Case number: 2600435/2018

EMPLOYMENT TRIBUNALS

BETWEEN:

and

Mr W M Campbell **Claimant**	Braunstone Victoria Working Mens Club Limited **Respondent**

At a Hearing

Held at: Leicester On: 28 & 29 November 2018

Chairman: Employment Judge Clark (Sitting Alone)

REPRESENTATION
For the Claimant: Mr Howlett of Counsel
For the Respondent: Ms Ali of Counsel

JUDGMENT

1. The claim of unfair dismissal **fails and is dismissed.**

2. The claim of unauthorised deductions from wages in respect of overtime **fails and is dismissed**.

3. The claim of unauthorised deductions from wages in respect of pay during periods of holiday is **dismissed upon withdrawal**.

4. The claim of accrued but untaken holiday is **dismissed upon withdrawal**.

REASONS

1. INTRODUCTION

1.1. This is a claim for constructive unfair dismissal and unauthorised deduction from wages. It arises from the claimant working additional hours, his internal claim to be paid overtime and the respondent's response to that. In short, the claimant says he resigned as the respondent had failed to pay him overtime at his proper contractual hourly rate and, moreover, that it indicated it would not do so; that they forced him to work excessive hours and that they bullied and harassed him about his request for the correct payment.

1.2. The claims originally brought in relation to holiday pay have been resolved and are dismissed upon withdrawal.

1.3. The respondent as originally named is not a legal entity. I am told that the club is, in fact, incorporated and the title should be Braunstone Victoria Working Mens Club Ltd. The claimant agreed to the amendment.

2. The Issues

2.1. The issues in the case are:-

a On deduction from wages:-

i. Whether the claimant had a contractual right to overtime at an hourly rate of £11.46 such that the payment received for the additional hours worked was less than that which was properly due.

b On dismissal

i. Whether the respondent breached a fundamental term of his contract as to:-

- Overtime Pay
- The implied term of trust and confidence in respect of bullying and harassment.
- The implied term of trust and confidence in respect of requiring him to work excessive hours.

ii. Whether the claimant resigned in response to any such breach.

iii. Whether the claimant affirmed the contract.

iv. If a dismissal, whether it was fair by reason of conduct.

v. If unfair, the chance that the claimant's employment would have come to an end in any event at some point due, principally, to the manner in which he said he had conducted the banking.

3. The Evidence

3.1. I heard from 5 witnesses each of whom gave evidence on oath. For the claimant, I heard from Mr Campbell himself. For the respondent, I heard from Mr Denis Liney, Secretary; Mr Stephen Mee, the respondent's accountant; Mr William Bray, Club President; Mrs Julie Mansfield, Bar

Person and formerly one of the claimant's team. All witnesses produced written statements and all were questioned.

3.2. I was taken to a bundle originally running to 79 pages. That increased to 120 pages after some further documents were disclosed at the outset and after it came to light the draft contract in the bundle was not, in fact, relevant to the claimant's employment.

3.3. Both parties made closing submissions.

4. Preliminary Matters

4.1. Within the original bundle [27] was an unexecuted, template contract that the claimant relied on as evidence of his terms, in particular to overtime pay. At the outset, Mr Howlett sought to adduce a previously undisclosed email chain in the claimant's possession and dating from 2016 that concerned a wholesale review of terms of employment and which gave rise to this draft contract. I presume that was intended to provide a foundation to argue if there wasn't a right to overtime before, there was after some time in 2016 when the new terms came into force. That email chain was disclosed. Upon reading it, it immediately became clear that the document being relied on by the claimant seemed unlikely to be the one relevant to his employment as Steward. It then came to light after cross examination had commenced that there were attachments referred to in that email chain, but not actually attached, which included a draft contract for the post of Steward. An early lunch was taken and the claimant was ordered to search his email accounts to see if he still had the original email from the HR consultant sending the contracts. If he did he was to disclose them, in particular the draft contract relating to the post of Steward as well as the employee hand book.

4.2. After lunch, those documents were found and disclosed. The steward contract is a different contract similarly in draft form and unexecuted but is consistent with the emails already disclosed insofar as they identify material differences between the terms of employment of bar managers and that of steward. Significantly, the draft steward contract confirms the intention of the parties at the time these draft contracts were prepared was that the post of steward was paid a salary, with no contractual right to overtime.

5. FACTS

5.1. It is not the tribunal's purpose to resolve each and every last dispute of fact between the parties but, rather, to focus on those matters necessary to determine the issues in the case and to place the decision reached in its proper context. On that basis, and on the balance of probabilities I make the following findings of fact.

5.2. The respondent is a social club, a working men's club, providing the typical facilities of such clubs. Its cash flow shows at the material time it was taking in the region of £8,500 per week on average. It is run by a committee made up largely of volunteers although some receive some modest remuneration. Its purpose is to provide a community focus and social facilities for events

and entertainment. It is a sad fact that this dispute comes before me against a background where those involved, whether employed or volunteering, give their time to the pursuit of such a social asset and where all those before me for some considerable time seem to have liked each other, got on well and socialised together.

