". People could meet one person from outside their support bubble outdoors.

26. The first claimant and Matt were told that they would be furloughed on a flexible basis. The second claimant was once more placed on furlough.

27. The second claimant states that he was advised that he was not permitted to speak to any of the other coaches or any of the members or parents in a professional capacity and was removed from all club WhatsApp groups whilst on furlough.

28. The coaches had proposed a land training programme for the second lockdown which comprised 14-15 hours. The committee decided to provide 7 hours of zoom sessions to the swimmers per week during this lockdown (5 hours by Matt and 2 hours by the first claimant). The first claimant raised concern that the committee had made this decision without consulting the coaching team and asked to be involved in future decisions of this nature.

29. The committee made a decision to shut-down for 10 days at Christmas. The first claimant asked that this decision be reconsidered because her view was that the shutdown would be detrimental to the swimmers to have so much time off swimming. The committee ignored the claimant's request but announced the shutdown as having been agreed by the first claimant and the committee.

30. On 15 November 2020, the fixtures secretary and the first claimant were invited to a meeting with Nicola Brown, Deb Smit (club secretary), and Nick Richmond (treasurer) to discuss the Level X races that had taken place on 2 November. The first claimant thought that this was an informal meeting; she was not told that the meeting related to her conduct in running the level X events.

31. The first claimant met with the chair and the club secretary on 18 November. While the meeting was more formal than she had expected she was not told that it was a disciplinary investigation meeting regarding her conduct.

32. On 19 November 2020, Nicola Brown contacted the first claimant regarding the induction of a new employee, Mikey Hire.

33. On 29 November 2020, the claimant was provided with a copy of the meeting minutes of the meeting on 18 November and asked to provide her amendments or comments. The claimant was informed that the matter had been referred to a disciplinary panel for a decision about whether the matter would proceed to a disciplinary hearing.

34. At a meeting on 29 November 2020, Nicola Brown told the claimant that there would no longer be coaches' meetings. The first claimant informed the second claimant that there would be no coaching meetings going forward. The first claimant contends that by ending coaches' meetings the coaches could not work together or discuss matters that affected their ability to deliver the coaching programme. At about this time the claimant says that there was monitoring of the squad WhatsApp groups by members of the committee. The first claimant contends that this was an erosion of her duties.

35. The first claimant requested that the committee allow her more time off from furlough to do the work she was being asked to do, but this was refused.

36. The first claimant produced a plan for the induction of the new coach. The first claimant's plan was challenged by the chair and the treasurer. The first claimant cites this as an example of eroding her duties over the coaching staff and the committee trying to prevent the claimant from managing the coaching team. The induction of new coaches had previously always been the first claimant's responsibility.

37. Mikey Hire commenced his employment with the Club on 1 December 2020.

38. Also in December 2020, at a time when the government guidance discouraged travelling in and out of Oxford, which was classified as Tier 4 due to the high levels of COVID-19 the second claimant was asked to carry out coaching sessions in person.

39. On 1 December 2020, the first claimant raised concerns to the committee that her flexible furlough hours were insufficient to carry out all the administration duties required of her role including Mikey's Hire induction and the additional work that entailed. The first claimant set out in an email the areas where she had concerns relating to her employment.

40. The first claimant received an email from Joanna Mertikas, a committee member who provided HR advice to the committee, inviting her to a disciplinary hearing to take place on Sunday 13 December relating to the first claimant's conduct of the Level X event.

41. The first claimant sought advice from Brian McGuiness of the BSCA, he wrote to Nicola Brown on the first claimant's behalf, raising concerns about the disciplinary process. Brian McGuiness informed Nicola Brown that he had advised the first claimant not to attend the disciplinary meeting on 13 December.

42. The first claimant was to attend an executive committee meeting on 11 December 2020, however the claimant wrote to Nicola Brown saying that "*the last few days have been very stressful & upsetting as a result of the Club enacting disciplinary proceedings against me."* The claimant stated that she needed "*time to process everything that has happened*".

43. The committee announced that they had changed their position on the Christmas shut down.

44. The first claimant states that on 11 December 2020 she received a barrage of emails from Nicola Brown. In the first, Nicola Brown stated that the respondent would not communicate with Brian McGuiness in respect of the first claimant's disciplinary. The second email stated that the committee wanted to discuss squad structure with the first claimant and to make amendments to the proposals. The third email concerned the first claimant not attending the disciplinary hearing on 13 December 2020.

45. The disciplinary hearing did not take place on 13 December and the first claimant was informed that her disciplinary hearing would now take place on 19 December 2020.

46. Joanna Mertikas communicated with Brian McGuiness asking him for his union credentials. She also wrote to the first claimant and confirmed that Brian McGuiness could represent the first claimant at the disciplinary hearing and that if the first claimant did not attend the hearing would go ahead in any event.

47. Brian McGuiness wrote to Joanna Mertikas and confirmed his status, following which he was told that he would not be able to represent the claimant at the disciplinary hearing and that the respondent would not engage with him because he was not a trade union representative.

48. The first claimant submitted a grievance on 16 December complaining that the disciplinary process was unfair, that the charges were unfounded, and that the process was being used as a form of bullying and harassment. The claimant was informed that the respondent would not engage with this grievance and that the claimant should attend the disciplinary hearing and raise the points made in the grievance at the disciplinary hearing.

49. The first claimant was informed that the disciplinary hearing was moved to the 20 December 2020. The claimant confirmed that she would not be attending the disciplinary hearing.

50. The disciplinary hearing took place on 20 December 2020 in the claimant's absence with the panel of Nick Richmond and Sarah Wordsworth (at the time a committee member) with Joanna Mertikas as a note taker.

51. The first claimant was informed of the outcome of the disciplinary hearing which found that the first claimant should be given a first written warning (p752). The first claimant appealed the decision. Sally Brabbin and Annette Smith, both Committee members, were appointed to consider the claimant's appeal.

52. On 22 December 2020, Nicola Brown invited the first claimant to a meeting with the executive committee to discuss various matters including her appraisal and to set a date for it to be completed. The first claimant had since November been receiving emails about having an appraisal.

53. Following correspondence from Nicola Brown about various matters the first claimant stated that while her disciplinary appeal and grievance were ongoing, she did not feel that it was appropriate to have a meeting with the executive committee about her appraisal and professional development but would engage in respect of "*all the business-as-usual things*".

54. Nicola Brown continued to chase the first claimant about the appraisal and the claimant received several emails from the committee about coaching decisions, regarding squad moves and structure that the first claimant considered was the committee involving themselves in matters which were the domain of the head coach and coaching team.

55. On 2 January 2021, the committee made the decision to furlough some coaches again while the pool remained closed. This included the second claimant. During furlough Nicola Brown contacted coaches and informed them about Continuing Professional Development (CPD) opportunities. While there was an expectation that the coaches would take up some of the CPD opportunities there was no obligation to attend every session suggested. All of the coaches were asked by Nicola Brown to confirm what CPD they had undertaken during that lockdown

56. An executive meeting took place on the 6 January 2021 during which the first claimant states that Nicola Brown "*discussed at length the details of my appraisal document and made comments which showed that she had sent a copy to the other committee members."*

57. The first claimant's appeal hearing took place on 9 January 2021 with Sally Brabbin and Annette Smith. The first claimant attended and presented grounds of appeal.

58. The first claimant complains that: "*The appeal panel came to their decision and provided comments to Joanna on the same day of the hearing, but they were asked to rewrite this" (p844).*

59. Sally Brabbin and Annette Smith initially made a decision that the disciplinary had not been correctly followed, that there was insufficient evidence against the allegations and that therefore the written warning should be overturned. They both agreed this initial decision.

