



EMPLOYMENT TRIBUNALS

Claimant: Miss Julie Ayngé

Respondent: Mr Keith Trickett t/a Sully Club and Restaurant

Heard at: Cardiff **On:** 21 and 22 November 2018

Before: Employment Judge R Vernon

Representation:
Claimant: Mr O'Callaghan (Counsel)
Respondent: Mr Stanley (Consultant)

JUDGMENT having been sent to the parties on 24 November 2018 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Introduction

1. The Claimant presented an ET1 claim form to the Tribunal. It was received by the Tribunal on 9 December 2016. In her ET1 she makes a complaint of unfair dismissal. According to section 9.2 of the ET1, the Claimant also seeks "Any holiday pay, notice pay".
2. The Claimant's case can be summarised as follows. She was employed at the Sully Constitutional Club. She was employed there initially by her parents as part of a family run business. She was employed by her parents for approximately 17 years. During that time, she worked predominantly in the kitchen at the club. In mid-2016, the business was sold by the Claimant's parents to Mr Trickett. Mr Trickett took over the business with effect from 1 September 2016 and continued to employ the Claimant thereafter. The Claimant complains of a number of issues which arose after the takeover by

Mr Trickett. In particular, she says that both Mr Trickett and his partner (Miss Jackie Brown) treated her poorly. She alleges that they took duties away from her, messed her around with her working hours and, on a number of occasions, treated her disrespectfully.

3. The Claimant's case is that matters came to a head on the weekend of the 15 and 16 October 2016. During conversations on those dates the Claimant asserts that Mr Trickett made clear that the Claimant's employment was terminated. The Claimant says that the termination amounts to an express dismissal and that that dismissal was unfair. In the alternative, the Claimant asserts that if (contrary to her primary case) she was not expressly dismissed by Mr Trickett, then she resigned from her employment on that weekend but that that resignation was a response to a breach of her contract of employment committed by the Respondent. The Claimant asserts that the Respondent's behaviour breached the implied term of trust and confidence which forms part of her contract of employment. She therefore asserts that her resignation amounted to a dismissal within the meaning of the Employment Rights Act and that her dismissal was unfair.
4. In summary the Respondent's case is, and has been throughout the litigation, that the Claimant was not dismissed, either expressly or constructively. The Respondent denies behaving inappropriately towards the Claimant at any time. The Respondent's case is that rather than it being the Respondent that had a poor and disrespectful attitude, it was in fact the Claimant who behaved in such a way. The Respondent says that the Claimant was often aggressive and was awkward during the course of her employment. The Respondent's case, put simply, is that the Claimant resigned from her employment during the weekend of the 15 and 16 October and she did so of her own choice. The Respondent says that her resignation was not a response to any breach of contract, whether fundamental or otherwise.

The hearing and evidence

5. For the purposes of this hearing, the Tribunal has been presented with a bundle of documents. The bundle contains pages from 1 to 173. Save for a couple of documents towards the end of the bundle, the primary focus of both parties (for the purposes of the liability stage of the case) has been on the documents which appear at pages 1 to 80 of the bundle.
6. In addition to the documents in the bundle, the Tribunal was also provided with an original document, namely a wall calendar upon which the Claimant had made various entries. A copy of that document appears in the bundle (pages 75-76) but that copy is unclear and difficult to read. With the agreement of all parties the Tribunal was provided with the original document rather than having to rely on the unsatisfactory copy.

7. In addition to the documentary evidence the Tribunal was also provided with written witness statements from the Claimant (in support of her case) and from Mr Trickett, Miss Jackie Brown and Mr Mark Shepperdson (in support of the Respondent's case). All four of those witnesses attended the Tribunal hearing. All four witnesses gave oral evidence and all four witnesses were cross examined by the opposing party.
8. It should also be noted that within the bundle of documents (at page 78) is a document entitled "Statement – Mr and Mrs C Ayngge". Mr and Mrs C Ayngge are the Claimant's parents. The Claimant says that that document was written by her but has been signed by both parents. It is right to say that there are signatures which appear at the bottom of the page. However, the following observations should be made regarding that document: a) it is not endorsed with a statement of truth as one would ordinarily expect to see on a witness statement for the purposes of a contested hearing, and b) neither of the Claimant's parents attended the hearing to give oral evidence.
9. The Claimant was represented throughout the hearing by Mr O'Callaghan. The Respondent was represented throughout by Mr Stanley. They each had the opportunity to cross-examine the other party's witnesses fully. They also each had opportunity to make submissions once the evidence in the case had been concluded. During the hearing, the Claimant left the Tribunal room on several occasions, particularly during the oral evidence adduced on behalf of the Respondent. The Claimant was suffering with a bad cough and there were several occasions when she was coughing badly. She asked to be excused from the Tribunal room. She was excused. At no time was the Tribunal asked to adjourn the hearing during any such periods. The hearing therefore continued in the Claimant's absence but she was represented at all times by counsel.