5.3. I would add that the club is also typical of its type in the lines of management, control and authority. Communication is not done particularly well at all, whether formal or informal, and records of such communications even less so. I find a number of aspects of this case are infected with miscommunication, misunderstandings and lack of clear communication.

5.4. The claimant was employed in July 1999, latterly as its club steward. He has a clean disciplinary record, was well regarded and I find was largely free to organise his own work. In fact, either by design or consequence of the circumstances, he was left to get on with things and that model seemed to work. He had also been a social member of the club although, by convention, this was suspended once he became employed.

5.5. He was the most senior member of employed staff below committee level. He carried a wide remit of managerial responsibilities for the other staff employed. He was responsible for bar/food, cash, premises and facilities. He reported to the management committee, through the Secretary, Mr Liney, who is also an employee.

5.6. I find the claimant's employment was originally governed by written terms issued by the previous secretary which neither party can locate. It is common ground between the parties that that original contract employed the claimant on a salary, not an hourly rate. That is entirely consistent with the evidence of payments paid to him.

5.7. For reasons I have already touched on, the blank draft contract [27] is of no relevance. The later disclosed contract is, although that remains draft and unexecuted. It is clear that the respondent undertook a review of terms of employment in 2016 including that of the claimant and secretary. In fact, I find the claimant was coordinating that review and was aware of the detail within, and differences between, the contracts for the different types of posts the club employed. In terms of the post of steward, I find this draft did not propose any material changes to pay, the method of calculating pay on a flat rate salary or whether the claimant was entitled to overtime. He wasn't. It does not require me to make any findings as to whether the proposed contract was ever finalised and executed. The terms remained consistent throughout his employment.

5.8. In evidence, the claimant accepted the fundamental basis of his entitlement to pay. His concession was wholly consistent with all other evidence before me. I therefore find that the material terms of the claimants contract of employment were:-

a That his pay was calculated by reference to a flat gross salary.
b It was paid weekly, latterly at the rate of £550 per week (£28,677 p.a.).

c There is a non-contractual discretionary bonus paid from time to time in a modest sum of around £100.
d He was not contractually entitled to overtime. In fact, in 8 years he had never worked it, never claimed it and never been paid overtime.
e His pay did not go up or down if his weekly hours exceeded or fell short of the nominal working week.

5.9. I have no explanation as to why, when the claimant had access to all the draft contracts he has chosen to disclose the one relevant to bar managers which includes an entitlement to overtime, and not the correct contract. As he was directly involved in the variation of these contracts it is unlikely he could have been mistaken as to which related to his employment. His witness statement, adopted on oath as true and correct, makes clear assertions that the contract at p27 reflected his terms and that he was not paid a salary and that he was contractually entitled to overtime. In oral evidence, he rejected the possibility that he might have submitted the wrong contract.

5.10. Other aspects of the role of steward include the following matters:-

a He is the manager of all other staff employed responsible for day to day management and supervision.
b He recruits and disciplines staff under his control, albeit under the supervision of the committee.
c He organises and delivers training, both on the job and through consultants such as “HIT training” supplier.
d He has complete control for setting the rota for staff and allocates shifts.
e He liaises with payroll and reports staff timesheets for payment.
f He is responsible for cash handling and banking.

5.11. From June 2017, there were staffing issues at the club. Two staff had been suspended and by 18 July 2017 had been dismissed on suspicion of theft. The claimant had brought his concerns to the committee about his two assistants. He was tasked with and undertook an investigation which in evidence he accepted was a reasonable request, contrary to his further particulars. The Committee decide to dismiss both.

5.12. Both individuals had been employed as Assistant Stewards. That is, the next level below the claimant. I find there had previously only ever been one assistant steward. After their dismissal, the committee decided to revert back to a single Assistant Steward. The claimant was asked to seek a replacement which he set about doing.

5.13. I find the committee also took the view that the work left by the two departing individuals could be covered by allocating additional shifts amongst the remaining staff. I find bar staff duties for such shifts were paid at £7.50 per hour and that is the rate the committee members anticipated incurring.

5.14. The claimant’s case is that this state of affairs meant he had to work many additional hours over his contracted hours to cover the bar. This was as

much as 95 hours per week. I find as a fact that he would eventually accumulate the total number of hours he claimed to have worked although I have seen no contemporaneous evidence of his shifts, there is nothing to gainsay it and the committee accepted it. The total hours were 616 in the period June to September, and 240 in the period October to December 2017. If find, however, that the respondent did not know the actual number of hours until the meeting of 3 October 2017. It did, however, know from as early as 18 July, the date the two assistants were dismissed, that the claimant was already now working at a level appropriate enough to be described as "excessive hours" but at that time Mr Campbell made clear he was quite happy with the situation as was recorded in the committee notes [34].