60. A draft of the appeal letter was considered by a solicitor and then sent back to the appeal panel with amendments made. One of the appeal panel members raised some concern that words were being placed in their mouths and that some of the additional paragraphs in the letter had not been discussed by the appeal panel.

61. Nicola Brown, at length, set out what she thought the appeal outcome should have been. (p882) Nicola Brown proposed that a meeting take place between her and the appeal panel and Joanna Mertikas to *"resolve this."* Nicola Brown had been one of the original investigation officers, and should not have been involved in the appeal decision making at all. At the time Nicola Brown was also the subject of the first claimant's grievance.

62. There was further correspondence relating to the appeal: On 18 January 2021, Sally Brabbin emailed Nicola Brown to respond to the points she had made and raised concern about the interference in the process (p888). Nicola Brown arranged a meeting for 18 January 2021, to *"resolve this"* and finalise the appeal outcome letter(p891). The meeting link was sent to other members of the Executive Committee who had been involved in earlier stages of the disciplinary process. Annette Smith had a change of heart about the appeal outcome and stated that having considered the matter further, she agreed with Joanna Mertikas and Nicola Brown. A redrafted appeal outcome letter confirmed a different outcome that now upheld the disciplinary sanction. Sally Brabbin asked to have her name removed from the redrafted appeal outcome letter.

63. On 19 January 2021, the first claimant received the appeal outcome letter purporting to be from Sally Brabbin and Annette Smith, now confirming that the disciplinary decision had been upheld (p895). The first claimant was then subsequently provided with an amended appeal outcome letter with Sally Brabbin's name removed (p912).

64. The first claimant was copied into an email from Sally Brabbin to Joanna Mertikas, Annette Smith and Nicola Brown in which she stated that she did not think the disciplinary appeal process was followed correctly. (p906)

65. The first claimant asked that her grievance be considered by an independent third party and for the appeal to be reheard by an independent third party. The first claimant was informed that the appeal outcome would stand and that it would not be reheard by an independent third party.

66. The first claimant submitted a Subject Access Request (SAR) on 22 January 2021. On 15 February 2021 Nicola Brown emailed the first claimant explaining that her SAR met the Information Commissioners Office's (ICO) definition of a "complex case" and therefore the respondent would extend the response deadline to 22 April 2021.

67. On 25 January 2021 Nicola Brown asked the first claimant to send her appraisal documents and stated that the committee would consider the claimant's concerns about the appeal.

68. On 28 January 2021 there was a meeting between the first claimant and Deborah Smit. So as to comply with lockdown restrictions the meeting took place at a service station.

69. The first claimant describes the meeting in the following way:

> "*I was informed of a wide range of concerns which were vague and had not been raised with me previously, and informed that there would be a disciplinary process against me and a finding of gross misconduct. She gave me three choices (1) dismissal for gross misconduct following another disciplinary procedure, (2) exit on mutually agreed terms (10 weeks full pay) and (3) voluntary redundancy.*"

70. Deborah Smit contends that this was a without prejudice meeting and should not have been ventilated in the tribunal proceedings.

71. Tina Nyazika, a club volunteer, began an investigation into matters raised during exit interviews by swimmers and their parents.

72. On 13 February 2021 the first claimant was invited to an investigation meeting to discuss issues which had been raised by ex-members at exit interviews. This was to be a disciplinary investigation meeting. The disciplinary investigation meeting in the event took place on 16 February 2021.

73. The second claimant was also invited to attend an investigation meeting with Tina Nyazika. The second claimant initially asked if he could be accompanied by the first claimant and was told that he could not. He subsequently was told that he could be accompanied by Mikey Hire the recently appointed coach. The second claimant met with Tina Nyazika on the 19 February 2021 in a meeting that lasted about 15 minutes.

74. The first claimant wanted to have the response to her SAR before attending her grievance meeting. On 25 February 2021, the first claimant confirmed that she would not attend a grievance meeting until she had received a response to her SAR. The first claimant was informed that the grievance hearing would proceed in her absence.

75. The first claimant did not want her grievance to be consider in her absence, but she did not have all the documentation that she wished to support her grievances and so on 26 February 2021 she withdrew her grievance, reserving the right to re-submit it once she had received the response to her SAR. The claimant was told that she could not re-submit the grievance once it was withdrawn.

76. The first claimant was again asked to proceed with her appraisal by Nicola Brown.

77. The respondent made a freedom of information request to the Health Care Professions Council (HCPC) seeking information about the first claimant.

78. On 2 March 2021 Sally Brabbin provided the first claimant with a timeline of events in respect of her disciplinary appeal. This was the point at which the claimant became aware of the full extent of the interference in her appeal by Nicola Brown and Joanna Mertikas.

79. On 3 March 2021, the claimant raised once more her concerns about conducting the appraisal to which Nicola Brown's response was that the appraisal must now be completed.

80. The club coaches asked Brian McGuiness to forward correspondence signed by all the coaches raising their concerns to the committee. The letter was dated 5 March 2021 (p1084). The coaches "*felt that it was important that the committee and the membership knew what the Executive Committee was doing on behalf of the Club and the damage their actions were causing to the Club, the swimmers, and the coaching staff.*" On the same day the coaches sent a similar letter to all the membership, including each of the members of the committee.

81. In the letter of 5 March 2021 the coaches had stated their position to the committee members. They stated that the coaching team feel harassed by the behaviour of the committee, which stopped them working as a team with the "*design to divide and conquer, whilst undermining our position as professionals*". They complained of micromanagement interference, and various other matters making their *"positions unworkable*". They asked the committee to consider their positions and stated that "*there is a strong possibility that we will all resign together*"(p1082). A letter in almost identical terms was sent to the members of the club. The coaches were asking the members to back them against the committee or "t*here is a strong possibility that we will all resign together*". The coaches subsequently stated that if the committee remained in post after the SGM that they would all resign together.

82. The committee removed the coaches from Swim Manager (a software system specifically designed for use by swimming clubs) and all the individual WhatsApp groups with the individual squads. The effect was the coaches could not communicate with the members. The coaches were then suspended. (p1101) The coaches were informed that they were suspended because of an alleged breach of GDPR by unauthorised access to members private information, conspiring to undermine the committee and because there was a breakdown of trust and confidence.

83. The coaches were invited to an investigation meeting scheduled on 7 March 2021.

84. The coaches confirmed that they wished the matters to be dealt with collectively and for Brian McGuiness to act on their behalf. They wanted to raise a collective grievance. When the coaches did not attend the investigation meeting on 7 March 2021 they were informed that failure to attend was an act of gross misconduct.

85. The committee refused to recognise the coaches collective grievance and would not correspond with Mr McGuiness choosing to communicate directly with the individual employees.

86. Joanna Mertikas wrote to the coaches and informed them that the grievance procedure only allowed for individual grievances to be raised, not collective grievances and therefore the committee did not consider any valid grievance to have been lodged by any of the coaches. Joanna Mertikas confirmed that the respondent would not engage with Brian McGuiness as he is not a trade union representative. The respondent further stated that it would not communicate with the coaches on the joint email address.

87. Nicola Brown wrote to the coaches individually requesting that they have a discussion with her about issues raised.

88. On 18 March 2021, Nicola Brown emailed the second claimant stating that the respondent did not recognise collective grievances, asking the second claimant to reflect on his actions and conduct.

89. On 19 March 2021, the claimants were invited to a disciplinary hearing on 26 March 2021. The invitation letter contained a long list of allegations against the first claimant.