Procedural history and issues

10. This was the second final hearing of the Claimant's claim. As a result of an appeal against the outcome of the first final hearing, the claim was remitted to the Employment Tribunal for a further hearing.
11. Prior to the final hearing, and after the case had been remitted by the Employment Appeal Tribunal, the claim was the subject of a telephone Preliminary Hearing conducted by Regional Employment Judge Clarke on 27 July 2018. During that telephone hearing, the issues to be determined were clarified following a discussion with the parties. The issues are set out within paragraphs 4.1 to 4.4 of Regional Employment Judge Clarke's summary of that Preliminary Hearing.
12. In summary the issues are as follows:

- 12.1 what words did the Respondent use towards the Claimant on 15 and/or 16 October 2016 and did those words constitute an unambiguous and express dismissal of her employment?
- 12.2 if the Claimant was expressly dismissed on either of those dates, which was the actual date of dismissal and was that dismissal fair or unfair? It should be noted at this stage that, during his oral submissions, Mr Stanley conceded on behalf of the Respondent that if there was an express dismissal then that dismissal would be an unfair dismissal (by reason of a defective procedure);
- 12.3 alternatively, if the Claimant was not expressly dismissed, was she constructively dismissed on either 15 or 16 October? In respect of that alternative complaint, the Claimant asserts that there was a breach of the implied term of trust and confidence. The matters relied upon as being breaches are as follows: a) the Respondent took away some of her duties, b) the Respondent messed her about in relation to her hours of work, and c) the Respondent spoke to her in a disrespectful and inappropriate manner. The Claimant puts this alternative claim on the basis of a 'final straw'. The 'final straw' relied upon is the events alleged to have occurred on 15 and/or 16 October 2016.

Relevant law

13. The Claimant brings a complaint of unfair dismissal. Where dismissal is not admitted, the burden of proving that there has been a dismissal rests upon the Claimant.
14. For the purposes of a complaint of unfair dismissal, dismissal is defined by section 95 of the Employment Rights Act 1996. That section reads as follows:
- (1) For the purposes of this part an employee is dismissed by his employer if, and subject to sub-section (2) only if,
 - (a) the contract under which he is employed is terminated by the employer whether with or without notice
 - (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 without notice by reason of the employers conduct.
15. If an employee can prove that she was dismissed, the Tribunal then must consider whether the dismissal was fair or unfair. Determination of that issue requires the Tribunal to consider Section 98 of the Employment Rights Act. Pursuant to section 98, the Tribunal must first consider whether the employer can show the reason for the dismissal and that that reason is a potentially fair reason. If the employer can discharge that burden, the Tribunal must then

consider whether the decision to dismiss for that reason was fair or unfair taking into account those matters set out in section 98(4) ERA 1996.

Findings and discussion

16. In coming to the findings of fact that are material to these proceedings, the Tribunal has taken into account all of the evidence adduced by both parties. The Tribunal has also taken into account all of the submissions that have been made. These reasons do not make specific reference to every feature of the evidence or every submission made. Although that is the case, the Tribunal has nonetheless considered all matters. The Tribunal has referred below to the evidence and submissions that it considers significant or material to the findings and conclusions below.

Express dismissal

17. In order to determine whether the Claimant was expressly dismissed as alleged, the focus of the Tribunal is on the events of 15 and 16 October 2016.

18. At the outset it must be noted that the events in question took place over 2 years ago. It is understandable that the memories of those involved in those events are likely to have faded during the course of those 2 years.