5.15. The claimant set about recruiting but did not make an appointment. He reported to the committee that the candidates he had seen were not suitable. Other staff did undertake some additional shifts but they were given limited shifts by the claimant. Whilst some of the bar staff had more skills and experience than others, I find they were all willing and otherwise able to provide additional cover. They were also all able to undertake any necessary training and I have seen no reason why any such training could not have been commenced sooner. I find it was not until mid-September before the claimant made any attempt to arrange training which was 2 or 3 months after the need arguably arose. I do not accept there was any obstacle put in the way by the committee to prevent that happening. Nor do I accept there was any other factor giving rise to the delay through the training provider itself, that is HIT Training. When training was arranged, it seems to have commenced within a few weeks. The committee met on 3rd and 17th October and the notes show training being arranged, and rescheduled all within 16 days. Since the claimant's departure, some of the staff have undertaken the necessary training and have been working at the level of bar manager. It seems therefore that training was a relatively straightforward matter to put in place. I find it gives some support to the conclusion that the claimant chose to undertake the shifts himself but it is at least consistent with the earlier representation that he was content with the state of affairs.

5.16. I find within the social club industry, there are individuals who perform relief steward work on a self-employed basis. They can be brought in to cover holiday or other absences. In this case, the committee did bring in one Gary Allen to do just that during a week when the claimant took holiday in September 2017. It seems to me the ease with which that was done goes to support the finding that the claimant had not made an issue with the committee that he was working excessive hours or that he could not deploy the existing staff in the way the committee had instructed. I find it very unlikely there would have been a refusal by the committee if the claimant had taken the line of sticking to his contractual hours and required the committee to bring in a temporary outsider. Having said that, I find Mr Liney's suggestion that Gary Allen had been booked and been sent away by the claimant unlikely. It is a significant assertion in the scheme of this case and surprising such a matter was not included in the evidence, or even that Gary Allen was called as a witness. I find Mr Liney is mistaken on that fact

and that Mr Allen's earlier involvement was to cover a week's holiday taken by the claimant. I do accept, however, as the claimant himself did in evidence, that the availability of people like Gary Allen provided an immediate and obvious answer to the problem of him working long hours. I find he must have known of Gary Allen, or people like him. He did not at any time suggest someone like him could be brought in to assist. I note he relied on this in his later letter setting out his constructive dismissal claim but there is no basis for finding that a request for cover was made and refused. As an aside, whilst it is not suggested in this case that any course was not taken on financial grounds I simply observe that the cost of relief stewards seemed remarkably cheap. Mr Allen may or may not be typical of the market for relief stewards but his charges were only £1 more per hour than basic bar staff, about £3 less than the claimant calculates his notional hourly rate to be and, of course, such self employed cover would not come with the additional costs associated with direct employment.

5.17. It leads me to conclude as a fact that when the claimant raised the situation at the outset, he was content with it and content to carry on. The state of affairs had arisen as a result of the dismissals, the claimant had taken on the additional hours, I find he was at all times entitled to say to the committee that he was not prepared to work the excessive hours. He did not do that. He did, however, make contact with the respondent's own HR consultants "Citation" on 3 occasions. In August 2017, he raised the fact that he was working on his own and doing a minimum of 95 hours per week and this was his 7th week and referred to there being no help from the management committee. A consultant called Katey advised him to raise it with the board. Other than what followed in October, I find he did not.

5.18. I find the only mention of his working hours by the claimant was made in passing to Mr Liney and I find this is likely to have been the occasion that is reported in the minutes on 18 July. I do not find this was expressed as a complaint or a threat to stop or a demand for money. It was simply a reflection of the state of affairs arising from the dismissal of the two assistants. Nor was Mr Liney told exactly how many hours the claimant was working, as the claimant himself conceded. I do not therefore characterise Mr Liney's response as in any way brushing off the issue. Mr Liney's response was to suggest pragmatically that the claimant should rota additional bar staff to assist, a state of affairs I am satisfied the club has been able to put in place subsequently without any difficulty. If the claimant was dissatisfied with that response, or if he felt Mr Liney was not grasping the real issue, it was not something he pressed further.

5.19. The claimant's contention that Mr Liney lived close by and could see him opening up does not provide a basis for importing knowledge of the hours the claimant worked. Mr Liney was not keeping close tabs on the claimant who also socialised at the club such that it would have been difficult in passing to distinguish times seeing him when he was working and other attendances during non-working time.