90. The whole membership of the club were informed that there was to be a Special General Meeting (SGM) on 1 April 2021.

91. The coaches were not only employees they were also members of the swimming club, the coaches were informed that they had been suspended from work and also from the membership they were therefore not permitted to attend the SGM.

92. The invitation to the SGM was not sent to the claimants or the other coaches so they emailed the club secretary on 23 March 2021 to ask for invitations.

93. The coaches disciplinary hearing was to the conducted by Alix Passey Brown an independent HR consultant, with Joanna Mertikas attending to take notes.

94. The coaches asked for a postponement of the disciplinary hearing on 26 March 2021 as they had not had sufficient time to review the documents that had been provided. The request was refused and the coaches did not attend the disciplinary hearing. The disciplinary hearing was subsequently re-arranged to 30 March 2021.

95. The coaches each requested permission to join the SGM but were informed by Nicola Brown that as they were suspended they could not join.

96. The SGM was held on the 1 April 2021 and was attended by members of the club, the whole committee, and three members of the South East Regional Management team.

97. The first claimant's sons were members of the club and so were invited to the SGM which was conducted on "Zoom". While the first claimant did not participate in the SGM she did observe it with her sons.

98. The SGM was chaired by Nicola Brown.

99. At the SGM a statement was read on the coaches' behalf, the statement made clear their position that if the committee remained in post they would all resign.

100. The first claimant points out that "*Deb Smit made false and unfounded comments about me and my fellow coaches, suggesting that the committee had serious safeguarding concerns about us – this comment being made in front of all of the children and all of their parents*." For the sake of clarity, there were never any safeguarding concerns around any of the coaches.

101. The SGM ended with the committee still in place.

102. The claimants resigned their employment together with the other coaches on 5 April 2021.

Protected disclosure

103. Did the claimants make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996 (ERA)? The claimants rely on the joint letter sent on 5 March 2021 as a protected disclosure by the claimants (and the other coaches).

104. Section 43A ERA provides that a protected disclosure means a qualifying disclosure as defined by section 43B. Section 43B(1) provides that a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the listed matters including: (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

105. The Tribunal must consider whether there is a disclosure of information. To be a disclosure of information the statement or disclosure (to be a qualifying disclosure) has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed. The worker making the disclosure should have the reasonable belief that the information they disclose does tend to show one of the listed matters. This has both a subjective and an objective element. If the worker subjectively believes that the information they disclose does tend to show one of the listed matters and the statement or disclosure they make has a sufficient factual content and

specificity such that it is capable of tending to show that listed matter, it is likely that their belief will be a reasonable belief. (Kilraine v London Borough of Wandsworth [2018] EWCA Civ 143).

106. The disclosure must tend to show a "relevant failure" as defined by section 43(B)(1) and the disclosure is made in the public interest.

107. There is therefore a four stage test: (i) Did the claimant subjectively believe that the disclosure tended to show a relevant failure? (ii) If so, was such a belief reasonable? (iii) Did the claimant subjectively believe that the disclosure was in the public interest? (iv) If so, was such a belief reasonable?

108. The claimants stated that they considered that they were making the disclosure in the interests of the wider membership of the club. The claimant submits that "Applying the **Chesterton** guidance, ...this was plainly reasonable. The wider membership consisted of a significant number of people (circa 200-300) including parents and swimmers. The nature of the wrongdoing alleged was a complete dereliction of duty by the committee so as to potentially ruin the coaching services provided by the Respondent. To the members themselves this would be a serious matter, affecting, for instance, their children's ability to compete at a professional level (see evidence of EM for instance)."

109. The respondent contends that there is no information in the emails of 5 March 2021, merely allegation. That there was no public interest as the dispute was about the claimants' own contracts and that it was not raised in the public interest because it was to cause damage to the respondent's reputation and to force the committee to step down. The respondent contends that the claimants did not reasonably believe that the email showed the respondent was in breach of its duty of care as an employer to the coaches nor a breach of the contractual obligations to its members to provide adequate swimming coaching to their children.

110. In this case the disclosure is contained in the email of 5 March 2021. The Tribunal consider that the email shows that the claimants considered that the respondent was breaching its legal obligations to the claimants and the members of the club. The breach of legal obligation arises from the employer and employee relationship between the claimants and the respondent; and the contract that is made with the members to provide swimming coaching for their children.

111. Taking into account the background in which all these events were taking place, a time when Covid was disrupting all aspects of normal life in the United Kingdom, it could reasonably be the case that one person's view of steps and actions taken is very different to another person. In this case we consider that the claimants reasonably believed that the respondent was in breach of its legal obligations.

112. The disclosure was made in the public interest. In Chesterton Global Limited v Nurmohamed and another [2017] EWCA Civ 979 it was stated that

"whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest". Relevant factors could include: numbers in the group whose interest the disclosure served, the extent to which interests are affected by the wrongdoing disclosed, nature of the wrongdoing, and identity of the wrongdoer.

113. We accept the evidence of the claimants that they considered that they were acting in the interests of the wider membership when making the disclosures. We did not consider that the simple purpose of the disclosure was to damage the reputation of the committee. There was genuine opposition to the actions taken and in expressing their views to the respondent and to wider membership the claimants had a reasonable belief that they were acting in the public interest as not only did the various decisions affect the claimants personally but they impacted on the service provided to the membership.

114. The Tribunal consider that the claimants' disclosure in the email to the respondent of 5 March 2021 to the committee was a qualifying disclosure. It is accepted that if the disclosure was a qualifying disclosure it was a protected disclosure because it was made to the claimants' employer.

115. In respect of the disclosure made in the email to the members the conclusion of the Tribunal is that the disclosure was protected in the case of the first claimant and not in the case of the second claimant. The disclosure to the members was made moments after the disclosure to the employer. They were in our view sent at about the same time.

116. The claimants say that the disclosure is also protected by section 43G ERA. That provides for disclosure in other cases. Section 43G provides that where a worker decides to make a disclosure to an external organisation, they will have to satisfy 4 conditions. The worker must reasonably believe the information disclosed and any allegation contained in it is substantially true. The worker must not have made the disclosure for the purposes of personal gain. One of the conditions in section 43G(2) must have been met. In all the circumstances of the case it must be reasonable to make the disclosure.

117. The respondent contends that the claimants have failed to meet this requirement. The claimants contend that they have met the requirement.

118. The Tribunal is satisfied that the claimants believed that the information disclosed, and the allegations contained, were substantially true.

119. The claimants did not make the disclosure for the purpose of personal gain. The Tribunal recognise that to some extent there may be personal gain to the claimants as a result of making the disclosure. However, the Tribunal is of the view that the claimants' purpose in making the disclosure was not for the purpose of a personal gain. The primary motivation of the claimants when making the disclosure was to bring to the attention of the members their

concerns about the way the club was being run and secure improvement by removal of the committee.

120. In the case of the first claimant she had previously made a disclosure of substantially the same information to the employer in the grievance sent on the 11 February 2021 (p979). The same does not apply to the second claimant. The first claimant therefore satisfies the conditions in section 43G(2).

121. The claimants have relied on the email sent to the employer on 5 March 2021 as satisfying section 43G(2). We do not consider that it does in the case of the second claimant but it does in the case of the first. The email sent to the employer was in our view sent to the employer at about the same time as the email sent to the members. In our view that email cannot be relied on as the claimants having "previously made a disclosure" in reference to the 5 March email to the members. There is in reality no opportunity for the respondent employer to act or respond to the 5 March email before the email is sent to the members shortly after.

