EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4104928/2016

Held at Glasgow on 15 and 16 February 2017

Employment Judge: Mr C Lucas
Members: Mr J McElwee
Mr W Muir

Mrs Susan Woods	**Claimant** **Represented by:** **Mrs M S McJannett – Solicitor**
Milngavie Golf Club	**Respondent** **Represented by:** **Mr C Robertson – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that because the Claimant did not terminate the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the conduct of the Respondent as her employer she was not constructively dismissed as envisaged by Section 95(1)(c) of the Employment Rights Act 1996, in which case her claim that she was unfairly dismissed by the Respondent in terms of Sections 95 and 98 of that Act has failed and is dismissed.

REASONS

Background

1. In a Form ET1 presented to the Tribunal Office by or on behalf of the Claimant on 5 October 2016 it was alleged that the Claimant had been unfairly dismissed by the Respondent on 10 June 2016.

2. In a paper apart presented to the Tribunal office with the Claimant's ET1 – (and which was deemed by the Tribunal to constitute part of that ET1) – it was alleged on behalf of the Claimant that the Respondent had breached both the implied term of trust and confidence which existed in the Claimant's contract of employment and "the implied term of support", that "this breach" was "sufficiently serious to constitute a repudiatory breach", that "by the Claimant's resignation she accepted the breach, that "… accordingly the termination of her employment amounts to a dismissal within the meaning of Section 95(1)(3) of the Employment Rights Act 1996" and "that her dismissal was both wrongful and unfair…"

3. The ET1 and the paper apart deemed to form part of it, both as presented to the Tribunal office on 5 October 2016, are collectively hereinafter referred to as, "the ET1".

4. In a Form ET3 received by the Tribunal office on 3 November 2016 and in a paper apart annexed to it – (and deemed by the Tribunal to form part of it) – the Respondent resisted the Claimant's claim in its entirety.

5. The Form ET3 as received on 3 November 2016 and the paper apart annexed to it are collectively hereinafter referred to as, "the ET3".

6. It was contended within the ET3 that the Claimant had resigned "with notice" in an e-mail on 23 May 2016. It was not disputed within the ET3 that the date on which her resignation had taken effect was 10 June 2016.

7. The ET3 contained specific denials that the Claimant had been constructively dismissed and/or that the Respondent's treatment of her had amounted to a breach of any express or implied term of her contract of

employment but, on an *esto* basis, went on to contend that if there had been such a breach then "the breach was not sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to treat the contract as terminated with immediate effect."

8. The Tribunal office scheduled a Final Hearing of the Claimant's claim to take place at Glasgow on 15, 16 and 17 February 2017.

9. Neither party sought any alteration prior to 15 February 2017 of any aspect of, as the case may be, the Claimant's claim as made in the ET1 or the Respondent's response as set out in the ET3.

10. A Final Hearing on the merits of the Claimant's claim took place at Glasgow on 15 and 16 February 2017. There was no need for the Tribunal to sit on the third scheduled day.

11. On the first day of the Final Hearing of the Claimant's claim, at a stage prior to any evidence being led and when preliminary discussions were taking place among the parties' respective representatives and the Employment Judge, it was confirmed by the Claimant's representative that the Claimant's sole claim was that she had been unfairly constructively dismissed by the Respondent.

12. During the course of the first day of the Final Hearing and for part of the second day of the Final Hearing evidence was heard from the Claimant and on behalf of the Respondent and later on the second, final, day of the Hearing closing submissions were made by, respectively, the Claimant's representative and the Respondent's representative.

13. In her closing submissions the Claimant's representative invited the Tribunal to consider and to take into account the decisions in the cases of:-

- Wadham Stringer Commercials (London) Limited v Brown
- Western Excavating (ECC) Limited v Sharp

- W A Goold (Pearmark) Limited v McConnell

as well as the provisions of the Employment Rights Act 1996 and of the ACAS Code on Disciplinary and Grievance Procedures.

14. In his closing submissions the Respondent's representative made no request to the Tribunal inviting it to consider any specific authorities or legislation.

Findings in Fact

15. Having heard evidence from the Claimant and on behalf of the Respondent, and having considered documentary evidence provided by the parties, the Tribunal found the following facts, all relevant to the Claimant's claim as set out in the ET1, to be admitted or proved.

16. The Respondent is an unincorporated association, a "members' club", which is managed by a committee – (hereinafter "the Respondent's Management Committee") – which pursues the Respondent's purpose of running a golf club, Milngavie Golf Club, at Laighpark, Milngavie.

17. The Respondent's Management Committee is chaired on an *ex officio* basis by whoever is the captain of Milngavie Golf Club – (hereinafter, "the Golf Club") - at any given time.

18. As at the date on which the Claimant tendered her resignation from her employment with the Respondent – (and still as at the effective date of termination of her employment) - the captain of the Golf Club – (and therefore, on an *ex officio* basis, the chairman of the Respondent's Management Committee) - was Mr Brian Mooney.

19. Mr Mooney was appointed captain of Milngavie Golf Club and therefore became chairman of the Respondent's Management Committee in February 2016. His predecessor had been a Mr Derek Hunter and during Mr Hunter's term as club captain and chairman of the Respondent's Management

Committee Mr Mooney had been vice captain of the Golf Club. Mr Mooney is a volunteer member of the Respondent's Management Committee and he receives no remuneration for his services. He has served on the Respondent's Management Committee for nine out of the last twelve years.

20. Where the context permits, Mr Mooney is hereinafter referred to as "the Chairman".

21. For a period of several years prior to the end of August 2015 the Respondent had employed two people as senior members of its clubhouse-based staff, namely its "Club Master" – (Mr Hugh Park) - and the Claimant.

22. The Claimant had been employed by the Respondent since 4 January 1995, always as "Secretary/Treasurer".

23. Early in August 2015 the Respondent decided to terminate Mr Park's employment on the ground of redundancy and Mr Park left the Respondent's employment on or about 31 August 2015.

24. The plan had been that Mr Park would cease to be employed by the Respondent at the end of September 2015. But he did not work out his full notice period and in fact left on or about 31 August 2015.

25. During the period beginning on the day after Mr Park left the Respondent's employment and which ended on 10 June 2016 – (a date hereinafter, where the context permits, referred to as "the effective date of termination") – the Respondent employed only one person as a senior clubhouse-based member of staff, i.e. the Claimant, but it also employed bar and catering staff, a head green-keeper and green-keeping staff.

26. Mr Park's role as the Respondent's Club Master had involved him acting as the primary point of contact for members arriving at the Golf Club, in dispensing drinks and food for such members, their guests and visitors to the Golf Club, in overseeing all aspects of the running of the Golf Club's bar, in ensuring and procuring maintenance of the Golf Club's clubhouse

premise and in acting as "Personal Licence Holder", such a named and authorised Personal Licence Holder being one of the prerequisites of the Respondent being entitled by the Licensing (Scotland) Act to sell alcohol at and from its clubhouse.

27. When Mr Park left the Respondent's employment "the catering facility also left" leaving no one other than the Claimant in employment and able to deal with the Respondent's catering needs from that time until new part-time catering staff and a part-time Catering Manager were employed by the Respondent.

28. From time to time during the course of her employment with the Respondent the Claimant was issued with statements of terms and conditions of employment. As at the effective date of termination the version of such a statement of terms and conditions of employment issued by the Respondent to the Claimant was a version issued on or shortly before 1 January 2011. That statement of terms and conditions of employment is hereinafter referred to as "the Claimant's contract".

29. The Claimant's contract identified the job title held by the Claimant as being "Club Secretary/Treasurer" but did not define what duties were incumbent on her as the holder of that position.