5.20. During the relevant period a number of other matters arose that have been referred to by the parties as relevant to this matter.

a On 20 August 2017, the claimant is said to have arrived late and others were not able to gain access to the club. I do not know why that was the case as Mr Liney is also a key holder. The respondent relies on this as evidence supporting its contention that the committee were very much the vulnerable party to the relationship at an interpersonal level. The claimant was asked for an explanation and refused. I return to the contention about the claimant's alleged intimidating character later. The relevance of this incident seems to me to be no more than the claimant undertook a short turnaround between a later finish and early start and simply overslept. I do not find there was a clear demand for an explanation and a clear refusal. I find it more likely there was no more than a vague exchange. The highest this matter gets is that in the discussions about pay that took place later, the respondent did not seek to account for occasions such as this.

b On 27 August 2017, there is said to have been an unauthorised absence when the claimant left a shift during a busy period. I accept his evidence that he set up the bar and left the staff to deal with it under a more experienced member of staff, Susan Stuttley. He did so in order take some time for himself. Again, the respondent says he refused to give an explanation. One of the difficulties in this case is separating out how matters are put from how they must have unfolded in reality. Again, I suspect the view that he didn't give an answer is more about the interpersonal communication between the two individuals. How questions are put and what answer is given and then how it is interpreted. I don't find in whatever exchange did take place any argumentative or obstructive character. In a small way, however, I do find this evidence probative of two points. First, this situation was an obvious opportunity for the claimant to vent any frustration with the working situation to his committee which he did not, Secondly, it appears to provide some basis for internal bar cover at least on a short term basis and which I find was taking place, albeit that the likes of Susan Stuttley, although experienced had not been shown simple matters such as setting up tills which if she had would have further facilitated Mr Campbell's release from the workplace.

c The third matter is the offer of employment to a Mr Wilson, a committee member. He and the claimant spoke about the vacancy. I find that the claimant indicated to him that he viewed him as a suitable candidate and no more than that. Mr Wilson reported back to the committee that he had been offered the job. The job was then not offered. I find it was not the claimant who resiled on the job offer. On balance, the final say so was that of the committee. Mr Campbell had already indicated a positive response. There was a suggestion that there was something in Mr Wilson's past that made him unsuitable but I have no evidence on that and make no finding on the suggestion. If the decision not to offer the post was based on a genuine reason not to offer the post, it matters not who decided not to proceed, but on balance I find it more likely to be that of the committee. Mr Wilson then resigned from committee.

d On 12 September 2017, the claimant indicated he was taking 5 days leave from the following day. I find the claimant had indicated his desire to take annual leave some time earlier. In any event, a short notice request, or even demand in these circumstances, is not necessarily indicative of the dominating personality the respondent seeks to paint. Moreover, whenever it was requested, there was immediate cover provided by a relief steward, a point I need to return to later.

5.21. I return to the question of the claimant's alleged dominating or intimidating personality. It was telling that Mr Bray was at pains to stress how much he liked the claimant, had known him all the time he had worked for the respondent, that he got on well with him and even amended his statement to remove reference to him being aggressive although he maintained the assertion he could be argumentative. I had by then heard and seen Mr Campbell being cross examined for 2 hours. I acknowledge great caution is needed to read very much at all into how a witness behaves in the artificial environment of giving evidence and I do no more than observe how he did not obviously come across as dominating or intimidating. In different settings where different interpersonal dynamics are at play that may be different but Mr Bray's amendment suggests to me that that the respondent's contention is not in fact how most people see the claimant. I am sure he is able to argue his corner, but the evidence before me does not disclose a particularly intimidating character, still less aggressive as originally put. For my part I have concluded the relationship between steward and secretary, if not the entire committee, was more about avoiding conflict than truly one of intimidation. Most walks of life face conflict from time to time, particularly when managing people. Just because one party may find that conflict difficult does not mean the other party is necessarily aggressive or intimidating.

5.22. I suspect that the claimant's initial contentment in doing very long hours was partly due to the fact he anticipated it lasting for less time than it continued for. As time went by I suspect he started to reflect more on his situation and begin to feel a sense of injustice. I find however, that injustice arose from him not being paid extra for it, not in the fact of working the hours.

5.23. Whether that, or in response to the Citation consultant's advice to him, the claimant requested a meeting with the committee in order to raise payment for his hours. I find as a fact that the issue of payment arises as a ***request*** to the employer, and not the insistence on its performance of a contractual right to payment which clearly reinforces there was no belief in a contractual right. Any such belief would have manifested within the first weeks or so of working the extra hours as it was the claimant who telephoned the accountant to prepare the weekly payroll and in doing so communicated the hours to be paid to each member of staff including overtime. It is also significant that what the claimant was seeking from the committee was payment for the hours, not the reduction of the hours themselves or for his work to stop. I find, therefore, that doing the hours themselves was not the claimant's concern. Whilst undertaking what at times became an onerous working week without additional pay is at the root of the claimant's

dissatisfaction with the state of affairs, the constituent elements of the situation need separating out. I find they are:-

a He was happy to do the hours if he was paid for them.
b He was not asking to stop doing the hours.
c He continued to do additional hours after the meeting.
d The state of affairs leading to him doing those hours was almost exclusively within his own control so much so that it is not surprising to see the respondent advance a view that he was deliberately controlling the shifts so that he could ultimately make this claim.

5.24. I do not entirely accept that latter point. I find the claimant was conscientious in his duties and content to do the work. The failure to recruit or train, though he was directly in control of those processes, no doubt meant that as the weeks went by what was initially something he was content with, became more of a source of resentment.