122. The Tribunal considers that the disclosure was reasonable in all the circumstances. The disclosure was made to the members who had an interest in knowing what was happening in the running of the club. In the context of the club the relevant failure was a serious one as it impacted on the way that the club was run and the effect on the swimmers. The situation was one which had been on-going for a time and was likely to continue if there was no change of attitude by the committee. In the case of Amanda Booth it was clear that the respondent had the opportunity to take action in response to her grievance but they had not acted, but had in fact made it difficult to pursue her grievance in their response to the handling of her subject access request.

123. Amanda Booth in our view therefore also has protection pursuant to section 43G ERA.

Detriments

124. There is a detriment when an employee or worker is put under a disadvantage, or where a reasonable employee or worker would or might take the view that the action of the employer was in all the circumstances to his or her disadvantage.

Suspension and removal from WhatsApp group and Swim Manager account

125. There is no dispute that the claimants were suspended. By suspending the claimants they were deprived of the ability to carry out their duties as employees and not able to exercise their rights as members of the swimming club. The suspension of the claimants was a detriment.

126. The claimants were suspended because of the sending of the letter to the members. The suspension letter refers not only to the GDPR breach, linking it to the letter to the members but also refers to a breakdown in trust and confidence which in our view refers back to the generality of the opposing positions of the respondent as described in the letters.

127. The conclusion of the Tribunal is that the coaches' suspension was because they had made a protected disclosure in sending the letter to the committee and also because of sending the letter to the members.

Commencing disciplinary investigation

128. There is no dispute that the disciplinary investigation was undertaken by the respondent. The disciplinary investigation was in our view a detriment.

129. The respondent's case is that the disciplinary investigation was triggered by the letter to the members. Had the claimants only sent to the letter to the employer we do not know what the respondent would have done. In our view bearing in mind the state of relations between the committee and the coaches it is likely that the same action would have been taken. The decision to begin the disciplinary process was because the claimants had written and sent the letters to committee and the members.

130. In the claimants' cases there was a detriment because the claimants made a protected disclosure.

Refusing to hear the collective grievance

131. There can be no dispute that the respondent refused to consider the coaches' collective grievance.

132. The claimants point out that Joanna Mertikas raised the possibility of the coaches raising a collective grievance in her email to them on 8 March 2021 (p1129). The claimants rely on the penultimate paragraph of the email as suggesting that she would be prepared to communicate collectively with the coaches if they raised a collective grievance. The passage relied on reads as follows: *"Moreover, as no collective grievances were raised we will no longer use this collective email address to communicate with you and any collective communications will be send (sic) to you all via individual emails."* There was a collective grievance made (p1136). The claimants ask that we draw an inference that the reason that the collective grievance was refused was because of the protected disclosure and thus a detriment.

133. The respondent contends that the reason that the collective grievance was refused was because there was no provision for a collective grievance in

their policies; there was no right to one and it wanted to deal with their individual employees which was nothing to do with raising a grievance.

134. The conclusion of the Tribunal is that we are able to draw the inference that the refusal to consider the collective grievance was because of the content of the letters to committee and the members. While there was no "right" to a collective grievance there was equally nothing that prevented it. We can see no reason in principle why where a collective grievance is expressed that it should not be dealt with. The email from Joanna Mertikas while it does not invite a collective grievance more importantly does not suggest that such a thing would be inappropriate or alternatively that it would not be considered. Indeed the position of Joanna Mertikas appeared to be that if a collective grievance was made it would be considered. The email from Joanna Mertikas does leave open the possibility of a collective grievance being made in its reliance on the fact that one has not been made as a reason for communicating with the employees individually. Refusing to hear the collective grievance was a detriment.

135. In our view the reason why the collective grievance was not considered was because of the fact that the claimants sent the emails to the members. First going down the disciplinary route then refusing to address a collective concern collectively in our view shows that the claimants were correct in their contention that the employer did not want to address the claimants' genuine concerns that were raised in the collective grievance.

Suspending the claimants as members and refusing to permit them to attend the SGM

136. There is no dispute that the claimants were suspended as members of the swimming club and thus barred from participating in the SGM.

137. The claimants point out that a number of different reasons were given for the claimants being suspended as members and being refused to attend the SGM. We are asked to infer therefore that the claimants were suspended as members because they made protected disclosures.

138. The respondent states that: *"The Claimant was suspended as a member and refused permission to attend the SGB because she was suspended. This was nothing to do with raising a protected disclosure."* In her witness statement evidence Nicola Brown stated: *"On 1 April 2021, the coaches each requested permission to join the SGM. I informed each of them that while they remained suspended as employees and as members of COSC, they would be ineligible to attend the SGM. Amanda and Fabian were off work sick during this period so I thought it would be inappropriate for them to attend.*" Nicola Brown's letters (p1403 and p1409) to the claimants on 1 April informs the claimants of their suspension as members of the club and as employees. The letters refer to the claimants having *"declined to engage with all offers and invitations*" to mediation, investigation and disciplinary

meetings. The letter also refers to a document *"written by the coaching team"* signed by the claimants and *"being circulated by parents and swimmers".* There is a suggestion here that the reason for the claimant's suspension from membership of the club was due to their activities since the suspension from employment.

139. The conclusion of the Tribunal is that all the factors were in play in determining the way that the respondent acted, namely the disclosures made on 5 March 2021 by the claimants, the way that the claimant's had campaigned with the membership since suspension to get across their position against the committee. All these matters were a substantial factor in the decision to suspend the claimants from membership of the club. The suspension of the claimants from membership of the club was a detriment. The claimants were suspended from membership of the club because of making a protected disclosure.

Making false safeguarding allegations, claiming Swim England were investigating serious welfare concerns when they were not

140. There is a conflict of evidence as to whether this occurred.

141. The claimants case is based on the evidence of Jo Murphy who says that: "DS, the Secretary, was also given a lot of airtime to share with the 160+ attendees (including children) how the coaches had "serious welfare issues against them and were being investigated" by Swim England".

142. Deborah Smit denies this allegation.

143. The Tribunal prefers the evidence of Jo Murphy because of the following matters: (1) Her evidence is consistent with the position of the respondent at the time; they had made references to Swim England about allegations of welfare concerns. (2) That position was stated in a bulletin sent on behalf of Deborah Smit on 6 April 2021 at 21:37 (p1425). (3) Nicola Brown had said to the claimants that they remained suspended from both their employment and as members of the club "until we have concluded the disciplinary matters relating to you and resolved our concerns around safeguarding swimmers." Making safeguarding allegations against the claimants in these circumstances was a detriment.

144. The statements were made as a way of providing justification of the actions taken against the claimants. The statements were not made because of the protected disclosures.

Sending the false and defamatory bulletin to the members and publishing it on the respondent's website and to the Oxford mail newspaper

145. The claimants say that "*the wording of the bulletin was clearly intended to smear the coaches after their resignations, and the protected disclosure would have been at least a material influence on this.*" As for the matter being reported in the Oxford Mail, it is accepted by the claimants that there is no

direct evidence that the respondent contacted the newspaper to request this. However, as the bulletin was made publicly available on the respondent's website, it was easy enough for a journalist to report it. The claimants say that *"the end result (i.e. the detriment) is the same".*

146. The respondent states that the bulletin and Oxford Mail which is a lift of the bulletin were true following advice and that there is no evidence that it was the respondent who published it in the Oxford Mail and it was not because the claimant raised a protected disclosure.

147. The conclusion of the Tribunal is that this allegation is made out. The tenor of the allegation, which in our view was a 'dog-whistle', suggesting that there is a form of abuse going on without actually specifying anything. This would have had a particularly serious impact on the way that the claimants were viewed by their peers, parents, swimmers and other people, including potential employers. We are satisfied that the comments came from the respondent and we consider that it was a detriment.