30. At no time during the course of the Claimant's employment with the Respondent had anyone ever told the Claimant precisely what duties that role, that job title, required her to undertake. When she had begun employment with the Respondent the Claimant had quickly come to realise what work needed to be done and she had done it, effectively unsupervised, throughout the period which had begun on 4 January 1995 and which had continued up to the effective date of termination.

31. The Claimant's role as Secretary/Treasurer at Milngavie Golf Club was ill-defined, indeed non-defined, by the Respondent but included her having responsibility involved her being responsible for – (and, indeed, undertaking) - all administration work which the Respondent required to be undertaken,

for daily balancing of monies, for banking, for dealing with memberships and membership enquiries, for preparing monthly accounts, for dealing with suppliers, for taking reservations for golf outings and hospitality events and for "doing the salaries".

32. Those duties as set out at above and other administrative tasks were the duties undertaken by the Claimant as the Respondent's Secretary/Treasurer during the period when both she and Mr Park worked for the Respondent and prior to Mr Park's employment being terminated on the ground of redundancy.

33. Mr Robert Sim is the Claimant's Finance Convener. As such, he is responsible for preparing the Respondent's budgets, checking monthly accounts and generally dealing with the Respondent's financial affairs. He is not employed by the Respondent but is a volunteer member of the Respondent's Management Committee. As the Respondent's Finance Convener he was effectively the Claimant's line manager.

34. Mr Sim typically met with the Claimant at least twice a week.

35. Mr Sim did not know that the Claimant's contract did not specify what the duties of the Secretary/Treasurer were. He believed that it did so.

36. When both Mr Park and the Claimant were employed by the Respondent there was no significant cross-over of responsibilities, their roles within the Respondent's business as carried out at Milgavie Golf Course being distinct from each other.

37. After Mr Park left the Respondent's employment the work that the Claimant actually did for the Respondent changed, i.e. "changed" in the sense that what she did after Mr Park left was more than she had done before he left and included part of his duties.

38. The Claimant had not been consulted about the Respondent's decision to make Mr Park redundant or as to how the work previously carried out by him prior to his employment ending would be carried out.

39. It is not open to this Tribunal, dealing as it is with the Claimant's claim, to investigate or make any finding in fact as to whether the Respondent had been justified in terminating Mr Park's employment on the ground of redundancy but the Tribunal does find as fact that even after Mr Park's employment had been terminated on the ground of redundancy all of the types of work that he had previously carried out for the Respondent at Milngavie Golf Club needed to be carried out by someone.

40. Prior to taking a decision to dismiss Mr Park on the ground of redundancy the Respondent had not made any policy decision about who would do the work previously undertaken by him or as to how that work would be done, if at all. All that it had decided was that, as was mentioned in the ET3, "… some of his duties could be absorbed by existing staff members."

41. Mr Sim confirms that when the Respondent's Management Committee was discussing the possibility of Mr Park being made redundant there was no detailed discussion about who would take on the work that he, Mr Park, had previously been doing. Rather, there was just an understanding "that we would parcel it out in other ways."

42. Prior to Mr Park's employment with the Respondent ending the Claimant normally worked 35 hours per week, these hours being spread over Monday, Tuesday, Wednesday, Thursday and Friday, on each of which days her normal working hours were 9am to 4pm. They were her contracted hours.

43. After Mr Park left, bearing it in mind that by then it was the onset of Autumn/Winter, the Respondent had decided to reduce clubhouse opening hours, in particular closing some three hours earlier on Saturdays and Sundays, i.e. at 8pm rather than at 11pm and, at least over the winter months, to provide only a very basic food service during quieter times, that

basic food service being provided by bar staff under the supervision of a part time catering manager. But for the first 4 weeks after Mr Park left the Respondent's employment the Claimant, either at the Respondent's clubhouse or from her home, actually worked hours which grossly exceeded her 35 hour per week contractual norm. The Claimant estimates that during that period of 4 weeks beginning with the day after Mr Park left the Respondent's employment, in an endeavour to maintain the work that was part of her role as Secretary/Treasurer and the parts of the duties that Mr Park had previously done but which she had begun to do after his employment had ended, she typically worked 70 to 80 hours per week.

44. The Claimant had not been asked by the Chairman or by any other member of the Respondent's Management Committee to do any of the work previously done by Mr Park but the Chairman and other members of the Respondent's Management Committee, including the Respondent's Finance Convener, were aware that she was doing some of the work previously done by him.

45. The Claimant admits to having told the Chairman – (as he now is, although at the time he was the Milngavie Golf Club Vice Captain) – after Mr Park's departure that she would "do whatever it would take" to "maintain stability" within the Respondent's clubhouse. The Claimant reassured the Chairman that she was "happy to help" and "to do whatever was necessary" for the benefit of the Respondent.

46. The Claimant admits that in discussion with the Chairman at the time after Mr Park had left the Respondent's employment and before a part-time catering manager was appointed she, the Claimant, had volunteered her services to "help out". She has confirmed that she did tell the Chairman following Mr Park's departure that she would "do whatever it takes to support" the Respondent.

47. The Claimant admits that she was never asked by the Chairman or by Mr Sim or by any other member of the Respondent's Management Committee to take on additional work following Mr Park's departure.

48. The Claimant admits that it had been her own decision to take on such additional work and that she had chosen to do so because, as she perceived it, "there was no one else."

49. Some 4 weeks after Mr Park left the Respondent's employment the Respondent appointed a part time catering manager on a 16 hour per week basis but with the intention that after the winter months her hours would be increased. Some of the work that Mr Park had previously done for the Respondent was taken on by that newly-recruited, part-time, caterer, Ms Hughes, whose main intended role was "to provide catering at the Club bar".

50. That appointment of Ms Hughes as a part-time caterer resulted in the work previously carried out by Mr Park which the Claimant had assumed into her workload decreasing.

51. The Claimant admits that after the first four weeks after Mr Park's departure the workload undertaken by her did decrease.

52. Sometime after Mr Park's employment with the Respondent had ended the Chairman asked the Claimant whether she would be prepared to act as the Respondent's Personal Licence Holder for the purpose of compliance with the licensing law. The Chairman insists that at that discussion the only additional work or responsibility that the Respondent asked the Claimant to undertake or take on was the role as Personal Licence Holder.

53. The Claimant confirmed to the Chairman that she would take on that responsibility provided she was given authority by the Respondent to act as line manager for the Respondent's bar staff. She had felt that the Personal Licence Holder should be the person who was able to control how the bar staff conducted the licensed premise that was the Respondent's clubhouse.

54. The Chairman agreed to that pre-condition and the Claimant completed the training that was required by the Licensing Authority and became the Respondent's Licensed Premise's Personal Licence Holder.

55. Notwithstanding that the Chairman and the Respondent's Finance Convener, amongst others within the Respondent's Management Committee, knew that the Claimant was carrying out work over and above work that she had been doing prior to Mr Park's departure, the Respondent never issued the Claimant with updated terms and conditions of employment.

56. As the person entrusted by the Chairman to act at line manager to the Respondent's bar staff the Claimant took it upon herself not just to oversee the work carried out by those members of the bar staff but also to train them and, on numerous occasions – (either from behind the bar or in the bar storage area) - to work alongside them, personally doing work – (including serving and cleaning work) - which they, the Respondent's bar staff, were employed by the Respondent to do.

57. The Chairman believes that the bar staff who were in place after Mr Park's departure were "perfectly capable" of doing the work that they were employed by the Respondent to do and that there was no need for the Claimant to do any of that bar work.

58. Mr Sim's recollection is that as the Personal Licence Holder the Claimant also volunteered to deal with ordering of bar supplies but he insists that neither he nor any other member of the Respondent's Management Committee would ever have expected the Claimant to undertake cleaning work or to do catering work on any long term basis.