5.25. The respondent held a committee meeting on 3rd October 2017. A number of issues were discussed relevant to the claimant and his employment:-

a The first was a concern about the banking procedures being undertaken. The respondent's concern was that it was not being done according to its rules. I return to this below.

b The second was the claimant's request for payment for the additional hours. For the first time, he set out the hours he said he had done. They were 616 hours of overtime and he wanted to be paid for it. He had calculated his notional hourly rate as £11.50 and wanted paying at that rate. I find the respondent's initial position was that he was salaried and no overtime was due but the committee then appears to have acknowledged the work done, accepted his claim of hours worked without question and offered a lump sum. A global figure of £4000 was initially offered. It seems the claimant calculated that this amounted to less than the national minimum wage. The figure was recalculated at NMW rates on the basis that the claimant's additional hours were done to cover bar shortages which would have been paid at £7.50 per hour. The total payment was £4,620. They refused his claim for his notional hourly rate to be paid. According to the claimant's own evidence, his response to this offer was "If you think that's right its right, I was in no mood to argue". He agreed in evidence that he indicated acceptance and it is certainly the case that agreement is recorded in the committee minutes. In terms of the payment agreed upon, I find what was negotiated was in recognition that the claimant had done the hours. It was without legal obligation and therefore an-ex gratia payment. It was done against some view that the claimant ought not to have done such excessive hours, was not expected to and had done the hours at the expense of other staff employed to cover the bar. I find the claimant agreed to the payment at the meeting and that agreement was genuine. This was the first occasion on which the issue of overtime payment had been raised by the claimant and the committee's immediate response was to settle a significant ex-gratia sum on him.

c The third matter was the committee insisting that staff should be cellar trained which I find to be a consequence of where matters had got to after 3 months with the claimant undertaking the bulk of the additional bar duties.

d The fourth matter was a requirement for all staff to use a glass carrier when carrying glasses. I find the claimant refused to do it. I reject his contention that raising this was a "dig" at him. He deals with this part of the meeting in detail in his statement. It is clear he was refusing to comply saying that he was the only one insured to carry glasses without a glass carrier. Mr Liney was insistent that this health and safety requirement should apply. In the course of an exchange he began a sentence with "I am telling you" and before he could complete it the claimant replied "and I am telling you I have had enough of you and that you will get my resignation in the morning."

5.26. I find he intimated his resignation verbally at the meeting as indicated and confirmed this in writing received on 6 October 2017 with notice. It read:-

As of 4th of October 2017 I have decided to hand in my notice. I therefore give you the obliged 12 week notice. Thanks. Yours Martin Campbell.

5.27. It can be seen there is no mention of any reason given for his decision. Mr Campbell could not explain why it did not state a reason and accepted if the reason was clear, he would have mentioned it. That omission is odd. He explained the delay of 3 days as being because drafting this letter took a bit of time which is not consistent with the absence of a reason or the length of the letter. Equally, it is odd that after 18 years, he should choose to resign at all. The dynamic between the claimant and Mr Liney I find has something to do with that. I find the decision was influenced by a sense of disappointment he was not going to be paid the hours at his notional hourly rate and whilst he agreed, and outwardly indicated agreement, I find it more likely than not that it was a state of affairs he was disappointed with. He did not argue the point at that time as I am satisfied he knew he had no contractual entitlement to anything. That did not mean he was not disappointed. In what must have been a short measure of time matters progressed to the glass carriers and that disappointment spilled over. Both parties then conducted themselves in an uncivil manner with voices raised and the claimant said what he said.

5.28. There was, as Miss Ali hinted, an element of a "heat of the moment" response in what was said on 3 October and had the claimant resiled from his indication I doubt that the respondent would have tried to hold him to it. However, he went on to confirm his resignation. The absence of a reason at that time suggests he didn't really know why he had done it.

5.29. On 13 October 2017, he was paid the agreed ex gratia payment of £4620.

5.30. After tendering his resignation, the claimant continued to undertake additional shifts. He says they totalled 240 hours. The committee agreed he could be paid for them at the rate of £7.50. It seems odd that in these circumstances, he should continue to undertake the duties when the agreement reached was on the basis of the rate for the job, not his notional rate as steward, but he did. As he had already resigned, he could easily have stood on his contractual terms. It seems to me that is a further evidential basis for finding the claimant agreed to that rate of payment.

5.31. Similarly, there were clearly other measures put in place through the existing staff and their training to reduce the burden on him. In the period before the ex gratia payment, he was working on average in the region of 44 hours per week extra overtime. In the period after the payment, that reduced to around 24.