19. It should also be remembered that the litigation has a relatively long history. As already noted above, this is the second hearing of the claim. That is a material issue in this case for this reason. The witness statements which have been relied upon by the parties in these proceedings were prepared by all of the witnesses (including the Claimant and the Respondent) for the purposes of the first hearing. The same witness statements have been used for the purposes of this second hearing as were used for the first hearing. On the evidence before me, those witness statements were prepared at some point during the course of 2017. They were therefore prepared at a time significantly closer in time to the events in question than today. That factor is significant. It is likely that the recollection of all witnesses was better at the time that the witness statements were prepared than they were as at the date of the second hearing in November 2018.

20. The Tribunal firstly considered the events of 15 October 2016. The Claimant's account of the events of that date are set out in her witness statement. They are set out at pages 7 to 8. In summary, the Claimant's account is that during the course of that evening various issues arose, including some issues related to food being served within the premises, and also issues relating to the presence of the Respondent's dog within the premises, particularly within the restaurant area of the premises. Those issues culminated, the Claimant says, in the Claimant entering the kitchen of the premises where Mr Trickett was working. She asserts that there was a disagreement between them. The

Claimant says that the disagreement related to the Claimant's ability to remove the Respondent's dog from the premises. The Claimant's case is that, in temper, Mr Trickett said "*that's enough, this is your last shift tonight. That's it, you're done, get out*". The Claimant's witness statement makes clear that, after she alleges Mr Trickett spoke those words, she went outside of the premises, had a cigarette, spoke to some customers, then continued to serve other customers and then returned to the kitchen. In her own words, she returned to the kitchen "*to clarify what Mr Trickett meant*". On that occasion, she records that Mr Trickett said that she must have misheard what he said earlier and that he had in fact said "*this is your last busy shift tonight. You're not working a night shift again*". Shortly after that, the Claimant says she collected her bag and jacket and left the premises for the evening.

21. The Respondent's evidence (to some extent) is in similar terms. Mr Trickett also records (in paragraphs 34 to 47 of his statement) that various issues arose during that evening in relation to food stuffs and food preparation. It should be noted that he asserts that the Claimant was significantly more aggressive than the Claimant's evidence suggests. However, ultimately his evidence is that an issue arose regarding his dog being present within the premises. Mr Trickett's evidence is that he instructed the Claimant that the dog should be removed. Where Mr Trickett's evidence differs materially with the Claimant's evidence is as follows. In paragraph 43 of his statement, Mr Trickett says "*as a result of being busy I did not have time to deal with Julie properly, but I did say to her that this would be the last busy night shift that she would work and that from now on she would only be put onto shifts during the days on the bar*".
22. The evidence of Jackie Brown in her witness statement and of Mr Shepperdson in his witness statement in large part corroborates the evidence given by Mr Trickett. In their statements, both are clear that the Claimant was not told that that night was her last shift, but (consistent with Mr Trickett's evidence) she was told that it would be her last busy night shift.
23. Both parties and the other witnesses were cross examined. In the Tribunal's judgment, all of the witnesses (including the parties themselves) maintained the accounts in their witness statements in all material aspects.
24. Where there were inconsistencies between the evidence in the witness statements and the oral evidence of the witnesses, the Tribunal is satisfied that any such inconsistencies arose because of lapses in recollection caused by the passage of time rather than for any other reason, such as the witnesses being untruthful in their evidence or seeking to mislead the Tribunal.
25. As to the events of the 16 October, the Claimant's account of that day is set out at page 9 of her witness statement. She says that she went into the premises at around 6.30pm to ask for her wages. She says that both Miss Brown and the Respondent told her that her employment was finished. She

says that Mr Trickett told her that they would have got rid of her in the first week if it wasn't for the Claimant's parents and that they had been putting up with the Claimant. The Claimant alleges that Mr Trickett then bashed his fist down on the counter within the premises.