59. The Claimant's contract stated that "your hours of work will be determined by the Finance Convener and/or the Club Captain", that "your normal hours of work are 35 hours per week Monday – Friday", that "on occasions where you are asked to work overtime you will be paid at time and a half for any additional hours Monday – Saturday and double time on Sundays" and that

"salaries are reviewed in January of each year and any amendments are effective from 1 January."

60. The Claimant insists that in 2011 the then captain of the Golf Club, prompted by the Claimant asking to be paid overtime when she had perceived it to be necessary for her to work longer than her contracted hours, had told her that she was not entitled to be paid overtime. Notwithstanding the wording of the Claimant's contract, after that advice was given to her by the then captain and prior to Mr Park leaving the Respondent's employment the Claimant had never sought any payment for overtime worked by her.

61. The Chairman had never read the Claimant's contract and did not know what it said about being entitled to be paid at overtime rates. Nor did he realise that the Claimant's contract did not specify what duties were required to be completed by the person holding the role of Club Secretary/Treasurer, i.e. the role held by the Claimant throughout her period of employment with the Respondent.

62. The Chairman had assumed that someone holding a senior administrative role such as Club Secretary/Treasurer would be required to work, and would expect to have to work, "on a professional basis" by undertaking work as and when required out-with normal working hours without being paid overtime for doing so.

63. The Chairman would not have been surprised had the Claimant taken time off in lieu for overtime worked by her but he was not aware of any contractual mechanism contained within the Claimant's contract which would have entitled her to do so.

64. The Claimant's contract did not refer to or envisage any mechanism which would have entitled the Claimant to take time off in lieu for overtime worked by her.

65. Notwithstanding that the Chairman and the Respondent's Finance Convener, amongst others within the Respondent's Management Committee, knew that the Claimant was carrying out work over and above work that she had been doing prior to Mr Park's departure, the Respondent never made any additional payment to her which was explicitly an overtime payment. It did, however, make extra payments to her in each of November and December 2015 which were not explicitly overtime payments.

66. On or about 22 November 2015 a payslip was issued to the Claimant which showed, in addition to her basic pay of £1,971.90 for the month, a "bonus" of £455. That "bonus" had been subject to PAYE tax and employee NIC deductions.

67. The Claimant had responsibility for dealing with the Respondent's payroll in which case it is reasonable to assume that when procuring the issue of a payslip to herself she would understand what was meant on that payslip, a payslip as "bonus".

68. The Claimant purports to have assumed that that November 2015 "bonus", a sum approximately equivalent to a week's pay, was being paid to her by the Respondent to compensate her for the additional work carried out by her after Mr Park had left the Respondent's employment.

69. For his part, the Chairman believed that that £455 November "bonus" payment was one of two additional weeks' pay which he had obtained authority from the Respondent's Management Committee to pay to the Claimant in recognition of the additional hours worked by her during the four week period after Mr Park had left the Respondent's employment.

70. In December 2015 a payslip was issued to the Claimant showing a "bonus" of £500 and a "pay adjustment" of £455. That "bonus" and that "pay adjustment" had been subject to PAYE tax and employee NIC deductions.

71. The Claimant had responsibility for dealing with the Respondent's payroll in which case it is reasonable to assume that when procuring the issue of a

payslip to herself she would understand what was meant on that payslip as "bonus" and what was meant by "pay adjustment".

72. The Claimant purports to have assumed that that £500 "bonus" was a Christmas bonus similar to – (but higher than) – that issued to other members of the Respondent's staff and similar to – (but higher than) – a Christmas bonus which she had received in previous years.

73. For his part, the Chairman believed that that £500 payment was indeed a Christmas bonus but that it was a bonus calculated at a figure £250 higher than the Claimant would otherwise have been awarded and therefore one which, to a degree at least, recognised the additional work that the Claimant had done to help the Respondent in the aftermath of Mr Park's departure.

74. The Claimant purports to have assumed that the £455 "pay adjustment" was a payment equivalent to one week's pay which was being paid to her at the end of the Respondent's holiday year in lieu of one week's holiday which she had been unable to take "because of pressure of work". But the payslip made no mention of it being "holiday pay".

75. For his part, the Chairman believed that the £455 payment was the second of the two additional weeks' pay which he had obtained authority from the Respondent's Management Committee to pay to the Claimant in recognition of the additional hours worked by her during the four week period after Mr Park had left the Respondent's employment.

76. At no time after December 2016 did the Claimant receive any remuneration from the Respondent which was over and above her normal salary for her role as Secretary/Treasurer.

77. The Respondent published and made available to its employees, including the Claimant, a document entitled "Grievance Procedure" which contained a section headed "Individual Grievance Policy and Procedure". That policy is hereinafter referred to as "the Grievance Procedure Policy".

78. Under the heading "Grievance", the Claimant's contract stated that "if you have any grievance relating to your employment, you should follow the procedure detailed in the accompanying Grievance Procedure document."

79. The Claimant admits that she was aware that the Respondent had published a grievance procedure and had made it available to all of its members of staff including to her, but she insists that she had never been "issued" with a copy of the Grievance Procedure Policy and had never read it.

80. Mr Sim is certain that the Claimant had a copy of the Grievance Procedure Policy in a drawer or cabinet within her room at the Club House, that she knew where it was and, indeed, that she had previously retrieved it from such a place and shown it to Mr Sim in the context of discussions about another member of staff.

81. Under the heading "principles", the Grievance Procedure Policy stated that "all issues raised under the procedure will be treated as confidential and handled promptly and sensitively" and that "at each stage of the procedure the individual will be advised in writing of the outcome, together with details of the next stage should they wish to pursue the grievance further."

82. Under the heading "The Procedure", the Grievance Procedure Policy stated that "the procedure is designed to resolve grievances as quickly and as near to the point of the origin as possible" and that "throughout the procedure there may be a need for both parties to compromise in order to reach a satisfactory solution."

83. Under the heading "Informal procedure", the Grievance Procedure Policy stated that "in most cases the problem can be resolved informally by discussion between the individual and their Supervisor".

84. Under the heading "Formal procedure", the Grievance Procedure Policy stated that "where informal discussions do not resolve the grievance, the formal procedure aims to resolve the situation with the least possible delay" that "if informal discussions have failed to resolve the issue, an individual

may raise their grievance in writing to the Convener" and that "if the matter is not resolved the individual may raise the matter to the Captain… in writing within five working days of the outcome of the previous stage."

85. In March/April 2016 the Chairman "came to realise" that the Claimant was "doing more hours" than she had previously done prior to Mr Park's departure. He had discussions with Mr Sim who by that time was already helping out the Claimant by taking notes and preparing minutes of monthly Management Committee meetings, a responsibility which was within the Claimant's remit as Secretary/Treasurer.

86. Even at that time the Chairman's perception was that the Claimant "looked busy" but "not busy enough" to cause him to be "particularly concerned" or to gain "any impression of things being untoward".

87. On a number of occasions after Mr Park left the Respondent's employment - (all occasions prior to 5 May 2016) - the Claimant spoke with Mr Sim about the longer hours that she was working and about her perception that she was by then unable to carry out both the duties which were incumbent on her role as Club Secretary/Treasurer and the duties that she had taken on herself to do after Mr Park had left the Respondent's employment.

88. Sometime before May 2016 the Claimant had spoken to Mr Sim about feeling that she "was drowning a bit" and "letting everyone down so far as my own job was concerned" and on occasions she had also spoken to another member of the Respondent's Management Committee, Mr Sloan, in similar terms.

89. The Claimant accepts that on none of those pre-May-2016 occasions had she even informally expressed a grievance, as such.

90. Late in April 2016 the Claimant was copied into an e-mail from the Convener of the Respondent's Development Sub-Committee which had suggested that the Claimant be instructed to "phone round" all of the addressees of the earlier local-business sponsorship letter.