5.32. On 21 November 2017, about 7 weeks after his resignation, the claimant wrote a second letter in respect of his resignation [39]. This is substantially more detailed than his resignation. It refers to his resignation on 7th whereas it was actually on the 6th. It gives notice he intends to bring a claim of constructive unfair dismissal suggesting he has in the time between resignation and then sought some professional advice. Significantly, it identifies the basis of that claim of unfair dismissal as being in relation to the following matters:-

a Not paying overtime, then not paying it at his hourly rate. He refers to his contract but not in terms that he is entitled to overtime but that from his contract his hourly rate can be deduced from his notional working week and salary. I note he used the word salary.
b Being harassed and bullied in denying him overtime.
c Being forced to work in breach of H&S legislation.
d Refusing to manage the stress which could have been avoided by paying to bring in agency staff .

5.33. In this letter, and despite alleging breach in requiring him to work the hours, he continued to press for the balance of pay to bring his additional hours up to this time £11.43 (the exact calculation of the notional hourly rate varies from claim to claim). In a letter dated 3 December 2017, in responding to the claimant's further letter, the respondent appears to have agreed to pay the difference but then had a change of heart. Mr Liney says it could not afford to pay it anyway but then took advice and decided it was not obliged to pay it.

5.34. That letter also confirmed the claimant's final date of employment was 30 December and proposed that he need not work his remaining notice. The Committee again contract with Gary Allen as freelance steward to assist in respect of covering shifts in December.

5.35. On the question of the alleged harassment, there is simply a lack of evidence. The nearest that can be discerned is the exchange between the claimant and Mr Liney in the meeting of 3 October concerning use of the glass carrier in which voices were raised.

5.36. Whatever was in the claimant's mind in respect of harassment or bullying, upon his termination he has sought to rejoin the club as a social member. Whilst I accept his contention that that is a different relationship to one of an employee, it is a factor which points away from any significant bullying or harassment rather than towards it.

5.37. On the question of banking procedure, the club takes in the region of £8,500 per week. It used to employ G4S to collect and bank its cash. That ended in or around January 2017 due to service concerns, particularly the delay in banking the money. I find Mr Campbell was asked to source and arrange an alternative provider. The post office was mentioned as a potential secure courier. I do not accept this arose by recommendation of the accountant as it was the accountant who would later explain to the committee how the post office had ceased this service in October 2016. Of course, I do not know whether that is correct and Mr Mee did not deal with it in his evidence at all. Whether he had learned that subsequently is little to the point, as the respondent's position is not so much about the actual handling of cash, which appears to have been accurately banked at all times, albeit sometimes after a delay of a week, but with the allegation that information was being given to the committee by Mr Campbell which he must have known was not true. If I accept he said the things Mr Liney attributes to him, they clearly were untrue. The claimant says he was waiting on a signature from the committee. If it was a direct debit that would be correct as only the committee could sign off such a document. Any alleged comment about signature in respect of a post office contract and a "free trial" of their services would be unlikely if the Post Office had in fact ceased to provide the service. This is an area of the evidence that ought to be much clearer to establish. It is, after all, advanced by the respondent as a basis for establishing Mr Campbell's employment would have terminated in any event

5.38. I found the committee to be extremely vague about what contractual arrangements it had entered into and what its policy actually was. Any such banking policy as might exist is not in writing. I can accept that there is likely to be an expectation that banking is undertaken on a weekly basis but have nothing to suggest any consequence of not doing so. Since the contract with G4S was terminated in January, Mr Campbell had done the banking on his own whatever the size of the takings. I find that will have exceeded 10k on occasions and whilst a single week would not exceed 15k, delaying banking for two weeks easily could. In April 2017, the respondent's social club insurance was renewed. I accept that it is likely the conditions it contains would have been in force in previous policies by this insurer. The relevant conditions are:-

a that two people should transport money to the bank of a value between £5k and 10k,
b That 3 people should where the value was up to £15k
c If over £15k, a professional carrier of money should be used.
d Whilst it does not say so, by implication banking of under £5k could be banked by a single individual.

5.39. I do find there was a concern about banking procedure and the committee made a formal request to the claimant to provide a report by 5 October. Whether he was in the meeting on 3 October or joined it later, I am satisfied this request was made of him. I am also satisfied that he did not comply. Later "bond room audits", that is cash reconciliation checks, showed everything was fine with the banking. No action was taken. At that point in time, even if everything that Mr Liney has told me was in fact true, it was in his knowledge and that of the employer. In those circumstances, no disciplinary action whatsoever was taken by the respondent. The fact that the claimant resigned on 6 October is nothing to the point. He did so with long notice and it had everything in its knowledge to address any concerns it had within a disciplinary setting and chose not to. Instead, it continued with the contractual relationship for the following two months. The effect of the respondent choosing to ignore an apparent serious breach and continuing with the contractual relationship is only amplified by the terms of the letter it sent on 3 December 2017. Whilst it does release the claimant from any requirement to attend work during the remainder of his notice, read as a whole it is in positive terms referring to the committee's regret at his resignation, thanking him for his past contribution and making the short-lived offer to make a goodwill payment.