26. The account of the events of 16 October given on behalf of the Respondent is given by Mr Trickett and by Miss Brown. Mr Shepperdson was not present at the premises on that occasion. The evidence of both Mr Trickett and Miss Brown is to this effect. The Claimant came in for her wages, was agitated, was told again that she had not been dismissed but had simply been told that she would not be working any more busy night shifts and was offered her tips in addition to her wages. They say that the Claimant responded by indicating that Mr Trickett could shove the tips "up his arse" and then she left.
27. It is not in dispute between the parties that, after the 16 October 2016, the Claimant did not return to the premises and has not subsequently worked at the premises at any time.
28. It is clear from the above that there is a material dispute of fact as to the events of 15 and 16 October 2016. Resolution of that dispute, which is essential for the determination of these proceedings, depends heavily on the Tribunal's assessment of the witnesses. The Tribunal is uniquely placed in making that assessment as the Tribunal has had the opportunity to see and the opportunity to hear all of the witnesses give their evidence and be cross examined. Having considered all of the material evidence of the witnesses, the Tribunal has made the following findings and conclusions.
29. The Tribunal finds that Mr Trickett's evidence was clear and consistent. As already indicated above, any differences in the evidence he gave orally as compared to his witness statement are a result of the passage of time as opposed to being caused by any other reason.
30. His evidence is supported and corroborated by the evidence of both Miss Brown and Mr Shepperdson. Miss Brown's evidence supports the Respondent's evidence as to the events of both nights. Mr Shepperdson's evidence supports the evidence of the Respondent and Miss Brown regarding the events of 15 October 2016.
31. The Tribunal finds that there are no material inconsistencies in the accounts given by the Respondent or his witnesses in relation to those matters.
32. The Tribunal also finds that, in particular, Mr Shepperdson's evidence was significant. The Tribunal considers him to be an impressive witness. He is supportive of the evidence of Mr Trickett. The Tribunal is satisfied that Mr Shepperdson is independent of both parties. At the time of the events in question, he was employed by Mr Trickett. However, the Tribunal accepts and

finds that he is no longer employed by Mr Trickett. Further, no suggestion was made during cross examination or submissions that Mr Shepperdson in some way has an axe to grind with either party. The Tribunal finds that Mr Shepperdson's evidence was clear and adamant as to the events of the 15 October, namely that the Claimant was not told that that evening was her last shift.

33. As to the comment which Mr Shepperdson says was made on that evening, namely that the evening was to be the Claimant's last busy night shift, it is true to say that in cross examination he said that he "thinks" that that was said twice. The Claimant submits that that evidence suggests some uncertainty. However, the Tribunal notes that that comment in his oral evidence was quickly followed by him saying that he knew that it had been said twice. The Tribunal bears in mind that cross examination is a fluid process and that a witness is often doing their best to assist the Tribunal when giving their evidence. On this occasion, the Tribunal is left in no doubt that that is what Mr Shepperdson was doing. The Tribunal was left with the clear impression from his evidence that he had heard that comment, namely the comment that Mr Trickett says was made, on two occasions. That evidence is consistent with Mr Trickett's evidence.
34. The Tribunal also considers there to be further significance in the evidence of Mr Shepperdson. His evidence also corroborates Mr Trickett's evidence regarding the manner in which the Claimant is alleged to have been behaving on that evening. The Tribunal is satisfied and finds that the evidence of Mr Trickett and Mr Shepperdson is accurate and that the Claimant was behaving in the manner alleged. Further, that any awkwardness was coming from her as opposed to coming from Mr Trickett.
35. It will be apparent from that set out above that the Tribunal places significant weight on the evidence of Mr Shepperdson for the reasons outlined above.
36. As to the Claimant's evidence of those events, the Tribunal finds that her evidence regarding the events of 15 October 2016 was confused. Firstly, the Claimant's case and her evidence is that she was told initially by Mr Trickett that that night was her last shift, that she was done and that she should get out. The Tribunal notes that that is the only conversation referred to within the ET1 claim form as to that evening apparently relied upon by Miss Ayngé. Notably, there is no reference to the later conversation (which she now accepts took place) where she returned to the kitchen to seek clarification. The Tribunal considers that omission to be significant. If the words spoken by Mr Trickett on the first occasion were those asserted by the Claimant, it must have been clearly apparent to her that her employment had been terminated. All parties seem to agree that if those words were used then those words would amount to a termination of employment. However, the Claimant's evidence that those words were the words used is materially undermined by two matters. First,

rather than leaving the premises, the Claimant in fact (on her own evidence) remained at work. On her own evidence, she remained and in fact continued working (albeit briefly) serving other customers. Second, it is undermined, (again by her own evidence) where she indicates that she went back into the kitchen to "*clarify what he meant*". If the comment made was as the Claimant asserts, the Tribunal considers that it is very difficult to understand what clarification was needed. The Tribunal is satisfied that it is more likely that the only reason clarification may have been needed was because the Claimant was unclear about what had been said.