91. The Claimant regards the suggestion made by the Convener of the Respondent's Development Sub-Committee in the e-mail copied to her as "a step too far" for her to accept without resigning and as being "the tipping point" so far as her decision to resign from her employment was concerned.

92. The Claimant admits that "that" – (the suggestion made by the Convener of the Respondent's Development Sub-Committee in the e-mail copied to her) - was the event that caused her to decide to resign from her employment.

93. The Claimant was never actually instructed either by the Chairman or by Mr Sim as her line manager and member of the Respondent's Management Committee or by any other member of the Respondent's Management Committee to make such phone calls.

94. The Chairman regards membership mail-shots or local business sponsorship mail-shots as being an administrative task falling within the normal remit of the Respondent's Secretary/Treasurer, i.e. within the Claimant's role. He felt that it was "part and parcel of her duties" as Secretary/Treasurer for the Claimant to do that work.

95. The Claimant accepts that following up a mail shot about membership and/or sponsorship opportunities was a task appropriate to be given to her as the Respondent's Secretary/Treasurer, i.e. an administrative task, and not work that Mr Park, as the Respondent's Club Master would previously have undertaken.

96. Although following up mail shots by making telephone calls to local businesses was something that the Claimant was never actually asked to do by any member of the Respondent's Management Committee the Claimant's perception is that because – (as she admits was the case) - dealing with such matters fell within the remit of her role as Secretary/Treasurer it was "inevitable" and "reasonable" for her to assume that she would be asked to do that even although, at the stage of her asking to meet with Mr Sim and even at the stage of her sending the resignation e-mail, she had never been asked to do so.

97. Early in May 2016 the Claimant asked to meet with Mr Sim. She insists that her purpose was "to inform him" that she "was on the verge of a nervous breakdown".

98. Mr Sim describes the Claimant's approach to him early in May 2016 as being "different", as being "more than a comment", as being "not like usual". He identified the difference as being that on that occasion in early May 2016 the Claimant she had specifically asked to have a meeting with him to express her concerns.

99. Mr Sim recalls having told the Claimant at that early May 2016 meeting that she should express her concerns in the form of a written grievance.

100. The Claimant cannot now be sure that she was not told that but she continues to "think" that there was no such suggestion made.

101. The Claimant admits that in any event she had decided not to put anything in writing because, as she perceived it, she had done all that was necessary to express her grievance by asking for a meeting with Mr Sim and then leaving it to him to raise matters with the Respondent's Management Committee as he did in his e-mail. She felt that she had given the Respondent "notice of the issues she had with her employment and the opportunity to resolve those" on numerous occasions.

102. The Claimant accepts that until that time early in May 2016 she had neither raised a formal grievance nor even informally aired a grievance with Mr Sim as her line manager.

103. On 5 May 2016 Mr Sim sent an e-mail to the Chairman and to a Mr Cobburn – (who was another member of the Respondent's Management Committee). The content of that e-mail – (hereinafter, "Mr Sim's e-mail") – is quoted as including, -

> "Guys,

I had another recent series of plaintive discussions with Susan this morning – she does not make complaints lightly or frivolously and we must recognise we have a serious problem, not just brewing but coming to the boil.

We have put a tremendous additional workload on her shoulders with the departure of Hugh, and the arrival of a different catering model. She has been willing to do that, sometimes under traumatic circumstances, but even if she has a job description I'll bet these duties are not listed.

What is tipping the scales increasingly is all the other tasks she is having dumped on her. She is not anybody's secretary (with the possible exception of the Captain's), she is Secretary of the Golf Club and must not be treated as a skivvy.

When I went into the Allander Room this morning it was quite literally covered in papers, on every conceivable surface. Her normal day job consists of interruptions, never mind all the additional tasks she has been asked to undertake. In all my years on Committee I have never seen so much extra work thrown her way. She has always worked considerably longer hours than contracted, including taking work home regularly, and she sees everyone else and their auntie getting overtime while she does not.

Conveners and their assistants must undertake their own work in future, and requests for so much extra information must be curtailed vigorously otherwise Susan's basic job will suffer and mistakes will be made.

Susan is on the verge of resigning (I have seen staff being overwhelmed before and just giving up) and we would face a substantial claim for constructive dismissal, which she would win without doubt. The impact on Members, just as we feel we may be

turning the ship around, would not be worth contemplating. We must tackle this urgently, or I will be joining her.

Yours with regret."

104. Mr Sim's e-mail was copied by him, Mr Sim himself, to the Claimant on 9 May 2016 with a covering e-mail stating, "Hope this is a fair comment". Mr Sim's purposes in copying his 5 May e-mail to the Claimant on 9 May were twofold, namely to provide the Claimant with reassurance that both as her line manager and as a member of the Respondent's Management Committee he was trying to present her point of view to the Respondent's Management Committee – (and, in so doing, to procure changes which he hoped would be acceptable to her) – and to minimise any risk that the Respondent would lose the services of its valued Secretary/Treasurer and suffer from the consequences of doing so.

105. For three months prior to May 2016 Mr Sim had acted as minute taker at monthly meetings of the Respondent's Management Committee, a task previously – (and for many years) - undertaken by the Claimant as part of her duties as Secretary/Treasurer. He had done so in the hope that by doing so he would lighten the workload that he knew the Claimant had taken it upon herself to do.

106. Mr Sim is candid in his expression of his feelings as being that, as he put it, "the last thing we wanted to do in a period of change was to lose the Secretary" and that the Respondent's Management Committee's priority was not to ease the Claimant's workload or otherwise address the problems that she had raised with him early in May 2016 but was to "keep the Club running".

107. Mr Sim's motives were altruistic, but only in part.

108. Mr Sim is certain that once he had sent his 5 May 2016 e-mail to the Chairman he, the Chairman, took immediate steps to address the issues that had been raised.

109. The Chairman is certain that the Claimant had never formally expressed a grievance – (whether in writing or whether verbally) - prior to her asking to have a meeting with Mr Sim a few days prior to Mr Sim's e-mail being sent and for that reason he was surprised by the fact and content of Mr Sim's e-mail.

110. The Chairman believed that Mr Sim's e-mail represented "an overreaction" and that Mr Sim "got it wrong". Nevertheless, at the time of receipt of Mr Sim's e-mail the Chairman determined that he needed to find out more about the Claimant's concerns and he took steps to do so by immediately setting up a meeting with her, i.e. that same day, and talking her concerns through with her.

111. Having spoken to the Claimant the Chairman believed that she was "taking on tasks we hadn't asked her to do" and that "other people should have been asked by her to do those tasks", those being tasks which were perfectly suitable to be done by even part time bar – (or catering) - staff members rather than by the Claimant as the Club Secretary/Treasurer.

112. The Chairman believed at the time of his meeting with the Claimant on 5 May, i.e. the meeting that he set up with her on the day that he received Mr Sim's e-mail, that the Claimant, "was getting involved in things she was not needing to". It was because of that belief that he "had made what I thought were valid suggestions", suggestions which, as he perceived it, the Claimant "was in control of implementing".

113. Having listened to the concerns expressed by the Claimant directly to him at the meeting on 5 May the Chairman instructed the Claimant not to do work which could more appropriately be done by bar or catering staff – (for example, serving behind the bar and cleaning) - and he explained that she should be delegating all of that work to the Respondent's bar staff members.

114. At that discussion on 5 May the Chairman suggested that the Claimant should have discussions with the part time catering manager to explain what he, the Chairman, had instructed and he suggested that he personally

would prepare documentation – (such as a stock sheet) - which he felt would enable stock to be checked more easily.

115. The Claimant rejected all of those suggestions. She felt that none of what the Chairman was suggesting to her at that meeting on 5 May was necessary.