Discussion and Conclusions

6. *Unauthorised Deduction*

6.1. I start with this claim as the conclusions I reach here will determine a large part of the unfair dismissal claim.

6.2. Section 13 of the1996 Act, so far as is relevant to this case:-

> ***1) An employer shall not make a deduction from wages of a worker employed by him unless-***
> ***(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or***
> ***(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.***
> ***2) …***
> ***3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.***

6.3. Whether a payment is properly payable is to be resolved by considering the ordinary contractual principals. (**Greg May (Carpet fitters and contractors) Ltd v Dring 1990 ICR 188 EAT)** and if not arising in contract, must still have some legal basis (**New Century Cleaning v Church 2000 IRLR 27 CA**).

6.4. Deduction cases typically fall into one of two types. Either there is a settled amount of pay due, from which a discrete sum is deducted by the employer for some reason or another, or simply the amount which is properly due on a particular occasion is not paid when it is due. This case engages the latter in the question whether an overtime payment at the notional hourly rate of

£11.46 was properly due to the claimant at any time after June 2017? In other words, in any pay reference period was he paid less than that which was properly due?

6.5. In my judgment, the answer is emphatically no. There was no term entitling overtime at any rate or at all. The claimant knew there was no term. He sought recognition of the hours he was working and made a request to the committee. Whilst it declined his request to pay at £11.46, it did agree to make a payment. There was no contractual basis for paying overtime, what it did was to make an ex gratia payment at the equivalent of £7.50 per hour which reflected the pay date applicable to bar work and that the other staff would have received had they been trained to do the work. Further, it continued to authorise overtime payment at that rate for as long as the extra hours continued to be worked.

6.6. It follows that in each pay reference period, which in this case is weekly, the claimant did not receive less than that which was properly due. There was no unauthorised deduction from wages.

6.7. Although not put on this basis, it cannot even be said that the claimant was paid at a rate less than that which the law requires under the National Minimum Wage Act 1998 as all additional hours were paid at the prevailing rate.

7. *Constructive Dismissal.*

7.1. It is for the claimant to establish a dismissal under s.95(1)(c) of the Employment Rights Act 1996. So far as is relevant to this claim, it provides the circumstances in which an employee is dismissed as follows:-

> ***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—***
> ***(a) ..***
> ***(b) ..***
> ***(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.***

7.2. Whether the claimant is “entitled to terminate it … by reason of the employer’s conduct” is to be answered by reference to principles of contract law. It is not enough for the employee to leave merely because the employer has acted unreasonably. (**Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27**). In order for the claimant to make out his claim, he must satisfy four conditions:-

a There must be a breach of contract by the employer.
b In assessing this the position of the tribunal is no different to that of the High Court when it has to determine whether or not there is a breach of contract.
c He must leave in response to the breach and not for some other, unconnected reason.

d He must not delay too long in terminating the contract in response to the employer's breach or otherwise affirm the continuation of the contract.

7.3. As to the term of trust and confidence, the elements of the implied term of mutual trust and confidence should not be paraphrased or reduced to shorthand. It was identified in (**Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462**) as:-

> ***'The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'***

7.4. There are therefore three elements to the term and unless all three elements are satisfied, the term has not been broken. They are:-

a Conduct by the employer
b which was without reasonable and proper cause
c which was calculated or likely to destroy or seriously damage the relationship of confidence and trust

7.5. The analysis requires an objective assessment of the gravity of the situation and is not made out on the subjective beliefs and feelings of the claimant. A breach must be sufficiently important to justify the employee resigning. In **Croft v Consignia PLC [2002] IRLR 851**, Lindsay P observed:-

> ***"It is an unusual term in that it is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows.***

7.6. As to affirmation, The relevant principals were summarised in **WE Cox Toner (international) v Crook [1981] IRLR 443** as follows:-

> ***If one party ('the guilty party') commits a repudiatory breach of the contract, the other party ('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation:*** **Allen v Robles** ***(1969) 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation:*** **Farnworth Finance Facilities Ltd v Attryde** ***(1970) 1 WLR 1053***

7.7. As to the reason for resignation, it is trite that the alleged breach must be a material factor in the reason for resigning but it need not be the whole or only reason. (**Meikle v Nottinghamshire CC [2004 EWCA Civ 859**.)

7.8. The claimant relies, individually or cumulatively, on three circumstances in which he says his contract of employment has been fundamentally breached. I deal with each in turn below. They are:-

a Pay in relation to overtime.
b The implied term of mutual trust and confidence in relation to bullying and harassment.
c The implied term of mutual trust and confidence in relation to working excessive hours.

7.9. Pay will always be a fundamental term of the contract of employment in respect of all but the most de minimis of situations. But in all cases there must actually be a breach of a term to found a claim of constructive unfair dismissal. Put simply, there is no term relating to overtime payments and therefore no breach on which the claimant can rely.

