



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Duerdin  
Mrs S Duerdin

**Respondent:** R&M Gaskarth

**Heard at:** Manchester

**On:** 13 and 14 March 2018

**Before:** Employment Judge Horne

## REPRESENTATION:

**Claimant:** Mr B Henry, counsel  
**Respondent:** Mr J Thornhill, solicitor

**JUDGMENT** having been sent to the parties on 23 March 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## The issues

1. By claim forms presented on 25 August 2017, the claimants raised a single complaint of unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 (“ERA”).
2. The issues for determination were clarified at the start of the hearing and further refined during the course of the parties’ closing submissions. In particular:
  - 2.1. it was not the claimants’ case that they had been dismissed within the meaning of section 95(1)(a) of ERA: their claim depended entirely on establishing that they had been constructively dismissed;
  - 2.2. the respondent conceded that, if it had fundamentally breached the claimants’ contract, the claimants had resigned in response to that breach;  
and

2.3. the respondent did not seek to argue that the claimants had affirmed the contract.

3. The first issue for me to determine, then, was whether the respondent had fundamentally breached the contract. Only one term of the contract was alleged to have been broken. This was, to use the shorthand, the implied term of trust and confidence. The ways in which it was alleged that the respondent had undermined trust and confidence were set out in the claimants' Further and Better Particulars as follows:

“

1. By convening a performance review meeting with the Claimants on 20 January 2016 and seeking to measure the Claimants' performance and impose performance targets upon them which were inconsistent with and in excess of the established performance targets of the Respondent and by pressing the Claimants to commit to a retirement date for no apparent reason Mr Smith for the Respondent, without reasonable and proper cause, acted in a manner which seriously damaged the trust and confidence which should exist between an employee and an employer.
  2. By convening a further performance review meeting with the Claimants on 31 May 2016, by repeating what he had said in the earlier meeting at (1) above both in relation to performance and in relation to seeking a retirement date and by issuing the Claimants with a verbal warning when they were achieving the established performance targets of the Respondent, Mr Smith further seriously damaged the implied duty of trust and confidence.
  3. On 29 September 2016 at yet a further performance review meeting convened by Mr Smith he again repeated what he had said at (1) above, by ignoring event which had taken place in Rochdale which were beyond the Claimants control, by ignoring that the takings had increased and by again pressing for a retirement date Mr Smith further seriously damaged the implied duty of trust and confidence.
  4. By subjecting the Claimants to a Capability and Performance meeting on 7 February 2017 despite the fact that they were performing at a level in accordance with the Respondent's established performance targets and despite the fact that the Claimants were eligible for a performance bonus by imposing unrealistic performance targets upon them Mr Smith further seriously damaged the implied duty of trust and confidence.
  5. The letter Mr Smith wrote to the Claimants on the 8 March 2017 confirming the unrealistic performance targets was the last straw.
  6. The cumulative impact of the excessive performance meetings and unreasonable performance targets set for the Claimants completely destroyed their trust and confidence in the Respondent and had a devastating impact upon their health and well-being which resulted in Mr Duerdin attempting to take his own life.”
4. I had to decide, in relation to each claimant:
- 4.1. Whether the respondent conducted itself as alleged;

- 4.2. Whether the respondent had reasonable and proper cause for such conduct;  
and
- 4.3. Whether the contract was calculated or likely to destroy or seriously damage  
the relationship of trust and confidence.
5. If there was a constructive dismissal, the respondent was required to prove the  
sole or principal reason for it. The reason asserted by the respondent was Mr  
Smith's belief that the claimants had failed and were failing to make the Roebuck  
pub profitable.
6. The issues for determination were, for each claimant:
  - 6.1. Whether the respondent could prove that this was the sole or principal reason  
for fundamentally breaching the contract;
  - 6.2. If so, whether it was one that related to the claimant's capability or conduct;  
and
  - 6.3. If the reason fell into one of those categories, whether the respondent acted  
reasonably or unreasonably in treating that reason as sufficient to dismiss the  
claimant.
7. As it turned out, I found that the claimants had been unfairly constructively  
dismissed. I announced my judgment to that effect with reasons, by which time  
the time was 4.48pm. The parties then asked me to determine one further issue  
relevant to remedy. The issue was whether Mr Duerdin's compensatory award  
should be reduced on the ground that, had the respondent not constructively  
dismissed the claimants, their employment would or might have terminated in any  
event. In particular, I considered the possibility that the claimants might have  
resigned in any event in circumstances that did not amount to a constructive  
dismissal, or that that they might have been fairly dismissed for poor  
performance. Because of the time constraints the parties agreed to my  
determining this issue under a strict timetable. Their submissions were limited to  
10 minutes and I indicated in advance that my reasons would necessarily be  
brief.