148. The comments were made as a way of providing justification of the actions taken against the claimants. The comments were not made because of the protected disclosures.

Failing to properly respond to the SAR, including withholding documents which the claimant was entitled to see (re Amanada Booth only)

149. The claimants "*acknowledged that this is a difficult allegation to determine on the facts*." Despite this the claimants ask that the Tribunal find that the protected disclosure was a material influence on what was a conscious decision to limit the amount of documentation that would be provided to the first claimant, in breach of the respondent's obligations under GDPR.

150. The respondent states that in respect of failing to respond to the SAR, it is not clear what documents they are but in any event the respondent responded as best they could but they could not force individuals to send them. There is no detriment and it is not because she raised a protected disclosure.

151. The conclusion of the Tribunal is that there is not sufficient evidence to conclude that this detriment has been made out. The respondent did engage in respect of the SAR, they considered it a complex exercise and using the statutory scheme sought an extension of time to provide documents. The documents were not contained in a central location and were in the hands of various individuals. We are not satisfied that this detriment has been established.

Constructive dismissal

152. Section 95 (1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in

circumstances in which he is entitled to terminate it without notice by reason of the employers conduct." In Western Excavating (ECC) v Sharp [1978] 1QB 761 it was stated that: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

153. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (*Malik v Bank of Credit and Commerce International SA* [1998] AC 20. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).

154. The test of whether there has been a breach of the implied term of trust and confidence is objective. The conduct relied on as constituting the breach must impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

Amanda Booth

155. In the first claimant's case did the respondent do the things set out in section 2.1.1 of the list of issues?
The persistent and deliberate erosion of the claimant's contractual duties (list of issues 2.1.1.1)

155.1 The fist claimant relies on her job description as containing her duties, she also refers to the swimming club as a "coach led club". The first claimant states "*amongst other things, that the Head Coach and coaching team would be responsible for squad moves and that the Head Coach's decision is final."* Following the resignation of William Shorter in 2019 Nicola Brown became the interim chairman; the first claimant contends that from that point Nicola Brown became involved with the committee and the duties of the coaches began to be eroded and first claimant's duties and relationship with the respondent began to change.

155.2 The first claimant refers to a number of matters including that in January 2020 the Committee unilaterally decided to start asking the performance swimmers to cover the expense costs of the coaching staff who were travelling with them to overseas meets without discussing this with her. The swimmers had never had to cover this cost before and the competition programme was a coaching decision so the first claimant considers that she should have been involved in the decision-making process but was only informed when she saw it in the minutes which were sent to her in February.

155.3 The first claimant had been responsible for the leave arrangements of coaching staff: however in September 2020 Nicola Brown delayed agreeing the first claimant's leave until the last minute. The committee then introduced a new holiday approval system taking this role away from the claimant.

155.4 The first claimant points out that in November 2020 Nicola Brown stated that there would no longer be coaches' meetings. The coaches meeting, from the first claimant's point of view, was an essential part of running the club: it was an opportunity for the "coaches [to] coordinate everything connected with organising the pool and land timetable, planning training sessions and competitions, organising coaching cover and discussing and planning squad moves." The "meetings were an opportunity for the team to reflect and support each other … an opportunity for [the head coach] to feed back to the coaches … Removing coaches' meetings meant that the coaches could not work together". The first claimant states that this was a further erosion of her duties. On 13 December 2020 it was decided that each of the coaches would have a specific committee member to report to. The first claimant states that the effect of this was to remove her line management obligations thus a further erosion of her duties.

155.5 Nicola Brown responds that in November 2020 the country had gone back into lock down and therefore coaches' meetings were not required or allowed under the terms of the furlough agreement. She states that it was suggested that one committee member could link up with a coach, so that the whole committee were supporting the coaches rather than just the first claimant and Nicola Brown. She goes on to state that this never actually happened in practice though.

155.6 As the head coach and their line manager, the first claimant had always been responsible for the induction of new coaches. In the case of Mikey Hire the committee were intervening and overriding the first claimant's judgment and decisions. The first claimant considers that this was another example of the committee eroding her duties.

155.7 Nicola Brown explained that Mikey Hire was going to join the respondent after the lockdown lifted. The first claimant wanted him to have a 2 week induction period shadowing her, but the committee didn't

think that was necessary because he was an experienced coach and it would have led to higher staffing costs

155.8 The claimant says that the committee had become involved to an extent that they had not previously been involved with decisions about squad moves, squad structure and the squad criteria. These decisions had always been the head coach and coaching team.

155.9 Nicola Brown accepted that squad moves were a matter for the head coach, but stated that as Chairman she was envisaging a discussion about squad structure and report on squad moves. Referring to an email exchange with the claimant about squad moves Nicola Brown stated that she raised a group of shared concerns from the membership secretary who knew the swimmers and that it was her business to be aware of moves that could lead to resignations from the club. Nicola Brown stated that there was no micromanagement of the claimant or an erosion of duties. The claimant and the coaches were simply being given reasonable management instructions. The use of the word micromanagement by the claimants, for example in the 5 March 2021 letter, was really an attempt to bully the committee.

155.10 The conclusion of the Tribunal is that there was a new committee which wanted to exert its authority in circumstances where the outgoing chairman had resigned in contentious circumstances. There was a clash with the first claimant who considered that the new committee were interfering in places they had no right to. The Tribunal considers that this change of approach was reasonably seen by the first claimant as interfering in her role because it was doing things that had previously not been done by the committee. The situation is further confused by the fact that there was the background of the covid epidemic which called for new ways of working and lockdowns which impacted on everyone. There then over time developed a breakdown in the relationship of the first claimant with Nicola Brown and the committee. This meant that matters which ought to have been capable of being worked through with discussion and compromise were not worked through and festered thus infecting the relationship between the parties. This was all happening in the context of covid and national lockdowns which made it difficult for normal conditions to prevail and thus further exacerbated the situation. The conclusion of the Tribunal is that the effect of all this was that the first claimant's duties were eroded over time.

156. The first disciplinary procedure which led to the issue of the written warning (list of issues 2.1.1.2)

156.1 The first claimant was called to a disciplinary hearing following the level X events. This followed an investigation conducted by Nicola Brown and Deborah Smit. There was no indication in the email setting up the investigation meeting that there was a disciplinary investigation being undertaken, rather the first claimant was told that "*it would be helpful to*

meet and discuss the issues and decide how we address the points raised." There was an investigation meeting on 18 November 2020 and subsequently the first claimant was invited to a disciplinary hearing that ultimately took place on the 20 December 2020. The first claimant did not attend the disciplinary hearing and it took place in her absence.

156.2 While the Tribunal consider that the investigation stage was problematic because while the committee knew that they were undertaking a disciplinary investigation, the first claimant was not aware that the meeting she was called to on the 18 November 2020 was a meeting of that nature until she arrived at the meeting to be questioned by Nicola Brown and Deborah Smit about the two Level X events. The investigation report produced justified some action being taken. The first claimant was invited to a disciplinary hearing that was reasonably done, the hearing itself was reasonably conducted in the first claimant's absence and in view of the claimant's failure to attend the conclusions of the disciplinary reasonably justified.