37. For all of those reasons, the Tribunal finds that on 15 October 2016, when the Claimant left the premises for the evening, the only comments that had been made to her by the Respondent were that that would be "*the last busy night shift*" that she would work.
38. The Tribunal finds that those words are not and do not amount to an unambiguous express dismissal. The Tribunal is satisfied that the Claimant was not expressly dismissed by Mr Trickett on the evening of 15 October 2016.
39. The Tribunal is satisfied that there is further significance to that finding. The significance is as follows. When the Claimant left the premises on 15 October, the Tribunal finds that she could not have believed that she had been dismissed. That was not the effect of what had been said to her. Further, and in her own oral evidence, she accepted that she didn't in fact know what was going on on the evening of 15 October 2016 when she left the premises.
40. Those matters are significant because, notwithstanding that evidence, on that same evening the Claimant was engaged in some form of instant messaging with her cousin Janet (see page 38 of the bundle). On two occasions in that instant messaging conversation, she told her cousin that she had been sacked. By reason of the findings made above, the Tribunal is satisfied that that cannot have been the Claimant's understanding at that time. However, she was nonetheless telling others (and others who were not involved in the events) that that is what had happened. The Tribunal finds that to be a matter which undermines the Claimant's credibility as to the events in question.
41. Furthermore, two days later on 17 October 2016, the Claimant also sent a text message to her NVQ Assessor called Josie (page 34 of the bundle). That text message included the following assertion "*Hey Josie, I was sacked Sat night*". That is clearly a reference to the events of 15 October 2016 and not to any other date. Again, for the reasons outlined above, the Tribunal finds that that could not have been the Claimant's understanding at that time. The Tribunal is therefore satisfied that the Claimant was informing others of a state of affairs which was not accurate.

42. Those two instances either display a lack of clarity in the understanding of the Claimant or alternatively show that the Claimant was informing others of a state of affairs which she knew were not accurate. Either way, the reliability and/or credibility of her evidence is undermined.
43. There is no dispute that the Claimant then returned to the club the following evening on 16 October 2016. The parties agree that she went in to collect her wages for the week that had just been worked. Her normal pay day was Sunday.
44. As to the dispute regarding what was said on that occasion, the Tribunal again resolves that dispute in favour of the Respondent. Given the findings made above regarding the events of 15 October, the Tribunal finds that nothing then changed between 15 October and the evening of 16 October. The Tribunal finds that it is therefore fundamentally unlikely that the Respondent would have said anything different to the Claimant on the Sunday evening to that which he said on the Saturday evening. The Tribunal is satisfied that the Respondent's evidence as to what was said on 16 October 2016 is clear, namely that he simply again indicated that the Saturday evening would be the last busy night shift that the Claimant would work.
45. It was submitted on behalf of the Claimant that it is unlikely that she would have arrived at the premises on that evening shouting and being aggressive in the manner alleged by the Respondent. However, the Tribunal is satisfied that her behaviour was simply a continuation of the way in which the Claimant had behaved on the Saturday night. Furthermore, she arrived asserting that she had been sacked, which of course is no different to that which she had been doing on the Saturday evening during her instant messaging conversations with her own cousin.
46. For all of those reasons the Tribunal is satisfied and finds that on both dates the Claimant was told no more than that the Saturday night would be "*the last busy night shift*" that she would work.
47. As already indicated, the Tribunal is satisfied that those words do not amount to an unambiguous and express termination of the Claimant's contract of employment. Further, the Tribunal finds that the words do not amount to a dismissal within the meaning of section 95(1)(a) of the Employment Rights Act 1996.