116. That meeting on 5 May ended with the Chairman repeating to the Claimant that although he accepted that he had asked her to be the Personal Licence Holder for licensing law purposes he had never expected her to work as a member of the bar staff.

117. The Claimant admits that the Chairman told her to stop cleaning the bar cellar and to delegate such work but that she continued to do so even in the face of such direct instructions, her feeling being that "there was no one available", this despite the fact that the Respondent had employed bar staff whose job it was to do such work.

118. On 23 May 2016 the Claimant sent an e-mail to the Chairman, with copies to Mr Sim and a Mr Gordon Sloan, which had as its subject heading the word, "Resignation".

119. That 23 May 2016 e-mail from the Claimant to the Chairman, as copied to Mr Sim and Mr Sloan, is hereinafter referred to as "the Resignation e-mail".

120. The Resignation e-mail was very brief. It contained only three substantive, single-sentence, paragraphs. Those three paragraphs stated:-

> "This is the most difficult I have ever had to compose and the decision has not been taken lightly.
>
> I wish to tender my resignation at today's date. In accordance with my contract, I give one month's notice to the Club.

> As I will still have two and a half week's holiday entitlement to take, my final working day at Milngavie Golf Club will be 10 June 2016."

121. Under the heading "Termination of Employment", the Claimant's contract stated that "if you wish to terminate your employment with Milngavie Golf Club, you are required to give 4 weeks' notice in writing to the Club Captain" and that "should Milngavie Golf Club need to terminate your employment for reasons other than gross misconduct you will be entitled to 1 week notice for each year of service up to a maximum of 12 weeks after 12 years continuous service."

122. The explanation offered by the Claimant for having given the Respondent one month's notice of termination of her employment is that she did so because she believed that she was contractually obliged to do so.

123. The Resignation e-mail did not hint at the reason for the Claimant's resignation being that she felt that she had been constructively dismissed by the Respondent.

124. On the day that the Claimant sent the Resignation e-mail, at a time that day very soon after he had received it, the Chairman spoke to the Claimant by telephone. And later that same day he met with her at her home.

125. At that meeting at the Claimant's home on the evening of 23 May the Chairman told the Claimant that the Respondent did not wish her to leave its employment and he asked what steps it, the Respondent, needed to take to persuade her to withdraw her resignation. The Chairman tried to persuade the Claimant to change her mind about resigning. But she refused to change her mind.

126. Over the ensuing eight days the Chairman had two further discussions with the Claimant about her resignation, but on each of those occasions, despite him having asked her to tell the Respondent what work she was prepared to do and what hours she wanted to work, the Claimant refused to withdraw

her resignation. On each occasion the Claimant told him that "I had reached breaking point and couldn't go on the way I had been".

127. At those discussions on and within the eight day period after 23 May the Chairman offered to change the Claimant's hours to part-time hours if that is what she wanted. He offered to recruit new members of staff to take some of the work that she was doing away from her. And he sought to persuade her to give the Respondent a period to demonstrate its good intentions so far as making things easier for her was concerned. But the Claimant refused all of these offers.

128. With the benefit of hindsight, the Chairman believes that part of the cause of the Claimant feeling overwhelmed by work was that following flooding within the clubhouse the Claimant had been moved out of her basement office there into the clubhouse's Allander Room. The Allander Room is "much more accessible to" the members of Milngavie Golf Club and to members of the Respondent's Management Committee and he thinks that it was that ready accessibility which frequently caused the Claimant to be interrupted when working and therefore that "there was a negative impact" on her ability to fulfil her core tasks as Secretary/Treasurer.

129. At the time that he had received Mr Sim's e-mail the Chairman had had reason to believe that remedial works being carried out in the basement area were "no more than a few weeks away from being completed" and that once those works had been completed the Claimant would move back to her normal office and away from distractions.

130. At the time that he had received the resignation e-mail the Chairman had believed that completion of the remedial works and the Claimant's move back to her normal office and away from the distractions faced by her wen working in the Allander Room "was no more than two weeks away".

131. The Chairman believes that, as Secretary/Treasurer working within the Respondent's clubhouse on a daily basis, the Claimant would have known "better than anyone" how the work to the basement area was progressing

and that it would not have been long after the date of the resignation e-mail before she would be moved back to her normal, less easily interrupted, office in the basement area.

132. Throughout the Tribunal process, including at the Final Hearing on the merits of her claim, the Claimant has maintained her position as being that it was the fact that she had been "copied into an e-mail from the sub-committee where it was suggested that in order to generate more business the Claimant should phone round all of the recipients of the letter to ensure that they had received it" that "was the tipping point" for her so far as her decision to send the resignation e-mail and to leave the Respondent's employment was concerned.

133. There is no evidence that the Claimant's health had actually suffered because of the work that she was undertaking whilst employed by the Respondent, in which case the Tribunal is not able to find as fact that the Claimant "had reached breaking point" so far as any effect on her health was concerned.

134. The Claimant now acknowledges that whenever in the pleadings, or whenever at the Tribunal Hearing, she has referred to being "required" to carry out work that use of the word "required" does not mean – (and it is not her intention to state) - that any member of the Respondent's Management Committee demanded or instructed that she must do work that she had not previously done. To the contrary, the Claimant confirms that what she meant by using that word, "required", is that she felt that work needed to be done and that she personally did it because, as she perceived it, there was no-one else on whom the Respondent could rely to have it done. In other words, that she did the work that she personally felt needed to be done even if no one told her to do it and, at times, even in the face of being told that she was not to do it.

135. As at the effective date of termination the Claimant's gross pay was £2,011.00 per month. After deduction of PAYE tax and employee NI contributions her normal take home pay was a net £1,631.00 per month.

136. During the period which began on the day after the effective date of termination and ended early in December 2016 the Claimant had not been in receipt of any income from employment or from a self-employed business.

137. After the effective date of termination the Claimant registered as a Jobseeker and made consistent and persistent attempts to find alternative work before succeeding in such attempts by beginning work with a business known as "Woods McCaw" on a date not earlier than 6 December 2016.

138. During the period which began on the day after the effective date of termination and ended on 6 December 2016 the Claimant received a total of £1,263.60 as Jobseeker's allowance.

139. On or about 7 December 2016 the Claimant obtained employment with Woods McCaw from whom she is in receipt of a salary of £500 per month gross. As at the date of the Tribunal Hearing the Claimant had not received any payslip which showed any deduction of PAYE or employee NI contributions and so is unable to specify what, in the future, her normal net, take home, pay will be.

140. As at the effective date of termination the Claimant was 63 years of age and had accrued a period of more than 21, but less than 22, years' continuous service as an employee of the Respondent.

<u>The Issues</u>

141. The Tribunal identified the issues which it considered to be relevant to the Claimant's complaint that she had been unfairly (constructively) dismissed contrary to the provisions of the Employment Rights Act 1996 as being whether the Claimant terminated the contract under which she was

employed in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct, all as envisaged by section 95 of that Act and, if so, whether such (constructive) dismissal was fair or unfair in terms of section 98 of that Act, an issue the determination of which requires consideration of, -

- Whether the Respondent was in breach of its contract of employment with the Claimant.

- Whether such breach was repudiatory, i.e. went to the root of the contract of employment between the Respondent and the Claimant and justified the Claimant's termination of the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

- Whether the Claimant's resignation from her employment with the Respondent was a direct result of that repudiatory breach.

- Whether the Claimant resigned timeously or whether she waived such repudiatory breach by delaying in resigning.

- Whether, if the Claimant's resignation from her employment with notice was justified, i.e. was effected in circumstances in which she was entitled to terminate her employment without notice by reason of the Respondent's conduct, that constructive dismissal was unfair.