157. The conduct leading to the rejection of the claimant's appeal against the warning , including Ms Brown's interference in the process (list of issues 2.1.1.3)

157.1 The first claimant complains about the conduct leading to the rejection of her appeal against the warning, including Nicola Brown's interference in the process. The way that the respondent handled the first claimant's appeal was in our view wrong. Joanna Mertikas describes herself and her role in these proceedings as follows: *"My professional background is in HR. I am a HR Business Partner, CIPD qualified, with 15+ years experience. … I provided HR advice to the COSC Committee throughout the disciplinary proceedings brought against Amanda, Fabian, and Matt… I was asked to oversee the process and provide HR advice. It was not within my remit to be involved in the decision made by the panel."*

157.2 The appeal panel of Annette Smith and Sally Brabin with the advice of Joanna Mertikas decided that the appeal was upheld. However, after the intervention of Nicola Brown their decision on the appeal was changed and the disciplinary decision was upheld. This was the clearest breach of the implied term of trust and confidence in its own right. The appeal panel considered matters and came to a conclusion, however Nicola Brown and Joanna Metrikas did not like the conclusions and eventually one of the appeal panel was turned and changed her mind about the outcome of the appeal. The outcome letter sent to the first claimant initially purported to represent the view of both members of the appeal panel when in fact it did not and a corrected outcome letter had to be sent omitting the name of Sally Brabbin.

158. Undue pressure to complete the claimant's appraisal including doing so publicly in committee meetings (list of issues 2.1.1.4)

158.1 The claimant was being asked to complete the appraisal by Nicola Brown. The Tribunal objectively considered the claimant was not being put under pressure to do so. The claimant was able to put off the appraisal. While the matter was raised in a meeting with the executive committee the Tribunal consider that such a situation was not on its face unreasonable. The conduct of Nicola Brown and the committee in this regard was not in our view unreasonable.

159. Refusing to postpone the grievance hearing until the SAR had been responded to, thereby forcing the claimant to withdraw her grievance (list of issues 2.1.1.5)
Delaying the SAR response without reasonable grounds to do so (list of issues 2.1.1.6)

159.1 The respondent considered that the SAR was meeting the ICO's definition of a "complex case" and therefore the respondent, acting in accordance with what it considered its legal rights, extended the response deadline to 22 April 2021. However, in this case it was clear that the SAR request was linked to the claimant's outstanding grievance which had been about "*bringing these illegal Disciplinary complaints forward*" where the claimant complained that she was being denied her rights and the proceedings had been "*designed to bully and harass*" the first claimant. By the time the claimant made the SAR she was aware of some of the shenanigans relating to the appeal and stated explicitly that she wished copies of notes of the appeal and SAR in respect of "*all correspondence*" from people involved in the disciplinary hearing, appeal and grievance. A cursory but fair consideration would have shown that there was a link between the SAR and the claimant's grievance. Nicola Brown knew her own involvement in matters and must have been aware that this was likely to be a matter of interest to the claimant and relevant to the fair consideration of the claimant's grievance.

159.2 While delaying in answering the SAR might have been a lawful action it was in our view not acting within the spirit of fairness but was designed to frustrate the claimant. In our view it is no coincidence that the claimant's request for a SAR was made on 22 January 2021 and the claimant was invited to a meeting with Debroah Smit on 28 January 2021.

159.3 The view of the Tribunal is that it was unreasonable to delay the compliance with the SAR and also to refuse the claimant a postponement of the grievance hearing to await the SAR. The conclusion of the Tribunal is that the approach was designed to frustrate the claimant.

160 The meeting on 28 January 2021 at which the claimant was threatened with dismissal if she did not voluntarily resign (list of issues 2.1.1.7)

160.1 The claimant was invited to a meeting with Deborah Smit on 28 January 2021 but was not told what the meeting was about. The claimant was taken by surprise in respect of the topic. Deborah Smit attended the meeting armed with a clipboard containing two pieces of paper. In her evidence to the Tribunal Deborah Smit said that "*these notes guided my conversation"* with the first claimant. Deborah Smit stated that after she told the first claimant *"that it was a protected conversation multiple times"* she "*only proceeded after* [the first claimant] *gave her assurance that she understood it was a protected conversation and that she would not discuss it with anyone else".* Deborah Smit accepted that the claimant was "*silent, and did not respond to anything I said".* Deborah Smit states that she "*did not read out allegations"* but she did say that *"we had further allegations requiring further investigations"* and that *"nothing was crystal clear".* Deborah Smit stated that the whole point of the conversation was to give the first claimant *"something to consider as there had been a complete break down in the relationship".* She denied that the claimant was given an ultimatum. It was put to Deborah Smit that she told the claimant if she did not leave she would be dismissed for gross misconduct. Her response was that was "*Not what I said at all. I was really clear that it may or may not be a disciplinary".* Her evidence appears to be contrary to the notes she prepared and *"guided my conversation"* which says: *"some of these are really serious and if we see through could lead to dismissal for gross misconduct".* In respect of this meeting to the extent that there is a dispute between the first claimant's account and the respondent's version we prefer the first claimant's account. The first claimant's account is that she was informed of a wide range of concerns, informed that there would be a disciplinary process against her and a finding of gross misconduct. The claimant says that she was given three choices "(1) dismissal for gross misconduct following another disciplinary procedure, (2) exit on mutually agreed terms (10 weeks full pay) and (3) voluntary redundancy." Bearing in mind that the conversation was in Deborah Smit's view apparently a protected conversation the claimant's version seems more likely to be correct than Deborah Smit's version where all that happened is that she laid out concerns and gave the claimant something to consider.

160.2 The claimant contends that the Tribunal can ignore section 111A(1) Employment Rights Act 1996 because the provision does not apply to the question whether the claimant was dismissed (see paragraphs 39-41 of the claimant's written submissions). The respondent states that this was a protected conversation or alternatively it was a perfectly reasonable conversation where three options were laid out for the claimant.

160.3 Section 111A (3) provides that subsection (1) does not apply where according to the complainant's case the circumstances are such that a provision (whenever made) contained in, or made under, the Employment Rights Act 1996 or any other Act requires the complaint to be regarded as unfairly dismissed. This is a constructive dismissal

case so if there is a dismissal the reason for the dismissal is the reason for the employer's breach of contract which led the claimant to resign. This is also a case where the claimant states that she was constructively dismissed because she made a protected disclosure, section 103A Employment Rights Act 1996. Section 111A(1) does not apply.

160.4 In the course of the meeting on the 28 January 2021 Deborah Smit told the claimant that she could be dismissed without a reference for gross misconduct relating to safeguarding concerns. The view of the Tribunal is that this was intended to intimidate the claimant thus cause her to stand back from the position she had been taking in her grievance and appeal.

161. The second disciplinary based on vague and unparticularised "complaints" from ex-members and involving the other coaches in this investigation, thereby undermining her authority with them (list of issues 2.1.1.8)

161.1 There was no disciplinary hearing arising from the second disciplinary investigation. A disciplinary investigation arising from genuine concerns raised by ex-members and or their parents at exit interviews is in our view a reasonable action to take.