### **Evidence**

8. The claimants gave evidence on their own behalf and in support of each other.  
The respondent called Mr Smith, followed by Ms Baker. I also considered  
documents in an agreed bundle marked CR1. In keeping with the warning that I  
gave the parties, I pre-read only those documents that had been referred to in the  
witness statements and considered those documents to which the parties drew  
my attention during the hearing.

### **Facts**

9. The respondent is a large family-run company limited by guarantee, which trades  
under the brand of Samuel Smiths Brewery. It is responsible for managing some  
200 pubs across the country. Its Chairman is Mr Humphrey Smith, who also acts  
as the Area Manager for Rochdale and the surrounding area.
10. The claimants are husband and wife. Mrs Duerdin was born on 5 January 1952  
and is about 9 years older than her husband. They were employed by the  
respondent from 8 January 1996 until 9 July 2017.

11. On 19 November 1998, the claimants started managing The Roebuck Hotel in Rochdale. One feature of The Roebuck Hotel is that it was situated close to a Wetherspoons pub known as The Regal Moon, a much bigger pub than the Roebuck. Also in Rochdale there were four other Samuel Smith pubs. None of them was as close to the town centre as the Roebuck, but they were all within a relatively close walking distance of each other.
12. The respondent had a written capability procedure. Amongst its rubric, it stated:
- “1.1 The aim of this procedure is to provide a framework within which managers can work with employees to maintain satisfactory performance standards and to encourage improvement where necessary.
- ...
- 3.1 In the first instance, performance issues should normally be dealt with informally... Informal discussions may help:
- ...
- 3.1.3 establish the likely causes of poor performance and identify any training needs; and/or
- 3.1.4 set targets for improvement and a time-scale for review.
- ...
- 5.1 If we consider that there are grounds for taking formal action over alleged poor performance, you will be required to attend a capability hearing.
- ...
- 7.4 The aims of a capability hearing will usually include:
- ...
- 7.4.3 establishing the likely causes of poor performance including any reasons why any measures taken so far have not led to the required improvement.
- 7.4.4 identifying whether there are further measures, such as additional training or supervision, which may improve performance.
13. The procedure went on to set out a series of stages at which escalating sanctions could be given. At Stage 1, the sanction was a “verbal warning”. Stages 2 and 3 could result respectively in a “first written warning” and a “final written warning”. If an employee reached Stage 4 they were liable to be dismissed. At each stage, the employee was given the right of appeal. By paragraph 12.4, the procedure provided that “The appeal hearing will be conducted by someone who has the authority to overturn the decision and who has not been previously involved in the case.”
14. The financial performance of each pub was assessed using the same accounting method. Each month, the respondent’s accountants would prepare a report for each pub and send it to the Area Manager. The monthly report would state the

total Net Takings for the month. Net Takings were simply the Gross Takings minus VAT. Underneath the Net Takings was the total cost of sales. Gross Profit was calculated by subtracting the cost of sales from the takings. The report then listed operating costs such as wages and salaries, heating and lighting and so on. Once those costs were deducted from the Gross Profit, the resulting figure was the Retail Profit. From the Retail Profit came further deductions for such costs as business rates, pension contributions, depreciation and building repairs. By deducting those costs, the accountants arrived at the Net Profit.

15. Managers' performance was generally assessed against three criteria: Retail Profit, Barrelage and Stock Surplus. Satisfactory performance against the first two of these criteria also triggered entitlement to a bonus. The two bonuses were independent: hitting the Retail Profit target would result in payment of a bonus regardless of Barrelage and vice versa.
16. Stock surplus requires a little explanation. It was generally expected that the stocktake would reveal a Stock Surplus; that is to say, after a given amount of sales there should be more stock than those sales had accounted for. This could be achieved in a number of ways. The two principal ways of achieving Stock Surplus was by selling post-mixed soft drinks. Unlike alcoholic drinks, there was no requirement to sell soft drinks in precise measures. Pubs could therefore sell half a pint of cola, but actually serve less than half a pint, especially if they added ice cubes to the drink. Another way of increasing the stock was to serve beer with a small head, meaning that the customer would receive slightly less than a full pint. Stock could be reduced by bar staff not properly accounting for drinks sales, or taking drinks for themselves. Across the business, Mr Smith's expectation was that Stock Surplus would be at least 5%.
17. Generally speaking, the Pub Managers would have a greater measure of influence over the Retail Profit than over the Net Profit. Pension contributions, rates and depreciation were fixed. By contrast, some of the key operating costs were largely within the manager's control. In particular, it was up to the managers to decide how many bar staff to employ and what hours to offer them. Cost of sales, as a percentage of bar takings, could be reduced by achieving a higher Stock Surplus. It was also Mr Smith's view that a good Pub Manager would be able to maximise bar takings by drawing in customers.
18. In 2004 the respondent introduced a new policy for how their managed pubs should be run. Music, television and drinks promotions were strictly forbidden. As Mr Smith put it, the rules were enforced "without any exception whatsoever". The respondent's business model was based on selling cheap, good quality beer together with other drinks and snacks. Prices were determined centrally and Pub Managers were not allowed to change them. Managers were encouraged to take the role of "mein host", using their social skills to provide a welcoming atmosphere. Customers would then spread the pub's reputation by word of mouth.
19. The claimants kept a very clean and tidy pub and kept their clientele in good order. At some point – it is unclear when – the claimants were commended by Rochdale Borough Council for the standard of the Roebuck.