The Relevant Law

142 Legislation and Regulations

- The Employment Rights Act 1996, sections 95(1)(c) and 98

Case Law

- Sovereign House Security Services Limited v Savage, 1989 IRLR 115.
- Walker v Josiah Wedgwood & Sons Limited, 1978 IRLR 105.
- Nottinghamshire County Council v Meikle, 2004 IRLR 703.
- Jones v F Sirl & Son (Furnishers) Limited, 1997 IRLR 493.
- Wadham Stringer Commercials (London) Limited v Brown, 1983 IRLR 46.
- Western Excavating (ECC) Limited v Sharp, 1978 QB 761, CA.
- W A Goold (Pearmark) Limited v McConnell, 1995 IRLR 516.

Discussion

143. The Tribunal considers that it is not necessary within this judgment to paraphrase or even summarise the evidence that was obtained over the course of the Final Hearing on the merits of the Claimant's claim, especially so when what it considers to be the relevant Findings in Fact have been set out in such detail earlier in this Judgment, but that it is appropriate to add some explanation to the Findings in Fact so set out by making reference to some of the oral evidence, to some of the productions and to some of the closing submissions received from the parties' respective representatives and, by doing so, to put the Findings in Fact relevant to the Claimant's claim into context when applying the relevant law to that claim.

144. Section 95 of the Employment Rights Act 1996 – (hereinafter, "ERA 1996") – states that, -

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if) -
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a contract for a fixed term and that term expires without being renewed under the same contract, or

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) 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 Respondent's conduct.

145. The Claimant resigned from her employment with the Respondent. She did so when sending the resignation e-mail on 23 May 2016. When tendering her resignation she gave notice of termination of her employment and as it transpired the effective date of termination of her employment was 10 June 2016.

146. Referring back to the wording of subsection (1)(c) of Section 95 of ERA 1996, there is no doubt that the Claimant terminates the contract under which she was employed and that she did so with notice. But that statement begs the question of whether she did so in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

147. It is for the Claimant to demonstrate to the Tribunal that when terminating her employment as she did she did so in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

148. The Claimant has sought to discharge that onus by referring in her evidence to her contemporary belief that the Respondent was asking her to make marketing telephone calls, or was intent on doing so, and to her perception that for it to do so "after many months of doing so much additional work" was "the tipping point", the "step too far" which had prompted her to send the

resignation e-mail. Through her representative at closing submission stage, she has contended that that was the "last straw" for her.

149. In her closing submissions the Claimant's representative referred to the Claimant's resignation having "followed a series of actions and inactions of the Respondent including their treatment of her following the redundancy of one of her colleagues and the expectation that she would take on the work previously undertaken by this colleague" and to her contention that her resignation "came about despite her numerous attempts to try and resolve this situation", all of which had "led the Claimant to feel that the relationship between her and the Respondent had fundamentally broken down, with the trust and confidence expected from the employment relationship lost". These propositions tied in with the claims made in the ET1 that the Respondent had breached both the implied term of trust and confidence which existed in the Claimant's contract of employment and "the implied term of support", that "this breach" was "sufficiently serious to constitute a repudiatory breach", that "by the Claimant's resignation she accepted the breach, that "… accordingly the termination of her employment amounts to a dismissal within the meaning of Section 95(1)(3) of the Employment Rights Act 1996" and "that her dismissal was both wrongful and unfair…" and the Tribunal has taken account of such propositions when reaching its decision. But it is appropriate to note within this Judgment that in direct response to a question put to her by the Employment Judge the Claimant's representative herself confirmed that – (to use legal jargon frequently used in the context of claims of unfair constructive dismissal) - the Claimant's claim is a "last straw" case and that that last straw had to do with the Claimant having been copied into a sub-committee e-mail which suggested that she should be asked to make follow-up phone calls to local businesses, something which the Claimant herself admits she was never actually asked to do but which if she had been asked to do it would have fallen within the remit of her role as the Respondent's Secretary/Treasurer.

150. The Claimant has admitted that she never formally raised any grievance with the Respondent as her employer. She has admitted that she had

deliberately chosen not to do so despite the fact that she knew that the Respondent did have a Grievance Procedure Policy – (and, according to Mr Sim's unequivocal evidence, knew where that policy was within her office and had previously shown it to him in connection with another member of the Respondent's staff).

151. There is no doubt that the Claimant was doing work, a lot more work, than fell within the remit of her role as the Respondent's Secretary/Treasurer.

152. It is inconceivable that the members of the Respondent's Management Committee did not know that.

153. From the evidence that it heard the Tribunal concluded that the Claimant might reasonably have considered that the actions of the Respondent's Management Committee were indicative of the fact that the Respondent, as such, was not a proactively good employer. But even if that was a true reflection of how bad, or good, an employer the Respondent was it would not, in itself, mean that the Respondent, as the Claimant's employer, had perpetrated repudiatory breaches of the Claimant's terms and conditions of employment which entitled her to terminate her employment with notice in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

154. It was apparent to the Tribunal that the Claimant's effective line manager, Mr Sim, only had meetings with her twice a week when he "popped in" after playing golf and that the Chairman rarely met with her at all.

155. It was apparent to the Tribunal that the Respondent's Management Committee in general and the Chairman in particular worked on the basis of "if it ain't broke don't fix it" by allowing the Claimant to continue to do work which she had taken upon herself to do following Mr Park's departure.

156. It was clear from the evidence that such attempts as the Respondent made to stop the Claimant doing work that she was not employed to do – (and therefore too much work) – (specifically when instructions were given by the

Chairman to the Claimant to stop doing certain things) - were ignored or disregarded by the Claimant who clearly preferred to continue to do things her way and to continue do those things that she had chosen to do even when told not to. It was equally clear, however, that between the end of August 2015 and the beginning of May 2016 the actions that the Respondent took to ensure that the Claimant was not taking too much work upon herself were minimal.

157. Yet it was apparent to the Tribunal from the evidence that it heard that even if the Claimant might reasonably have felt that she was being taken advantage of by being allowed to do work previously done by Mr Park, i.e. allowed or permitted by the Respondent's Management Committee to do work previously done by Mr Park even although she had not specifically been instructed by anyone to do it, she continued to work on, without raising a grievance and without either stopping doing that additional work or even protesting that being expected to do it was unreasonable, until early in May 2016 when, perceiving that she was about to be instructed to make marketing telephone calls to local businesses, she asked for and was given a meeting with Mr Sim, a meeting which Mr Sim immediately acted upon by sending his 5 May 2016 e-mail to the Chairman.

158. All of which suggests that even in her own perception the working conditions that the Claimant had effectively created for herself by taking on work that she had not been instructed to do were not so awful that she felt that she could not continue to do that additional, self-assumed, work.

159. The Chairman gave evidence that he realised that the Claimant was busy, that he knew that she had taken on responsibility as Personal Licence Holder and that as part of taking on that responsibility she had insisted that she was given the authority to act as line manager for the Respondent's bar staff.

160. But the Chairman's evidence was equally clear that until Mr Sim's e-mail had been received by him he, the Chairman, had not had any concerns and

was certainly not aware that anything resembling a grievance was being raised by the Claimant.

161. It is clear that by asking Mr Sim early in May 2016 to meet with her, the Claimant's intention was to raise a grievance.

162. She chose to do so informally and in the belief that what she complained about to Mr Sim would be relayed by him to the Respondent's Management Committee.

163. In the finding of the Tribunal a grievance was raised early in May 2016, i.e. at the meeting with Mr Sim that the Claimant had asked for and was given and which resulted in Mr Sim's e-mail being sent.

164. As it transpired, what the Claimant complained about to Mr Sim was indeed relayed by him to the Respondent's Management Committee very quickly, i.e. in the form of Mr Sim's e-mail. And when the Chairman read Mr Sim's e-mail he acted very quickly by having a meeting with the Claimant.