162. The suspension and third disciplinary investigation following the joint letter on 5 March 2021 (list of issues 2.1.1.9)
Refusing to recognise the coaches' collective grievance (list of issues 2.1.1.10)
Refusing to correspond with Mr McGuiness, instead persistently emailing the claimant (first claimant) (list of issues 2.1.1.11)
Suspending the claimant's membership and refusing to permit her to attend the SGM as a member (list of issues 2.1.1.12)

162.1 The letter of the 5 March 2021 was problematic for the committee because there was in effect a power struggle between the head coach on one side and some members of the committee on the other. There had by the time of the letter been a break down in the relationships. Had the relationships not broken down there would in our view have been a different approach to dealing with the issues between the claimants and the committee. The nuclear option of suspension of all the coaches was a symptom of the broken relationship rather than the inevitable consequence of any actual misconduct or potential misconduct by the coaches. The position adopted by the Nicola Brown and the committee in refusing to consider the claimants' collective grievance or correspond with Mr McGuinness or allow the claimants to attend the SGM were all actions born out of the break down in the relationship and the power struggle between the first claimant and the committee. The allegations against the claimants were not gross misconduct. They had simply sent an email to members of the club about matters relating to the club using club email. There was no real concern about harm to any children by any one on the committee yet

the committee chose to gaslight the coaches during the SGM by making enigmatic references to safeguarding concerns. There was no reason why, if acting in good faith, the respondent could not have considered the collective grievance. There was no good reason why the respondent refused to deal with Mr McGuiness he was not problematic, he was acquainted with the issues and while not a Union official per se, he was a from a representative body to which the coaches were members and the first claimant as part of her contract of employment was effectively required to be a member. If the respondent was acting in good faith with the coaches there could be no reason for preventing them from being able to attend the SGM and put forward their version of events, however suspension of the claimants and other coaches was deliberately intended to act as a device to silence the coaches.

163. Did the matters set above breach the implied term of trust and confidence? In the first claimant's case we are satisfied that there was a breach of the implied term of trust and confidence. The actions of the respondent in the way it dealt with the claimant's appeal was in breach of the implied term of trust and confidence. Additionally the respondent's actions in suspending the claimant from employment and the club instead of addressing the concerns raised in the collective grievance and issues arising from the 5 March 2021 letter was also in our view breaching the implied term of trust and confidence. The conduct of the respondent taken as a whole was in the case of the first claimant likely to destroy or seriously damage the trust and confidence between the first claimant and the respondent. There was no reasonable and proper cause for the said actions as they were designed to undermine the claimant in the context of what the Tribunal consider to have been a power struggle between the claimant and the committee.

164. The Tribunal considers that there was a serious breach of contract and that it was the reason for the claimant's resignation. The claimant did not affirm the contract as was clear from her actions in raising the grievance, making a SAR, raising a collective grievance and then resigning shortly after the SGM.

165. The conclusion of the Tribunal is that the first claimant was dismissed.

166. Section 98 (1)-(2) provide that in determining for the purposes of Part X Employment Rights Act 1996 whether the dismissal of an employee is fair or unfair, it is for the employer to show (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason falls within this subsection if it (a) relates to the conduct of the employee.

167. Section 103A provides that an employee who is dismissed shall be regarded for the purposes of Part X as unfairly dismissed if the reason (or, if more than

one, the principal reason) for the dismissal is that the employee made a protected disclosure.

168. This is a constructive dismissal case. The reason for the dismissal is the reason for the employer's breach of contract which led the claimant to resign. Included in the breach of contract leading the claimant's resignation is the detriment suffered by the claimant in response to the protected disclosures made to the employer in the first claimant's letters of 5 March and also in the letter to the members of the same day. The respondent suspended the claimant from the membership of the club and her employment as a result of this protected disclosure. The reason for the claimant's dismissal included the protected disclosure detriment. The first claimant was unfairly dismissed by reason of section 103A Employment Rights Act 1996.

169. Alternatively, the respondent has failed to show that the first claimant has been dismissed for a potentially fair reason and therefore the claimant has been unfairly dismissed by reason of section 98 Employment Rights Act 1996.

Wrongful dismissal

170. A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled namely: the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and the dismissal must have been without sufficient cause to permit the employer to dismiss summarily.

171. The first claimant in this case has not committed any action that justifies her dismissal. The claimant was dismissed without notice. The claimant was entitled to a minimum of statutory notice pursuant to section 96 Employment Rights Act 1996. The claimant's employment commenced on 4 December 2010 and ended on 5 March 2021, the claimant is entitled 10 weeks' notice.

Fabian Whitbread

172. In the second claimant's case did the respondent do the things set in the second claimant's list of issue at 1a-s?

173. Removed the claimant from Whatsapp and did not allow him to have contact with colleagues and club members during furlough (all 3 lockdowns) (second claimant's list of issues 1a)

173.1 The Tribunal accept the second claimant's evidence that he was told that he could not have contact with the other coaches as he alleges.

174. From November 2020 cancelled the coaches' weekly coaches' meetings and told them they had to report to a committee member (second claimant's list of issues 1b)

174.1 The evidence produced before us established that this was the case.

175. From November 2020 did not consult with the claimant on club matters and did not send him committee meeting minutes (second claimant's list of issues 1c)

175.1 The respondent in our view was under no obligation to consult with the claimant on club matters and to the extent that the claimant was not sent the minutes of the committee meetings this was not a breach of the claimant's contract of employment.

176. In December 2020 Nicola Brown asked him whether he agreed with the first claimant's decision not to hold a level X event (second claimant's list of issues 1d)

176.1 Even if the second claimant was approached in December 2020 by Nicola Brown and asked whether he agreed with the first claimant's decision not to hold a Level X competition in December there was no conduct that could be considered a breach of contract or that might be a breach of contract. There is no evidence that by approaching the second claimant Nicola Brown was attempting to undermine the first claimant.

177. From February 2021 harassed the claimant by contacting him frequently out of hours including about the unparticularised investigation (Second claimant's list of issues 1e)

177.1 The evidence that we have heard does not justify a conclusion that the second claimant or any other person was contacted frequently out of hours so as to justify a complaint about such contact. There would necessarily be some level of contact between the employees and the committee. The committee members are volunteers and so when they contact the employees it is likely that some of that contact would be out of hours.

178. In October 2020 Nicola Brown had a meeting with the claimant about her daughter and pressured him to agree that she only needed to attend evening sessions (second claimant's list of issues 1f)

178.1 The parties agree that this meeting took place. The claimant states that he was pressured into a position that he did not agree with by Nicola Brown during the meeting about her daughter. The Tribunal accept the second claimant's evidence on this issue. The second claimant would have felt that he was being pressured into making certain decisions about squad matters by Nicola Brown whether that was her intention or not.

179. In October or December 2020 Louise Salmon made suggestions about playing music and allocation of swimmers (second claimant's list of issues 1g)

    179.1 The Tribunal accept that this occurred. The second claimant was not being directed to play music and was entitled to resist such a suggestion.

180. In December 2020 the claimant was made to coach in person when Oxford was in tier 4 (second claimant's list of issues 1h)

    180.1 The second claimant states that,

> "In December 2020, the government guidance discouraged travelling in and out of Oxford, which was classified as Tier 4 due to the high levels of COVID-19. Nicola [Brown] wrote to all of the coaches warning them of the risks of travelling in Oxford. She confirmed that Matthew Croyle could coach his sessions online but stated that I had to coach my sessions in person. I wasn't happy about this as I was concerned about travelling between a lower and high tiered area and placing my family members at risk, as I was living at home with my mum. As we weren't having coaching meetings at that point, I didn't have the opportunity to raise my concerns. I didn't think there was any point in raising it with Nicola Brown because I anticipated a negative reaction."

    180.2. The conclusion of the Tribunal is that accepting all that the second claimant's says on this issue there is no conduct here by Nicola Brown that justifies criticism that might form part of a breach of contract.

181. In January and February 2021 Nicola Brown contacted the claimant about his continuing professional development (CPD) and required him to attend additional talks (second claimant's list of issues 1i)

    181.1 The second claimant states that in January and February 2021, whilst on furlough Nicola Brown contacted him requiring him to attend additional tasks for his CPD and requiring him to set out how he had spent his time on furlough to do CPD. The second claimant states that the first claimant had always guided him on CPD as part of her role as his line manager.

    181.2 Nicola Brown explains that on 2 January 2021, the committee made the decision to furlough some coaches again while the pool remained closed, this included the second claimant.