Constructive dismissal

48. The Tribunal has next considered the Claimant's alternative assertion that there was a constructive dismissal.

49. The Tribunal starts by again noting that the Claimant puts her case on the basis of a 'last straw'. In summary, the Claimant asserts that there was an accumulation of events which amounted to a breach of her contract of employment entitling her to resign. The last straw relied upon is the events of 15 and 16 October 2016. For the reasons set out above, the Tribunal rejected the Claimant's account of the events of those dates and has found that the events occurred as described by the Respondent.
50. During his oral submissions, Mr Stanley referred the Tribunal to the authority of ***Omilaju -v- Waltham Forest London Borough Council [2004] EWCA Civ 1493***. The Tribunal has considered that authority and taken it into account. When considering a last straw type case, the last straw relied upon needs to actually add something to the chain of events that has gone before it in order to amount to a last straw so as to support a constructive dismissal claim. If that which is complained about is nothing more than "*an innocuous act*" then it is not of sufficient gravity to amount to a last straw in that sense.
51. For reasons already given, the Tribunal has found that, on both dates, the only comments made by the Respondent to the Claimant were that the Saturday evening shift would be the Claimant's "*last busy night shift*". The Tribunal is satisfied that that did not amount to a statement to the effect that there would be no further work for her or that there would be any marked reduction in her working hours.
52. The Tribunal finds that the Claimant's shifts had varied during her employment with the Respondent. The Tribunal also finds that, at least towards the end of her time working for her parents, her shifts also varied. There is no written contract of employment in this case or any statement of employment particulars. There was no written contract at the time the Claimant was employed by her parents and there was no written contract during the time that the Claimant was employed by Mr Trickett. The Tribunal is satisfied that there was therefore no express term as to the hours which the Claimant could expect to work in any given week. It should be noted that the Claimant asserts that there was an agreement reached at the outset of her time with Mr Trickett that her employment would be "*full time*". However, exactly what is meant by full time is entirely unclear from the evidence presented. Firstly, in her ET1 the Claimant indicates that her average hours each week were 30 hours prior to dismissal. However, she has also prepared a Schedule of Loss which seems to suggest (when one works out the calculations used to prepare the schedule) that she worked 40 hours per week. There is therefore an inconsistency in the case being advanced by the Claimant. The Claimant also points towards the statement from her parents which indicates that the agreement was that there would be a full time contract. However, her parents have not provided a statement endorsed with a statement of truth and, in any event, have not attended to give oral evidence. Their evidence goes to a keenly disputed issue of fact. It therefore seems likely that had they attended to give oral evidence,

Mr Stanley would have wished to ask questions of them, particularly in relation to that issue. In the absence of them attending and giving oral evidence, and because the statement is not endorsed with a proper statement of truth, I attach no weight at all to that document.

53. In addition to those matters the Tribunal was also referred to other documents dealing with the Claimant's pay. There is a pay record at page 77 of the bundle which governs the period up to the takeover by Mr Trickett. There has been some disagreement between the parties as to what that document demonstrates as to the average hours worked by the Claimant during that period. Mr Stanley suggests it shows 23 hours a week. Mr O'Callaghan suggests 27 hours per week. The Tribunal is satisfied that the significance of that document is not in the average hours worked during the period but rather that the hours worked clearly fluctuated week by week during that period. Further, not only did they fluctuate but they fluctuated reasonably significantly. The Tribunal notes that there were weeks during that period during which the Claimant's pay was as little as £94; in other weeks, her pay was in the region of £140 to £150. At that time, the evidence shows that the Claimant was earning £8 per hour. A simple calculation shows that £140 at £8 per hour amounts to 17.5 hours in that week. Therefore, the Tribunal is satisfied that that document undermines any suggestion that during that period the Claimant had a full time contract. What the document demonstrates is that the Claimant had employment during which her contractual hours varied week by week and varied significantly. The Tribunal is satisfied and finds that that is a situation which continued after the takeover by Mr Trickett.
54. The Tribunal further notes that there is no evidence at all of any complaint having been made by the Claimant post 3 September 2016 regarding the hours she was being provided with. If her position is that she had an agreement for full time hours, whatever that expression may mean, then it is surprising (at the least) that she would not have raised her concerns when her hours were being reduced at the time that they were being reduced.
55. For all of those reasons, the Tribunal is not satisfied that the Claimant had any firm expectation, and certainly no entitlement (by way of contractual terms) as to any particular number of hours in any particular week.
56. For all of those reasons, the Tribunal is satisfied that the comment that was made by the Respondent to the Claimant on 15 and 16 October, namely that she would not work any more busy night shifts was "an innocuous act" in the sense meant in the case of ***Omilaju -v- Waltham Forest London Borough Council***. It added nothing to any events which had gone before it and, therefore, does not amount to a final straw giving rise to any entitlement on the part of the Claimant to resign and allege that she has been dismissed.