7.10. I accept that there is nothing inherently inconsistent between a salaried position and paid overtime, but as a matter of fact, that does not arise here. I reject any contention that there is a basis for implying a term as to overtime payments. It is simply not necessary to give effect to the purpose of the contract and is arguably in conflict with the express terms the parties have agreed.

7.11. There may be an implied term, or other legal basis on which to alleged constructive dismissal, in respect of compliance with the national minimum wage but the case has not been put on that basis and, in any event the ex gratia payment made by the respondent would satisfy that.

7.12. The only basis on which the circumstances of the claimant's payment for the hours worked could support a claim of constructive dismissal is in the manner in which the respondent dealt with it offended the implied term of trust and confidence. Again, that is not how the case has been put but I would in any event reject such a contention. The claimant voluntarily worked the hours, had it within his control to organise alternatives or report back with his difficulties which he did not. He could have approached the committee with a demand to reduce his hours, instead he chose to seek payment. The immediate response of the employer was shrouded in some concern that he ought not be working the hours but nevertheless, resulted in an immediate offer of a substantial back payment which it was not contractually obliged to make and which was accepted and he continued to work on that basis. Within that, I find no basis for holding the actions of the employer objectively show conduct which was likely to serious damage the relationship and, to the extent that simply not paying that which was being asked for is capable of amounting to such, it was with reasonable and proper cause based on the absence of any obligation to do so.

7.13. The second basis of this claim is in relation to harassment and bullying. This is simply not made out on the facts and must be dismissed.

7.14. The third basis is in respect of working the hours that the claimant worked which is also put as a breach of the implied term of trust and confidence as opposed to any other implied term going to safe systems of work.

7.15. This basis of claim has required particular consideration as it is clear that Mr Campbell was working a large number of hours each week in excess of his notional contractual hours, even accounting for the fact he was salaried. The employer knew from early on that the hours Mr Campbell was working to were at a level that could be described as excessive, even if it did not know the actual hours worked. It could have done more to put itself in a position to find out who was doing what shifts on the rota to cover the reduction in the bar workforce. I step back from concluding a breach of contract because this state of affairs arises less from the respondent's conduct, and more from that of the claimant himself being in control of his working hours and expressing contentment to work those hours. Even where there remained elements of conduct on the part of the employer, it is therefore conduct which is not without reasonable and proper cause arising directly from the claimant's apparent attitude and control over the state of affairs and ability to remedy it.

7.16. If I am wrong about that, and there was a breach in respect of acquiescing in the claimant working the excessive hours, I have come to the conclusion that the contract was affirmed when the claimant submitted his claim to the committee to be paid. This was not a complaint seeking to reduce the hours he worked, but of seeking payment for them and, significantly, to continue working on that basis in the future. The act of continuing upon payment, is inconsistent with the allegation that the hours being worked are a breach. The claimant's later apparent dissatisfaction on the level of remuneration for those hours does not alter the fact that in seeking payment for the hours worked, he did an act inconsistent with accepting any repudiation that could have arisen by the fact of working the hours. Consequently, if there was a breach, the contract was affirmed by the claimant's otherwise unambiguous actions in maintaining it.

7.17. I am satisfied that the rate of pay settled on between the parties was part of the claimant's dissatisfaction which led him to resign and that this was fuelled by the manner of the exchange between him and Mr Liney during the meeting on 3 October. Looking at how the reasons are expressed, or rather not expressed, a few days later I suspect that that was a heat of the moment comment which the claimant did not really mean but that, for some reason, he felt bound to follow through with it a few days later. The subsequent letter with full and expansive reasons threatening constructive dismissal has the flavour of being written after seeking advice and I suspect that advice was given without the benefit of the full contractual position I have had put before me.

7.18. It follows, I conclude there was no breach of contract and the claimant's resignation was just that, a resignation, and does not amount to a dismissal

for the purpose of s.95(1)(c) of the 1996 Act. The claim fails and is dismissed.

7.19. It is therefore not necessary for me to deal with the respondent's alternative arguments of a fair dismissal and that he would have been dismissed in any event. I would merely observe that, had it been necessary, I do not see a basis on which the knowledge of Mr Liney and the committee about the claimant's account of, and practice relating to, the banking procedures could now be resurrected to found a basis for a later dismissal under the principals of Polkey. The relevant state of affairs has not been discovered subsequent to the resignation, it was known from early October. Not only was no action taken then, the employer has actively affirmed the contract of employment in its continuation throughout the claimant's long notice. The fact he was working his notice is nothing to the point. That is itself a performance of a contractual term and the continuation of the employment, the payment of salary, and payment of the temporary overtime agreement whilst in full knowledge of those matters now advanced as a fundamental breach of contract and a basis for dismissal, must amount to a waiver of any such breach or, more correctly put, an affirmation of the continuation of the contract during its remaining time.

EMPLOYMENT JUDGE R J Clark

DATE 7 January 2019

JUDGMENT SENT TO THE PARTIES ON

……..……..

AND ENTERED IN THE REGISTER

……..……..
FOR SECRETARY OF THE TRIBUNALS