165. The Tribunal was satisfied that whenever, for the very first time, the Claimant had raised anything which resembled a grievance, even when she did so only informally by asking for a meeting with Mr Sim early in May 2016, Mr Sim promptly relayed that grievance to the Respondent's Management Committee and, in the person of the Chairman, the Respondent took immediate steps to obtain a better understanding of her grievance.

166. The Claimant never followed up that informal expression of a grievance by raising any formal grievance in terms of the Grievance Procedure Policy.

167. Within three weeks of her meeting with Mr Sim, some two and a half weeks after the Chairman had met with her on 5 May and some two weeks after Mr Sim's e-mail was copied by him to her, the Claimant resigned. As Mr Sim's email had highlighted – (or hinted) - she might do.

168. The words used by the Claimant in the resignation e-mail were unambiguous and, in the finding of the Tribunal, were genuinely understood by the Chairman at face value, i.e. as constituting intimation by the Claimant to the Respondent on 23 May 2016 that she was tendering her resignation as at that date but that, in accordance with what she believed to be her contractual obligation, she was giving notice of termination of her employment, notice which was accompanied by an explanation that as she still had two and a half weeks holiday entitlement to take her final working day – (the effective date of termination) - would be 10 June 2016.

169. There is no doubt that as soon as he saw the resignation e-mail the Chairman tried – (and over a period of eight days persistently tried) - to persuade the Claimant to withdraw her resignation. But by then, as soon as the resignation e-mail had been received by the Respondent, the Claimant's resignation had been effected, albeit with notice.

170. In which case the guidance given by the Court of Appeal in the case of **Sovereign House Security Services Limited v Savage** that "…. where unambiguous words of resignation are used by an employee to the employer directly or by an intermediary, and are so understood by the employer, the proper conclusion of fact is that the employee has in truth resigned" and that "… tribunals should not be astute to find otherwise" is appropriate.

171. In the present case, the words used by the Claimant in the resignation e-mail were unambiguous and, taken at face value, indicated a clear and present intention by her to sever the employment relationship and to stop working for the Respondent on the effective date of termination, 10 June 2016.

172. The Tribunal heard evidence from the Claimant and from the Chairman that the Chairman had tried to persuade the Claimant to change her mind, to withdraw her resignation. The Tribunal was satisfied that the Chairman was prepared to do whatever it took in order to persuade the Claimant to change

her mind about resigning. But the Claimant made it clear in her evidence that she had never had any intention of changing her mind and that once she had intimated her resignation in the resignation e-mail she had no intention of ever working for the Respondent at any time after 10 June 2016.

173. It is clear from the terms of the resignation e-mail, from the evidence that both the Claimant and the Chairman gave about the Claimant's reaction to the Chairman's attempts to persuade her to withdraw her resignation – (and, indeed, from the content of Mr Sim's e-mail and what Mr Sim and the Chairman respectively told the Tribunal) - that for her part the Claimant intended to resign from her employment but that the Respondent had no wish for her to leave its employment.

174. The Respondent's representative suggested to the Tribunal that the post resignation e-mail actions of the Respondent evidenced clear intention by the Respondent not to perpetrate any repudiatory breach of any fundamental term of the Claimant's contract, that desire on the part of the Respondent that the Claimant should withdraw her resignation and remain its employee was apparent from the Chairman's willingness, as expressed to the Claimant, to do whatever she wanted the Respondent to do so far as restricting her duties - (or work which she was doing but which fell out-with her duties) - , by restricting her hours of work, by allowing her to work part time if that was her wish and by employing additional bar staff.

175. The Tribunal was satisfied that had the Claimant been persuaded by the Chairman at his meeting with her on 23 May – (or on any of the occasions in the eight day period after that date when he spoke with her) - to withdraw her resignation on the basis that whatever changes she, the Claimant, felt were necessary, would be effected – (a "blank cheque" undertaken having been given by the Chairman to her) – she would have reverted to doing only the work that she had been doing prior to Mr Park's departure, the work appropriate to her role as Secretary/Treasurer, and that the Respondent's clear wish not to lose her services would have been achieved, thereby enabling the Claimant to continue work that she had been doing for some 21

years prior to Mr Park's departure. As a corollary, that outcome would have ensured that the Respondent retained her valued services as Secretary/Treasurer.

176. The Tribunal was satisfied that that the Respondent had not had any positive intent to affect any repudiatory breach of the Claimant's employment. But that does not mean that they did not do so unintentionally. Nor does it in itself mean that the Claimant was not justified in resigning, did not fall into the category of being an employee who terminated the contract under which she was employed in circumstances in she was entitled to terminate it without notice by reason of the Respondent's conduct.

177. The Claimant claims that she has been unfairly (constructively) dismissed by the Respondent.

178. For her claim of unfair (constructive) dismissal to succeed the Claimant must prove a fundamental or repudiatory breach of the employment contract by the Respondent. The Respondent must be proved to have broken the contract in such a way that a fundamental term of the Claimant's terms and conditions of employment was breached.

179. It is established law that for a Claimant to successfully prove unfair (constructive) dismissal she or he must prove that she or he left in response to a breach committed by the employer, the guidance given in the case of **Walker v Josiah Wedgewood & Sons Limited** being that, -

> "..it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case ….".

180. But since that decision in the case of **Walker v Josiah Wedgwood & Sons Limited** was handed down it has been established by the Court of Appeal in the case of **Nottinghamshire County Council v Meikle** and by the EAT in the case of **Jones v F Sirl & Son (Furnishers) Limited** that the repudiatory

breach or breaches need not be the sole cause provided it or they is or are the effective cause.

181. In the case of **Jones v F Sirl & Son (Furnishers) Limited** the EAT gave guidance that in deciding whether an employee left employment in consequence of a fundamental breach of contract by the employer a Tribunal must look at whether the repudiatory breach was the effective cause of the resignation. Delivering the judgment of the EAT in that case of **Jones v F Sirl & Son (Furnishers) Limited,** Judge Smith stated that, -

> "..it is clear from case law that in order to decide whether an employee has left in consequence of fundamental breach, the Industrial Tribunal must look to see whether the employers repudiatory breach was the *effective cause* of the resignation. It is important, in our judgment, to appreciate that in such a situation of potentially constructive dismissal, particularly in today's labour market, there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of his contract of employment entitling him to put an end to it. Thus an employee may leave both because of the fundamental and repudiatory breaches, and also because of the fact that he has found another job. In such a situation, which will not be uncommon, the Industrial Tribunal must find out what the effective cause of the resignation was, depending on the individual circumstances of any given case",

and that, -

> "In our judgment, in the case of an employee like the appellant who had been in the self same employment for a period of almost thirty years, the overwhelming presumption is that when a whole series of serious breaches of contract occur over a few months and the employee then leaves only three weeks later to go to another job, the effective cause of her leaving is the fundamental breach of contract. Whilst the breach must be the effective cause of the

resignation, it does not have to be the sole cause, and there can be a combination of causes provided the effective cause for the resignation is the breach."

182. In the case of **Nottinghamshire County Council v Meikle** the Court of Appeal went further, Lord Justice Keene stating that, - "The proper approach, ..once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation.." and that "it follows that .. it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer".

183. The Tribunal has borne it in mind that the Claimant's contract lacked specification as to what her job role was but that, as the Claimant had confirmed in her own evidence, from the very beginning of her employment with the Respondent, some 21 years previously, she had more or less made up her own job description and had just done whatever she perceived it was necessary or appropriate for her, as one of only two members of an administration team employed by the Respondent, to do. Strange though it may seem, the reality was that it was the Claimant herself who decided what work it was appropriate for her to do. No-one else.