    181.3 Nicola Brown stated that she was keen to ensure that the coaches still had access to CPD opportunities if they wanted to engage in learning and development but that there was no obligation to attend every session, but in line with what was permitted under the furlough scheme,

there was an expectation that the coaches would undertake some CPD while furloughed and that she made the coaches aware of several opportunities.

181.4 When the second claimant informed her that he could not attend one she confirmed that this was fine, and let him know an alternative session if he was interested. Nicola Brown states that on 30 January 2021, she asked all of the coaches to confirm what CPD they had undertaken during that lockdown and expressed the expectation that CPD should be undertaken. Nicola Brown states that the claimant was only being asked to spend a couple of hours on a training session every so often and that this was not an unfair expectation. When the second claimant provided her with information of the work he had done she was happy with it.

181.5 We accept that Nicola Brown acted reasonably and proportionately in this regard and there is in our view no evidence of conduct that might form part of a breach of contract on her part in doing as she did.

182. In February 2021 the claimant was made to take annual leave and told to attend an investigation meeting during said leave (second claimant's list of issues 1j)

182.1 The documents produced that purport to be the second claimant's first written contract of employment, unsigned but dated 3 September 2017 provided that the second claimant should take holiday at such times as may be convenient to the respondent. The second claimant's purported written contract, unsigned but dated 4 November 2020, provided that the respondent may require the second claimant to take (or not to take) holiday on particular dates.

182.2 There was no breach of contract in the respondent requiring the claimant to use his leave during the furlough period. There was no breach of contract in the claimant being requested to attend a disciplinary investigation meeting during his leave period.

183. On 18-19 February 2021 the claimant was only allowed to be accompanied 2 hours before the meeting (second claimant's list of issues 1K)

183.1 There is no conduct complained of here that could amount to a breach of contract on the basis of the facts in this case.

184. The investigation meeting on 19 February 2021 was poorly handled, including not making it clear that the claimant was not being investigated (Second claimant's list of issues 1l)

184.1 The claimant may have felt concerned about his own position and not properly understood what was in progress but in requiring the claimant to attend an investigation meeting there was no breach of contract.

185. On 24 February 2021 he was sent inaccurate notes of the meeting (second claimant's list of issues 1m)

    185.1 There is no evidence that this was done deliberately or carelessly so as to disadvantage anyone.

186. On 5 March 2021 removed the second claimant from WhatsApp groups (second claimant's list of issues 1n)
    On 5 March 2021 suspended the second claimant and commenced a disciplinary investigation against him (second claimant's list of issues 1o)

    186.1 The second claimant was suspended and removed from the WhatsApp groups on 5 March 2021.

187. On 18 March 2021 refused to deal with the collective grievance (second claimant's list of issues 1p)
    On 18 March 2021 Nicola Brown refused to correspond with Brian McGuinness and contacted the claimant directly (second claimant's list of issues 1q)

    187.1 On 18 March 2021 the respondents refused to deal with the collective grievance and refused to deal with Brian McGuiness, insisting that they deal directly with their employee the second claimant.

188. On 1 Apr 2021 suspended the Claimant as a member of the club so that he couldn't attend the SGM (second claimant's list of issues 1r)

    188.1 The second claimant was informed that he was suspended as a member of the club as well as an employee.

189. On 1 Apr 2021 Deborah Smit and Alix Brown made false statements about safeguarding concerns at the SGM (second claimant's list of issues 1s)

    189.1 The comments that were made at the SGM gave the impression that there were safeguarding concerns about swimming coaches when in fact non such existed.

190. In the case of the second claimant the Tribunal found that when furloughed during the various lockdowns the second claimant was not allowed to contact colleagues, the coaches' meetings were stopped from November 2020. The effect on the second claimant was to contribute to what the second claimant considered to be a "*rapid decline in my mental health*". The second claimant felt pressured by Nicola Brown and other committee members when they interfered in his coaching by making suggestions about playing music or attendance at squad training sessions. The respondent refused to consider the collective grievance and deal with Mr McGuiness as the second claimant's representative. It was suggested that there were safeguarding concerns at the SGM when there were no safeguarding concerns relating to the second claimant. The claimant was removed from the WhatsApp group on 5 March and suspended as an employee and a member of the club. The

second claimant was implicated in a baseless suggestion that there were safeguarding concerns.

191. Did that conduct breach the implied term of trust and confidence? The conclusion of the Tribunal is that these matters up until about 5 March 2021 while particularly difficult for the second claimant were not intended to be bullying and were not matters which could have been known by Nicola Brown or the respondent to have the adverse effect on the second claimant's health that he contends. We note that up to 5 March 2021 the second claimant had not raised with the respondent any complaints about the conduct towards him by anyone.

192. The second claimant considered that he had been mistreated by the committee in respect of all the events that had taken place by about March 2020 that had caused him anxiety and so the second claimant signed the letter of 5 March 2021 together with other coaches. The second claimant also put his name to a letter to the members complaining about the committee. The claimant was suspended even though there was no genuine belief on the part of the Nicola Brown that the second claimant had been guilty of misconduct let alone any serious misconduct. This can be seen from Nicola Brown's message to the second claimant on 7 April 2021 (p1564) in which she offered him his job back and confirmed that he was not facing "*serious disciplinary action*" like some of the coaches but that that he had "*somehow got dragged down into this with them*".

193. The respondent's conduct towards the claimant from 5 March 2021 beginning with his suspension, commencing disciplinary action, refusing to consider the collective grievance or deal with his chosen representative culminating in the claimant's suspension from the members of the club and refusal to allow him to attend the SGM was conduct that cumulatively amounted to a fundamental breach of contract by the respondent.

194. The SGM failure to take a decision to remove the committee led to the second claimant resigning with the other coaches. The reason for the claimant's resignation was because of all the events that had taken place including the earlier events which took place before and after 5 March 2021. The second claimant's resignation was in response to the respondent's fundamental breach of contract.

195. The second claimant did not affirm the contract before resigning. The second claimant was constructively dismissed.

196. The reason for the second claimant's dismissal was the second claimant's conduct in sending the letters of 5 March to the committee and the members. The letter of the 5 March 2021 to the committee was a protected disclosure. The second claimant was therefore dismissed because he made a protected disclosure: the second clamant was unfairly dismissed.

<u>Directions for Remedy Hearing</u>

197. The Tribunal has listed the remedy hearing on the **9 and 10 December 2024,** at Reading Tribunal Hearing Centre, commencing at 10.15 am. The parties are to notify the employment tribunal within 14 days of this judgment being sent to the parties if these dates are not convenient.

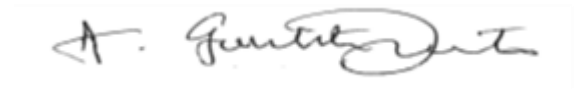
198. The parties are to forthwith disclose and provide inspection of any documents relevant to remedy if that has not already taken place.

199. The parties are to agree a remedy hearing bundle by the **1 November 2024**.

200. The claimant is to prepare the remedy hearing bundle and provide a hard copy and an electronic copy to the respondent by the **7 November 2024**.

201. The parties may agree to vary the dates on which these directions are completed, but not if this would affect the hearing date.

202. The claimant must provide to the Tribunal an electronic copy of the remedy hearing bundle 7 days before the remedy hearing, and bring to the remedy hearing two hard copies of the remedy hearing bundle for the Tribunals use.



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Employment Judge Gumbiti-Zimuto
Date: 13 September 2024

Sent to the parties on: 25/10/2024

S Ghafoor
For the Tribunals Office

Public access to employment tribunal decisions:
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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or