20. For the periods with which this claim is concerned, the claimants achieved their Retail Profit bonus consistently. They managed to achieve their Retail Profit Target with Gross Takings in the region of £4,500.00 per month.
21. From about 2012, Mr Smith started writing to the claimants expressing his disappointment with their Stock Surplus figures. I accept the evidence of Mr Smith that the better performing managers would achieve Stock Surplus at around 7 or 8%. The claimants consistently achieved Stock Surplus of less than 5%.
22. In approximately 2014 the Roebuck Hotel underwent a major refurbishment incurring significant capital costs. Following the refurbishment there was a small improvement in sales. Mr Smith was disappointed. The increased sales were not enough to provide a proper return on the respondent's investment.
23. In 2015 Mr Duerdin was off work for a period of time with a hernia. In the same year, Mrs Duerdin was also too unwell to work for 3 weeks. During the claimants' sickness absence, the respondent brought in a relief manager. This increased the operating costs and reduced the Retail Profit to the point where the pub was making a Net Loss. By 1 April 2015 the pub had made a £7,000 Net Loss in the year to date. This state of affairs was considered by Mr Smith to be intolerable. He expected not just a Net Profit, but sufficient Net Profit to provide a return on the respondent's investment in the building.
24. By the end of October 2015, the Roebuck Hotel was averaging £5,012 Gross Takings per week based on the year to date. Mr Smith believed the pub to be unsustainable on those figures. He compared the takings of the Roebuck Hotel to corresponding figures for other Samuel Smiths pubs in the local area. The Roebuck did not compare well.
25. In December 2015 there was major flooding in the centre of Rochdale. For the claimants, the bad weather came as both a challenge and an opportunity. The claimants had to work extremely hard to save the cash float and the cellar stock. They had to close the Roebuck, but thanks to their hard work, they managed to reopen three days later. The Regal Moon did not get off so lightly. Because of the flooding, the Regal Moon had to close for three months. The claimants had a unique opportunity to turn Wetherspoon's loss into the respondent's gain.
26. On 8 January 2016, Mr Smith told the claimants that he was going to start a formal capability and performance process. The claimants were invited to a performance review meeting which took place on 20 January 2016. At the meeting Mr Smith told the claimants that they would be set sales targets which would be monitored during a review period. The claimants agreed, but they debated what level of sales the target should be. Mr Duerdin's initial position was that it should be £4,500 Gross Takings per week, which he then revised to £5,200 per week. Mr Smith did not think that either figure was acceptable because of the need for a Net Profit and because of the opportunity to take customers from the Regal Moon. He gave them a target of £5,500 Gross Takings per week, to be monitored during the period 24 January to 20 February 2016.
27. At this meeting there was a discussion of the fact that Mr and Mrs Duerdin were both in the company's final salary pension scheme. It started early in the meeting

with a throwaway line from Mr Smith. Later in the meeting the subject came up again. This time it was Mr Duerdin who raised it. This was because both he and Mrs Duerdin genuinely felt that they were being pressurised into taking early retirement. At the time of this meeting, Mrs Duerdin was 63 years of age and Mr Duerdin was 54. Once Mr Duerdin raised the subject of retirement, Mr Smith asked follow-up questions about Mrs Duerdin's retirement plans. Mrs Duerdin replied that she was "seventy-thirty" in favour of staying on past the time at which Mrs Duerdin would be eligible to retire. Once Mrs Duerdin had indicated that she probably would not be retiring, Mr Duerdin resumed talking about setting targets.