184. In the finding of the Tribunal, even after Mr Park left the Respondent's employment a month or so earlier than the Respondent had expected him to, it was the Claimant herself who had decided to take on elements of the work previously undertaken by him. At that time she was never asked by the Respondent to do anything other than to accept the responsibility of acting as the Personal Licence Holder for the purposes of licensing laws. And that was something that she was very willing to do, had had previous experience in doing and which she took on only on the condition that the Respondent would respect her own insistence that she would have authority as line manager for the bar and catering staff.

185. The Tribunal was satisfied that the Respondent had never asked the Claimant to do anything else, let alone instructed her to do anything else, that fell within the remit of what Mr Park had previously done.

186. It was clear that the Chairman, Mr Sim, and other members of the Respondent's Management Committee knew – (or reasonably ought to have known) - that the Claimant was doing a lot of the work previously undertaken by Mr Park. But is equally clear that from time to time the Chairman – (in particular) - told the Claimant to stop doing elements of that work and to delegate and that those instructions from the Chairman were consistently being met either by the Claimant's refusal to accept such an instruction or by her utter disregard of them.

187. In the view of the Tribunal the Claimant did what she wanted to do, not what she was told to do.

188. When sending the resignation e-mail the Claimant provided the Respondent with no expressed reason for her resignation There was no suggestion in the resignation e-mail or which might be inferred from the Claimant's actions prior to the effective date of termination that she, the Claimant, felt at that time that she was entitled to terminate her employment without notice in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct. But that is not in itself fatal so far as the Claimant's subsequent resolve to claim that she was unfairly constructively dismissed by the Respondent is concerned.

189. In the view of the Tribunal reasons for the Claimant resigning from her employment with the Respondent were only provided to the Respondent after the resignation e-mail had been sent – (and, indeed, may have evolved with the passage of the period of time which includes the progression of the Claimant's claim). That said, the Tribunal was satisfied that running through the Claimant's reasons as variously expressed after the resignation e-mail was sent was a thread of thought, perhaps a misconceived perception by her, that the Respondent had either asked her to make marketing telephone calls or was intent on doing so.

190. It is apparent that even if misconceived it was that perception that was "the tipping point" the "step too far" expressed by the Claimant personally, or the "last straw" discussed by her representative, at the Final Hearing.

191. In the finding of the Tribunal that "tipping point", that "step too far", that "last straw" which had led the Claimant to feel that the Respondent had either fundamentally breached the terms of her employment with it or intended to do so.

192. The Tribunal has borne it in mind that – (at times, seemingly, almost perversely) - the Claimant has consistently reverted to assuring the Tribunal that "the tipping point", the "step too far" and the "last straw" which had prompted her to send the resignation e-mail was a perception by her that the Respondent had either asked her to make marketing telephone calls or was intent on doing so. It has borne it in mind, too, that although the Claimant accepts as fact that she had never actually been asked to make marketing telephone calls she but acknowledges – (and knew at the time) - that if she was asked to do that then that work would fall fairly and squarely within her remit as the Respondent's Secretary/Treasurer.

193. Put bluntly, the Tribunal was satisfied that the Claimant acted in accordance with only her own perception that something which had not happened - (and in fact did not happen prior to the resignation e-mail being sent) - was about to happen.

194. Before reaching its determination the Tribunal revisited the Claimant's representative's proposition that the Claimant's resignation had "followed a series of actions and inactions of the Respondent including their treatment of her following the redundancy of one of her colleagues and the expectation that she would take on the work previously undertaken by this colleague" and that her resignation "came about despite her numerous attempts to try and resolve this situation", all of which had "led the Claimant to feel that the relationship between her and the Respondent had fundamentally broken down, with the trust and confidence expected from the employment relationship lost". Having revisited these matters and considered such

propositions in the light of the evidence that it had heard the Tribunal determined that there had been no "expectation" by the Respondent that the Claimant would take on any additional work or responsibility other than to act as Personal Licence Holder, that she, the Claimant, had not made "numerous attempts to try and resolve this situation" – (but, to the contrary, had resisted albeit minimal attempts by the Chairman to get her to stop doing what she was not supposed to be doing) – and that the Respondent had appreciated her voluntary attempts to help out after Mr Park's departure, had appreciated that effort so much that in each of November and December 2015 her remuneration was enhanced substantially. In the finding of the Tribunal the failures on the part of the Respondent to stop her from acting as she did, from taking on work that she was neither employed to do nor required to do, did not constitute actions or inactions on the part of the Respondent which caused the relationship between it and the Claimant to break down fundamentally or to destroy the trust and confidence expected from the employment relationship.

195. The Tribunal has determined that the effective cause of the Claimant terminating her employment with the Respondent when she did, "the tipping point", "the step too far", "the final straw", was the Claimant's perception that she was about to be asked to make follow-on, marketing, phone calls to local businesses.

196. That was the tipping point, the step too far, the last straw.

197. In the view of the Tribunal there cannot be an acceptance by an employee of repudiation by the employer until there has been repudiation. Given the Claimant's insistence as to what the tipping point, the step too far, the last straw, had been, that means that in the present case the Claimant could not accept, as repudiation by the Respondent, something which the Respondent had never actually done, i.e. "repudiation" which had never happened.

198. The Tribunal was satisfied that because there had been no such repudiation, no repudiation which the Claimant was entitled to accept as being a basis for resignation amounting to constructive dismissal, the

Claimant could not accept a repudiation perceived by her as being that the Respondent was intent on asking her to make marketing telephone calls.

199. The Tribunal was satisfied that even if the making of such telephone calls did not follow within the remit of the Secretary/Treasurer – (which, in fact, the Claimant admits it did or would have done) – the Claimant could not resign in anticipation of a fundamental breach which had not happened, or at least could not resign on the basis of constructive dismissal, the Tribunal accepting that it is not enough to resign in response to a fear or expectation.

200. The Tribunal was satisfied that even if the Claimant's perception that she was about to be asked to make follow-on, marketing, telephone calls to local businesses was justified, any such request made to the Claimant as the Respondent's Secretary/Treasurer would not have amounted to a repudiatory breach entitling the Claimant to terminate the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the conduct of the Respondent as her employer. For her to do what she feared she was being or would be asked to do was something which, in the Claimant's own admission, fell within her role as the Respondent's Secretary/Treasurer.

201. The Tribunal was satisfied that, metaphorically, the Claimant had "jumped" by resigning for the reason that she has told the Tribunal was the reason for her resigning when she did, that she was not "pushed" into a situation where, because of repudiatory breach on the part of the Respondent which entitled her to terminate her employment by reason of the conduct of the Respondent as her employer and to claim constructive dismissal.

202. The Tribunal has determined that Claimant did not terminate the contract under which she was employed by the Respondent in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct.

203. If the Tribunal had found that the Respondent had perpetrated a repudiatory breach of a fundamental term of the Claimant's terms and conditions of employment then it, the Tribunal, would have gone on to consider the

questions of whether the Claimant accepted such repudiatory breach and resigned, whether she resigned timeously and whether that repudiatory breach was the effective cause of the Claimant treating the contract of employment as at an end. But the Tribunal has not been satisfied that the Respondent had been guilty of any repudiatory breach of the Claimant's terms and conditions of employment.

204. Those findings having been made by the Tribunal it follows that there is no need for the Tribunal to determine whether any such constructive dismissal, as envisaged by Section 95(1)(c) of ERA 1996 was fair or unfair in terms of Section 98 of that Act.

205. The Claimant's claim that she had been unfairly (constructively) dismissed by the Respondent has failed and is dismissed.

Employment Judge: Mr C Lucas
Date of Judgment: 08 March 2017
Entered in register: 10 March 2017
and copied to parties