57. Given that conclusion it is strictly unnecessary to make findings in relation to the other incidents relied upon by the Claimant as to the events leading up to the alleged final straw. However, the Tribunal notes the following matters in relation to those allegations:

57.1 Firstly, the Claimant complains that duties were taken away from her. That complaint relates specifically to allegations that she was moved out of the kitchen and that she was removed from her duties of conducting paperwork in relation to food hygiene at the premises. As to that allegation, the Tribunal again prefers the evidence of the Respondent and his witnesses as against the evidence of the Claimant. The Tribunal is satisfied and finds that the Claimant in fact agreed to move out of the kitchen. The Claimant's evidence (and the argument on her behalf) is that she would not have done so because it was essential to her NVQ course that she continue to work in that capacity. However, that assertion is significantly undermined by other evidence in the case, most notably (at page 28 of the bundle) a record of a meeting between the NVQ Assessor (called Josie) and the Claimant. There is agreed evidence that that was a meeting that Mr Trickett and Miss Brown also attended. When one looks at that document it is entitled 'Learn at Welfare and Progress Review – Formal Review'. It is clear that that document is intended to be a record of a formal review of the progress being made by the Claimant on her NVQ course. The Claimant's evidence was that she told her Assessor that there had been a change in her duties. She also gave evidence that the alteration of her duties was a matter which affected the NVQ course. If that evidence were true, it is extremely difficult to understand why there is no mention at all of that matter in the record of that meeting. In fact, the document indicates something quite to the contrary. For example, the document contains a box entitled 'Learner Comments'. That is clearly a box where there is an opportunity for the Claimant to indicate anything that is concerning her or any comments she wishes to make about the course generally. There is no mention there of any concern. Even more significantly perhaps, the Assessor has written the following comment "*good to see Julie positive about qualification*". It is very difficult to reconcile that evidence with the evidence given by the Claimant, namely that there had been a fundamental change in her duties which had a detrimental impact upon her NVQ course;

57.2 As to the allegation that the Respondent behaved towards the Claimant in a disrespectful and inappropriate manner, the Tribunal finds that many of the incidents complained of by the Claimant in her statement can properly be described as minor incidents. Those incidents which are of any significance, and upon which much of the focus in this case has been placed, are a) an incident involving a chef brought in to work in the kitchen after the Claimant moved out to undertake different duties, and b) an incident where the Claimant attended the premises at about 2.00am

where she alleges that Mr Trickett behaved inappropriately towards her, by being aggressive and banging his fists on the bar. As to the first incident involving the chef, the Tribunal was again impressed by the evidence of Mr Shepperdson who gave direct evidence on this issue. His evidence was that there was an incident. He supports the evidence of Mr Trickett in that regard. Both of them describe an occasion when the Claimant, rather than anybody else, was behaving inappropriately. The Tribunal is satisfied that that behaviour arose because the new chef was making changes to the kitchen, a kitchen in which the Claimant had worked historically and (at that time) was continuing to do some work. It is therefore entirely understandable and consistent with that evidence that the Claimant would have been frustrated by the changes made. However, the Tribunal finds that that is also consistent with a finding that the Claimant was frustrated and became upset and behaved in the manner alleged by the Respondent and his witness;

57.3 The Tribunal next considered the later incident, where the Claimant returned to the premises at 2.00am. Notwithstanding the close proximity of the Claimant's home to the club and the Claimant's familiarity with the business, the Tribunal considers it unusual for an employee to return to work at 2.00am having earlier gone home. That conclusion is supported where, on the Claimant's own evidence, this was not a situation where she had only just left work herself. On her own evidence this was a number of hours after she had left work. Further, the explanation the Claimant gave in her oral evidence as to the reason why she returned was that she wanted to raise the issue of the cash and carry run with Mr Trickett. The Tribunal considers that evidence is difficult to understand. The Tribunal can see no reason why that was a matter that had to be raised that particular evening and why it couldn't have waited until the following day. Further, the Tribunal also notes that this incident was described to the NVQ Assessor according to the record at page 26 of the bundle. However, the account given on that occasion was somewhat different. The record of that conversation (at page 26) reads as follows: "*She raised some food safety concerns with the employer and the employer had a problem with this. Julie went home and came back to clear the air*". That is a different and inconsistent account where the Claimant has given a different reason for returning. The Tribunal is satisfied that the Claimant's evidence in relation to that incident is inconsistent whereas there is no inconsistency in the account given by the Respondent and his witness;