28. The target of £5,500 per week was confirmed in a letter dated 25 January 2016.
29. During the four weeks from 24 January to 20 February 2016, the Roebuck Hotel took Gross Takings averaging £5,471. The claimants had missed their target by a mere 0.5%. Another way of looking at the same figures would be to say that they had increased sales by 10% from the previous year. Mr Smith did not see it the increase as an occasion for congratulation. He wrote to them on 11 March 2016, informing them that "you have failed to achieve the target that was set for you albeit by a very narrow margin." The letter set a date for the next review meeting.
30. The review meeting took place on 17 March 2016. Mr Smith opened the meeting by saying "Well you very nearly achieved the target which was good. But as I have just been saying it's the only time that the Roebuck has come into profit." Later in the meeting, Mr Duerdin recounted the precise figures, to which Mr Smith replied "very good". At the time of this meeting, all present were aware that the Regal Moon was about to re-open and that it would promote itself aggressively in an attempt to win back its customers. It was agreed that £5,500 per week would probably not be sustained. To cater for a likely exodus of customers they agreed on a target of £5,200 Gross Profit per week over the period 20 March to 30 April 2016.
31. On 1 April 2016 the National Living Wage came into force, effectively increasing the National Minimum Wage. As a result, the respondent had to pay increased staff costs across its business. Some of the increased cost was passed on to the consumer. The respondent took a centralised decision to raise prices by approximately 5% across all its product range. They did not expect, and did not see, any significant drop off in sales. The respondent's general experience, based on tax-based price rises, was that demand for its drinks was relatively inelastic. Just as a few pence increase on a pint of beer did not significantly alter drinking habits, a 5% increase in bar prices resulted in approximately a 5% rise in turnover. Unfortunately, the Roebuck's performance was not consistent with that general trend. Between 20 March and 30 April 2016 the claimants' Gross Takings were 4.4% short of their target.
32. On 31 May 2016 the claimants were invited to a further performance review meeting, which eventually took place on 7 July 2016. Only Mr Duerdin met with Mr Smith. At this meeting it was Mr Smith who raised the subject of retirement. He asked, "Don't you think we've got to have some agreement for retirement really?" He added, later, "Well we will have to continue with these targets then but the sensible thing would be for us to agree that you both retired at the end of the year or something". Mr Duerdin for his part accepted that the sales figures

had fallen short of target but said there was nothing more that the claimants could do.

33. At this meeting, as at others, Mr Duerdin and Mr Smith disagreed on a basic point of principle. Mr Duerdin did not like the respondent's strictures against music and television. Whilst recognising that Mr Smith was in charge and could make the rules, Mr Duerdin believed that Mr Smith was not making proper allowances for the difficulties the respondent's policy caused for the claimants in attracting customers. He felt that he was being unfairly criticised for poor bar sales when he was powerless to use television or music to draw them in. Mr Smith did not agree. He expected a good Pub Manager to try other ways to attract custom, mainly by using their personality to promote a convivial atmosphere.
34. At the meeting Mr Smith took the decision to give the claimants a verbal warning. He issued a further target. This time the target was not set as a cash amount, but as a 10% increase on takings on the corresponding weeks in the previous year. In cash terms the new target amounted, on average, to £5,136 Gross Takings per week. This figure was less than the previous target of £5,200, but considerably more than the claimants had achieved in recent weeks. Performance against the target was to be monitored from 31 July 2016 to 27 August 2016.
35. On 20 September 2016 the claimants were invited to a "Capability Performance Meeting". The invitation letter pointed out that takings had been 6.3% higher than in the previous year and not 10% as the target demanded. At the meeting Mrs Duerdin said that Mr Smith was not giving them "the tools" to attract more custom. This was a familiar protest from the claimants, but on this occasion it was given added significance by the fact that there had been major televised sporting events over the summer and many drinkers had opted for pubs where they could follow the sport on television. Mr Smith made a number of suggestions as to how they could attract more customers without music or screens. He suggested that they might host events such as pub quizzes and offered to provide them with a microphone. The claimants' responses appeared negative.
36. By letter dated 11 October 2016, Mr Smith gave the claimants a first written warning. Accompanying the warning was a new target for the period 2 to 29 October 2016, based once more on the sales figures for corresponding weeks in the previous year. As before, they were expected to increase sales by 10%. In cash terms, the average Gross Takings had to be £5,177 per week to meet the target.
37. The claimants appealed against their written warning. The appeal meeting took place on 8 November 2016. Chairing the meeting was Ms Susannah Baker, the respondent's Financial Controller, who reported to Mr Smith in his capacity as Chairman. This arrangement left Ms Baker in a curious position. She was hearing an appeal against the decision of her line manager. That is not to say that Ms Baker would always rubber-stamp Mr Smith's decisions. She had, on one previous occasion, overturned one of Mr Smith's warnings. But any reasonable person in the claimants' position would think that their appeal would be inherently unlikely to succeed.



38. Ms Baker heard the claimants' arguments. One point that arose was whether it was fair to expect the claimants to achieve a 5% increase in sales following the Living Wage price rises. On this point Ms Baker was sure of her ground. She thought it was fair to hold the claimants to that expectation. Her view was based on her own experience of measuring the impact of previous tax-based price rises. On other matters, however, Ms Baker deferred to the knowledge of Mr Smith. Ms Baker did not know for herself what was a reasonable level of turnover for a pub in a particular location.
39. By letter dated 26 January 2017, Ms Baker informed the claimants of the outcome of their appeal. Mr Smith's decision was upheld.
40. In the meantime, the Roebuck Hotel performed relatively well. In October 2016 (the review period set out in the 11 October 2016 letter), the claimants achieved an 8.5% improvement on the sales compared to the previous year. Put another way, they fell a little short of their 10% target. In November and December and for the first half of January, their sales were much stronger. On average, they managed over 10.5% more than during the equivalent period in 2015. Had they been given the same target as in August and October 2016, they would have exceeded it.
41. On 2 February 2017 Mr Smith wrote again to the claimants, inviting them to a further Capability Performance Meeting. The letter did not mention the claimants' improved performance in November, December and January. Nor did it contain a word of praise. Instead, it stated,
- "...we agreed upon a target for you to achieve a 10% increase in the pub's takings during the period 2 to 29 October 2016 in comparison with the same period in the previous year...unfortunately you have failed to achieve the target; the net wet takings were only 8.5% higher than the same period in the previous year."
42. The letter continued,
- "Please note that if you are unable to provide me with a satisfactory explanation for failing to reach the target in the October review period, the Company would be entitled to issue you with a final written warning..."
43. The Capability Meeting took place on 7 February 2017. Mr Smith's opening words were,
- "So I wrote to you, you nearly achieved it but you didn't achieve it, you would agree would you that we are now much the most competitively priced?"
44. With these words, Mr Smith set the tone of the meeting: the claimants were being told that they had not achieved their target and that they could not use the respondents' prices as an excuse.
45. The conversation turned to comparing the price of beer amongst competitor pubs, with Mrs Duerdin again reminding Mr Smith that those pubs also offered music and televised sport. Mr Smith raised the subject of the Roebuck's profitability. He criticised the claimants for only achieving Net Profit of £6,476 from May to November 2016. That observation prompted a discussion of the

pub's fixed costs, with Mrs Duerdin pointing out that the claimants had no control over maintenance costs. Mr Smith reminded them that the pub was a valuable asset and told them that the respondent was "not getting an adequate return". Mr Smith did not suggest any targets for reducing costs.

46. After a brief break for Mr Duerdin to fetch his glasses, Mr Smith suggested a target of £5,000 Gross Takings per week. Their discussion of this target led Mr Duerdin to point out the pub's recent performance: "...what we've done steadily since the middle of September we've steadily increased the take so at the moment we [are] basically doing £5,000 per week...gross... so now we're doing much better than we did before the Regal Moon shut because we got quite a few of their customers." To this, Mr Smith replied, "Very good. Well do we agree then, starting next week on wards for 4 weeks, £5,000 including VAT."
47. I pause here to address an argument put forward by the respondent. It is the respondent's case that this exchange showed Mr Smith praising the claimants' achievements. I do not think that this is how Mr Smith's words would reasonably have been understood. In their context, the words "Very good" appear to me to be Mr Smith's way of moving the conversation forward. It came across as Mr Smith's way of announcing the agreed target, rather than recognising the claimants' improved sales. At no point in this meeting did Mr Smith suggest that the claimants had done well by increasing turnover in excess of 10%.
48. Agreeing the target did not lessen the strain of the conversation. Mrs Duerdin again brought up the subject of music and television having been banned in 2004, and its impact on sales. Unhelpfully, she told Mr Smith, "You spoiled it, not us..." Mr Duerdin then intervened to conciliate and the agreed target of £5,000 was reiterated. At this point, Mr Smith abruptly changed the subject by telling the claimants to improve their Stock Surplus. Mrs Duerdin's reply was, "No matter how well we do you [are] pushing for more and more." Mr Smith did not suggest any targets for improving Stock Surplus. Similar exchanges took place later in the meeting, with Mrs Duerdin saying, "we are doing our best" and, "You're getting at us Mr Smith because you want me to retire." This rather dysfunctional conversation ended with Mr Smith saying, "The brewery wants a better return on its property."
49. On 8 March 2017, Mr Smith wrote to the claimants summarising the outcome of the meeting. Having recorded the agreed target, he referred to the claimants' recent performance in this way:
- "Referring back to the review period of 2 to 29 October 2016 takings had only increased by 7.8% in the Roebuck compared with the same period last year therefore you had failed to reach the target of a 10% increase set at the performance review meeting held on 29 September 2016. However, I note during the period from 30 October 2016 to 14 January 2017 wet takings have been 10.5% higher. I have therefore decided not to issue you with a final written warning."
50. The letter appeared to indicate that Mr Smith had revised the claimants' sales figures for October downwards from 8.5% (increase on 2015 sales) to 7.8%. There was no explanation for the change. Putting that discrepancy to one side, a reasonable reader of this letter would think that Mr Smith had taken into account the claimants' recent improved performance into account as a reason for not

escalating the claimants' sanction. But it would also be clear to a reasonable reader that Mr Smith was still dissatisfied with the claimants and did not think it worthy of any praise that they had managed 10.5% improvement in sales on the previous year. Nor did he appear happy with the fact that the amount of the increase was more than they had previously been targeted to achieve. For Mr Smith, exceeding those targets was apparently not enough.

51. When Mr Duerdin read Mr Smith's letter, he felt that he could not win. He believed that there was nothing that he and his wife could do to improve the pub's takings any more than they had already done. He also believed, quite understandably, that whatever they did, it would not please Mr Smith. His mental health deteriorated to the point where, on 8 April 2017, he tried to take his own life. Fortunately, Mrs Duerdin discovered him in time to save him and take him to hospital. Whilst Mr Duerdin was recovering in hospital, Mrs Duerdin took it upon herself to try and bring the very stressful situation to an end. With the help of solicitors, but without consulting her husband, she wrote to Mr Smith in the following terms:

"I very much regret to inform you that [Mr Duerdin] is currently in Hospital after attempting to take his own life over the weekend. As you will appreciate this is a most stressful time for the two of us.

I am awaiting an appointment with my Doctor to assist me with the stress I am trying to cope with but I want to let you know that neither [Mr Duerdin] nor I are well enough to work at the present time.

I also want to take this opportunity to inform you that the unrealistic performance requirements you have placed upon us are now having a serious adverse effect upon our health and in those circumstances I hereby give you three months["] notice of our decision to resign from your employment. Please acknowledge safe receipt of this letter."

52. The letter was sent by post to the respondent and, at the same time, e-mailed by Mrs Duerdin's solicitors to Mr Smith's assistant. It was passed to him on 11 April 2017. He did not reply. Nor did he do anything else to show concern for the claimants' welfare.
53. When Mr Duerdin found out what his wife had done, he was dismayed. Neither of them wanted to return to work. But nor did Mr Duerdin want to hand Mr Smith a resignation on a plate. They asked their solicitors to retract their resignation. This they attempted to do by e-mail on 24 April 2017. As was the respondent's contractual right, Mr Smith refused to allow the resignation to be withdrawn. He eventually replied on 7 July 2017 confirming that the claimants' employment terminated on the expiry of their notice. His letter did not express any sympathy for the claimants.
54. Mr Smith no doubt would have wanted to proceed with caution knowing that Mrs Duerdin had instructed solicitors. Nevertheless I find it surprising that he did nothing at all to show his concern for the claimants, having been informed that they were both too unwell to work and that Mr Duerdin had tried to take his life.
55. In deciding what to make of Mr Smith's actions and inaction from 11 April 2017, I have reminded myself that, by that time, Mrs Duerdin had given unequivocal notice of resignation on the claimants' behalf. If the claimants are to say that they

resigned in response to a fundamental breach of contract, the breach must have taken place before that date. Nothing that Mr Smith did (or failed to do) afterwards is of any legal consequence. But that does not, to my mind, mean that it is irrelevant to consider Mr Smith's conduct after 11 April 2017. His apparent lack of compassion from that time onwards helps me to find facts about how Mr Smith conducted himself before notice of resignation was given. This is not a purely academic point. The claimants and Mr Smith had different impressions of Mr Smith's attitude during the performance review meetings. Whilst I know what words were spoken at the performance review meetings – they were recorded and transcribed – those words only give a limited sense of what it was actually like to be in the room. It is not always possible to tell by looking at the transcript whether the words were spoken in a tone of encouragement or of chastisement. Was Mr Smith demonstrating a desire to motivate the claimants or to performance-manage them out of the business? When the words themselves do not provide the answer I am assisted by what I know of Mr Smith's attitude to the claimants. He did not show concern for their welfare as long-serving employees. Rather, he demonstrated that his concern was solely for the business and whether the Roebuck Hotel could generate sufficient profit.

### Relevant law

56. Section 95 of the Employment Rights Act 1996 (“ERA”) relevantly provides:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and... only if)—

... (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 employer's conduct. ...

57. An employee seeking to establish that he has been constructively dismissed must prove:

57.1. that the employer fundamentally breached the contract of employment;  
and

57.2. that he resigned in response to the breach.

(*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

58. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

59. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [\[2007\] IRLR 232](#).

60. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-v-Receptek* [2013] ALL ER (D) 364.

12....It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:

"So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

13. That has been followed since in *Cooper v Oates* [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of *Tullet Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.

61. A fundamental breach of contract cannot be "cured", but if an employer takes corrective action the employer may prevent conduct from developing into a breach of the implied term of trust and confidence: *Assamoi-v-Spirit Pub Co Ltd* [2012] ALL ER (D) 17.
62. It is not uncommon for an employee to resign in response to a "final straw". In *Omilaju v. Waltham Forest London Borough Council* [2005] EWCA Civ 1493, [2005] IRLR 35, CA the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act was totally innocuous, in the sense that it did not contribute or add anything to the earlier series of acts, it was not necessary to examine the earlier history.

## Conclusions

63. I now apply the relevant legal principles to the facts.

### Breach of contract

64. My starting point is the respondent's conduct as alleged in the Further and Better Particulars. I take each allegation in turn.

#### 1. 20 January 2016 meeting

65. Nothing happened significantly to undermine trust and confidence on 20 January 2016. An employer is entitled to commence performance management processes if it believes that an employee is underperforming. In 2015 the

Roebuck had traded at a loss under the claimants' watch. As Mr Smith put it, had the claimants been tenants, rather than managers, they would not have been able to cover their rent. Mr Smith had every right to try and turn the business around. He could also quite legitimately expect the claimants to improve their performance within the constraints of the respondent's business model. Other pubs made a profit without music and television. The claimants could be expected to do the same.

66. The Further and Better Particulars do not criticise Mr Smith for inadequate support or training at this time. What was alleged to undermine trust and confidence were the performance targets themselves.
67. It was legitimate for Mr Smith to set targets based on sales. They were specific, measurable, relevant and time-bound. They were also achievable. It is true that, in general, the turnover of a pub may be affected by factors beyond the manager's control. But that did not make sales targets inappropriate. A pub manager can influence sales, even without offering music or television, by providing a warm welcome and organising events that might attract customers. In the pub trade it was hard to set measurable targets based on activities short of sales. That the initial target was achievable is evident from the fact that the claimants very nearly achieved it.
68. The question of retirement at this stage was brought up by Mr Duerdin, not by Mr Smith. It was not harmful to trust and confidence for Mr Smith to decide – at that stage - to continue with performance management as an alternative to retirement. An employer may legitimately say to an employee that if they are going to retire in the near future there is no point in continuing with what may be a bruising process of performance management. Conversely, an employer must be allowed to resume performance management if the employee indicates that they do not wish to retire. Trust and confidence will only be dented if the manager goes beyond trying to establish the employee's preferences and starts using the performance management process as a means to put pressure on the employee to retire.

*2. 31 May 2016 invitation and subsequent meeting*

69. The meeting to which paragraph 2 of the Further and Better Particulars relates happened on 7 July 2016. In my assessment, Mr Smith's conduct at that meeting had a considerable adverse effect on trust and confidence. Mr Smith had reasonable and proper cause to criticise the claimants' performance. But he had no right to use a performance meeting as an opportunity to pressurise Mrs Duerdin into retiring. This was an entirely different situation from the meeting on 20 January 2016. Mr Smith was not exploring Mrs Duerdin's wishes. He knew by then that Mrs Duerdin's position was that she would probably want to continue working past the age at which she could draw her pension. Even so, he kept raising the subject and said in terms that he thought it would be better if Mrs Duerdin retired.

*3. 29 September 2016 meeting*

70. Mr Smith had reasonable and proper cause to expect improvements in the claimants' performance, despite major televised sporting events having had an impact on trade. He was entitled to take the view that these were events that would affect the performance of all its pubs and to compare the performance of

the Roebuck Hotel at these times to the performance of other pubs. If other pubs were able to maintain healthy sales during these sporting competitions then the Roebuck should be expected to do the same. There was little to dent trust and confidence at this meeting.

*4. 7 February 2017 meeting*

71. There was nothing wrong with inviting the claimants to the meeting that took place on 7 February 2017. It was legitimate to want to meet with them. There was reasonable and proper cause to continue to monitor their performance, given that the upturn in sales had occurred relatively recently. The claimants had a written warning on their file which was to last for 12 months. It was legitimate to monitor performance to see whether a sustained period of improvement could be achieved. In my view, although there had been a very considerable step forward in performance over the previous 15 weeks, Mr Smith was entitled to keep his eye closely on the Roebuck's turnover to see if it could be continued into the longer term.
72. What in my view did have a damaging effect on trust and confidence was the way in which Mr Smith conducted himself in the invitation letter and during the meeting. The letter concentrated exclusively on the claimants' relatively narrow failure to meet their target several months ago and made no mention at all of their progress since then. Nor did he say anything during the meeting itself to recognise their achievement. Instead, he raised other performance indicators that, up to that point, had never been part of the formal performance management process. He questioned the claimants closely about the Stock Surplus. He criticised the low Net Profit, but did not suggest any measurable targets for reducing costs. This would have left the claimants with the impression that Mr Smith wanted them to improve profitability by increasing turnover. But their bar takings had already improved in excess of the last two targets that had been set for them, and were still being criticised. A reasonable observer would think that the claimants could not win. Rather than being encouraged to improve, they were being pressurised into retiring.

*5. Letter of 8 March 2017*

73. In my view, the letter of 8 March 2017 would not have dispelled that impression. The targets themselves in the letter were not unrealistic; they had been consistently achieved by the claimant over a 15-week period. But the letter did not appear encouraging. It looked as though the claimants' recent achievements were merely a reason to avoid escalating the sanction to a final written warning, rather than something for the claimants to continue and build on with Mr Smith's encouragement. There was no positive reassurance that sustained improvement in performance would bring the entire performance management process to an end. This letter was not wholly innocuous and was capable of adding to a cumulative breach of trust and confidence.
74. Having looked at the specific allegations, I have stepped back to examine the overall effect of the respondent's conduct. Taken together, did it demonstrate an intention to abandon and altogether refuse to perform the contract? Before answering that question, I must address one of the arguments advanced by Mr Thornhill in his very pithy and well-focussed submissions for the respondent. He reminded me of the claimants' attempt to retract their resignation. Whilst accepting that this action did not amount to an affirmation of the contract, Mr

Thornhill argued forcefully that the claimants cannot themselves have viewed Mr Smith as having seriously undermined the relationship of trust and confidence. Otherwise, Mr Thornhill rhetorically asked, why would the claimants want to come back to work for him? In my view, the answer is exactly as Mr Duerdin described it. He did not want to work for Mr Smith, but still less did he want to hand Mr Smith what he wanted “on a plate”. He did not want to make it so easy. Game-playing of this kind is, in my experience, regrettably common once the relationship of trust and confidence has broken down. Neither claimant actually thought that the continued relationship was workable. Had Mr Duerdin felt that way, it is unlikely that he would have tried to take his life.

75. My view is that, overall, the respondent’s conduct was calculated or likely to damage seriously the relationship of trust and confidence. The claimants were entitled to resign. Having done so in response to the breach, they were constructively dismissed.

Reason for dismissal

76. I am satisfied that respondent has proved the sole or principal reason for constructively dismissing the claimants. More precisely, it has proved Mr Smith’s reason for conducting himself so as to breach the implied term of trust and confidence. His reason was his belief that the claimants were underperforming by failing to generate sufficient Net Profit for the Roebuck pub. In my view that was a reason that related to either their capability or their conduct. Strictly speaking it is unnecessary for me to determine which of those two categories of reason it was, provided that the reason fell into one of them. If forced to choose, I would find that the reason was one that related to their capability.

Reasonableness

77. I must therefore decide whether Mr Smith acted reasonably or unreasonably in treating that reason as a sufficient basis for fundamentally breaching the contract. In my view Mr Smith acted unreasonably. If the claimants were not generating enough profit, the answer was not to put pressure on them to retire. It was to motivate them to perform better. He demotivated them by not giving proper recognition of their achievements in November and December and early January 2017. He did not have sufficient regard for their length of service. It was unreasonable of him to criticise their Net Profit figures when the only relevant target that had been set for them (Gross Takings) had been exceeded over the past 15 weeks. He concentrated on their shortcomings some 4 months earlier rather than on trying to offer positive encouragement or concern for their welfare.
78. For those reasons I find that the respondent did not act reasonably in treating its belief as sufficient reason for constructively dismissing the claimants and the dismissal was therefore unfair.

Causation of loss – might Mr Duerdin’s employment have terminated in any event?

79. I now turn to the question of what would have happened had the respondent not fundamentally breached the claimants’ contract.
80. In my view it would have been inevitable that Mr Duerdin’s employment would have continued for at least another 6 months after the date on which their employment terminated. That would be the minimum time necessary to give the



claimants, with the right encouragement, a sufficient opportunity to improve the profitability of the Roebuck Hotel.

81. Mr Smith would have been perfectly within his rights to continue the performance management process. It would have been reasonably open to him to bring Stock Surplus within the remit of the process, provided it was done with appropriate recognition of their having increased the Gross Takings and not just sprung on them at a meeting. Stock Surplus was relevant to the Roebuck Hotel's Gross Profit (and consequent Retail Profit and Net Profit) since it cut down the cost of sales.
82. I am satisfied that the Gross Takings for the Roebuck Hotel would have continued to exceed £5,000, and to exceed 10% over the 2015 figures. Given proper encouragement and recognition, there is a chance that their sales would have increased significantly more than that. It is unlikely that they would have achieved a 10% increase year on year. The claimants would still have blamed Mr Smith for taking away the music and television and they would have been wrong to do so. By January 2018, there is, in my view, a 50% chance that profitability would still be at a level that Mr Smith regarded as unsustainable, and that the claimants would have failed to meet fair targets for Gross Takings and Stock Surplus. By that point, the claimants would have had a sufficient opportunity to improve. In that eventuality, they would either have been fairly dismissed or they would have resigned in circumstances that did not amount to a constructive dismissal.
83. To summarise, therefore, had the respondent not constructively dismissed the claimants:
- 83.1. Mr Duerdin would inevitably have remained in employment with the respondent for a further 6 months, and
- 83.2. There is a 50% chance that Mr Duerdin would have remained in employment thereafter.

#### **Afterword**

84. Once I had announced judgment on the causation point, the parties agreed the remedy for both claimants.
85. Two matters remain. First, I would like to record my appreciation of the focused submissions of the representatives for both parties. Second, I apologise for the delay in sending these written reasons. This was due to pressure of work caused by sitting on other cases.

Employment Judge Horne

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17 May 2018

REASONS SENT TO THE PARTIES ON

23 May 2018

FOR THE TRIBUNAL OFFICE