57.4 The Claimant's final complaint is that she was messed about with her hours. The Tribunal has already found that there was no term and no expectation as to a set number of hours to be worked each week by the Claimant. However, there is one matter which is worthy of comment in this case. There is agreed evidence that the Claimant was laid off from her work for one week. There is some dispute as to the week during which

that occurred. On the evidence, the Tribunal finds that the Claimant is correct, and that it occurred during the week commencing Monday 19 September 2016. There is also some level of agreement as to the events of that week. On the preceding Sunday, Jackie Brown told the Claimant not to come into work that following week. That was at a time when Mr Trickett was going to be out of the country. The Claimant was paid 13 hours as holiday pay for that week. The Tribunal is satisfied that Miss Brown and Mr Trickett treated that week as a weeks' holiday for the Claimant. The effect of that in the Tribunal's judgment is that the Respondent effectively imposed a week of holiday upon the Claimant. Those actions are contrary to the provisions of the Working Time Regulations 1998. Those Regulations require that, if an employer wishes to dictate to an employee when a period of leave should be taken, the employee is to be given a period of notice twice as long as the period of leave that is to be taken. The Tribunal considers that to be a significant matter. However, notwithstanding that issue, the Tribunal is satisfied that after that week the Claimant returned to work and continued to work for the Respondent. She continued to carry out the duties she was given during the hours she was given and she continued to be paid. Further, no complaint was raised about that matter at that time or at any time prior to the termination of her employment. The Tribunal is therefore satisfied that, even if that matter amounted to a breach of her contract of employment (whether a breach of any express term or any implied term) then the Claimant affirmed the contract thereafter by continuing to work on without protest. Notably, she did not resign in response to those events.

58. Further, for the reasons already outlined above, the events of the 15 and 16 October relied upon as the last straw are not of sufficient quality to amount to a last straw so as to revive any breach committed by the Claimant being required to take a week's annual leave.

Conclusions on the issue of dismissal

59. For all of the reasons set out above, the Tribunal is satisfied and finds that the Claimant's employment terminated on the weekend of 15 and 16 October 2016. It terminated in circumstances where the Claimant walked out and did not return. The Claimant has not established that she walked out thereby terminating her employment in response to any fundamental breach of her contract of employment. The Tribunal is satisfied that the Claimant terminated her contract of employment when she walked out and that the termination occurred by her resigning from her employment. For the reasons given above, the resignation does not in the circumstances amount to a dismissal within the meaning of section 95(1)(c) of the Employment Rights Act.

60. For all of those reasons the Tribunal finds that the Claimant has not discharged her burden of proving that she has been dismissed in this case. Unless the Claimant establishes that she was dismissed, there can be no unfair dismissal. Accordingly, the claim of unfair dismissal (whether advanced on the basis of an express or a constructive dismissal) fails and is dismissed.

The Claimant's other claims

61. The Claimant's ET1 also included claims for notice pay and holiday pay.

62. The claim for notice pay amounts to a claim of wrongful dismissal. For the reasons already set out above, the Tribunal has found that the Claimant was not dismissed but rather that she resigned. A claim of wrongful dismissal requires the Claimant to prove that she has been dismissed. The Claimant has failed to do so. Accordingly, the claim for notice pay fails and is dismissed.

63. The Claimant adduced no material evidence regarding her claim for holiday pay. No explanation was given in her written or oral evidence as to how she claimed an entitlement to any amount of holiday pay. Further, no submissions were made on the Claimant's behalf in support of such claim. The claim fails and is dismissed.

64. The Claimant also sought an award under section 38 of the Employment Act 2002 in relation to the Respondent's failure to provide a written statement of employment particulars. Such an award can only be made if the Claimant succeeds in one or more of her substantive complaints. All of her complaints failed. There is no basis to make any award under section 38 of the 2002 Act.

65. Finally, after all of the evidence and submissions had been heard, and after the Tribunal delivered its oral Judgment and reasons, Mr O'Callaghan submitted that an award should be made in favour of the Claimant to reflect the Tribunal's findings that the Respondent had behaved in a manner contrary to the Working Time Regulations 1998 (see paragraph 60.4 above). Mr O'Callaghan however accepted that no such complaint was included in the ET1 claim form and that, in order to pursue such a complaint, the Claimant would need to amend her claim. Upon the Tribunal asking him whether an amendment application was being made, Mr O'Callaghan confirmed that it was not.

Employment Judge R Vernon
Dated: 19 January 2019

REASONS SENT TO THE PARTIES ON

.....22 January 2019.....

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS