EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Marsh	**v**	**Fuller Smith and Turner plc**

Heard at: London Central
On: 27 & 28 February 2019

Before: Employment Judge Hodgson

Representation

For the Claimant: Ms C Ibbotson, counsel
For the Respondent: Ms I Shrivastava, counsel

JUDGMENT

The claim of unfair dismissal succeeds.

REASONS

Introduction

1.1 By a claim form filed on 12 Marsh 2018 the claimant alleged he was constructively unfairly dismissed from his role as live-in general manager at the Cross Keys public house in Hammersmith.

The Issues

2.1 The issues were defined at the commencement of the hearing. The only claim is constructive unfair dismissal. It is said that the respondent breached either an express term, or the implied term of mutual trust and confidence. The express terms relied on are terms 2, 21, and 23 of the contract of employment from 2004. In addition, it is the claimant's case that the respondent's initial failure to tell him formally of the proposal to remove his accommodation, and then the failure to consult adequately, was a breach of the implied term of mutual trust and confidence.

2.2 It is the respondent's case that there was no breach of any express or implied term. Further or in the alternative, it is alleged the claimant affirmed his contract. Further or in the alternative, the claimant did not resign because of the breach of the contract.

2.3 If the claimant was dismissed constructively, the respondent relies on a substantial reason, it being the respondent's case that there was a business reason which involved renting out the property the claimant occupied.

2.4 It was conceded there was no express affirmation. Any affirmation was by reason of delay between the period of 12 September 2017 and 14 November 2017, when he resigned.

2.5 Contributory fault is alleged, as the claimant failed to pursue alternative employment; failed to engage adequately, or at all in the grievance process; and failed to accept the offer of bedsit above the Cross Keys pub, in which he was the manager. It is respondent's case that the true reason for his resignation was the claimant's acceptance of a new job.

Evidence

3.1 I received a bundle of documents, R1.

3.2 The claimant filed a chronology, C1.

3.3 The claimant gave evidence relied on a statement, C2.

3.4 For the respondent I heard from Mr Dawne Browne, R2; Mr Daniel Allen, R3; and Mr Adam Sykes, R4.

3.5 Both sides gave oral and written submissions on day two. Both supplemented their submissions with further written submissions following the hearing.

Concessions/Applications

4.1 Various documents were introduced into the bundle.

4.2 On day one, I ordered the respondent to produce floor plans and photographs of the house the claimant occupied and the bedsit the respondent proposed he should occupy.

4.3 On day two of the hearing, during submissions, we considered whether it was necessary to amend the claim. A number of amendments were made by consent, and they are referred to in the conclusions.

The Facts

5.1 Part of the respondent company's operation revolves around managing pubs. Some of them are tenanted. Some have salaried managers. A number of the pubs have accommodation, and managers can be a requirement to live-in.

5.2 The claimant joined the respondent in July 2003 as an assistant manager at the Partridge. In 2004 he was promoted to general manager at the Whistle and Flute, which was a live-in role. In October 2008, he transferred to the Duke of Kent as general manager, again as a live-in manager. On 15 November 2001, he transferred to the Cross Keys public house in Hammersmith, as a live general manager. The claimant resigned on 14 November 2017.

5.3 In October 2004, the claimant signed a contract to live-in the Whistle and Flute. It was a requirement that he lived in the accommodation provided. Clauses 2 and 21 provide:

> **2. Conditions of employment**
> **The Managers' employment is conditional on the Manager obtaining and retaining a Justices Licence in respect of the House in his name. It is a further condition of the manager's employment than he reside on the Premises, this being necessary for this to carry our his duties as set out in cause 4 below.**
>
> **21. Licence**
> **Subject to clause 22 below, the Company licences the manager form the date hereof until the Manager's rights are determined in accordance with clause 23 to occupy the Premises free of rent, rates, gas , electricity , and council tax. The Manager is responsible for insuring his own belongings kept on the Premises.**

5.4 The occupation would come to an end automatically if he were to cease to be employed. Clause 23 provides:

> **23. Conditions of Licence**
> **The Licence shall terminate automatically without notice as soon as the Manager shall cease to be employed by the Company…**

5.5 When the claimant moved to the Duke of Kent, and subsequently to Cross Keys, he did not receive a new contract. The original contract identified the specific residential accommodation which was to be occupied. The accommodation was not expressly identified when he transferred to the

Duke of Kent, and to Cross Keys. On both occasions he received an appointment form identifying the new public house, which indicated, by way of a tick box, that he would be living in.

5.6 At Cross Keys, from 2011, he occupied a three bedroomed house (I will refer to this as the house), which was attached to the pub. The pub also had accommodation, which has been described as a bedsit (I will refer to it as the bedsit) above the pub. The claimant was never required to occupy the bedsit. At times, the bedsit was occupied by his assistant manager.

5.7 By 2017, the claimant had married and he had one child, by September 2017, when the respondent served him notice to quit the house, his daughter was five years old and his wife was around four or five months pregnant with their second child.

5.8 It is apparent that the claimant received a number of promotions and salary increases during the course of his employment. Cross Keys is situated in Hammersmith. The claimant liked the area enormously, he and his wife had many friends, the school attended by his daughter was rated well by Ofsted. He was content, settled, and happy with his employment. He states in his evidence, "the Cross Keys was in my mind very much my retirement pub and I envisaged my children growing up there. I was very much in it for the long haul."

5.9 In October 2016, the claimant's operations manager, Mr Adam Sykes, mentioned the respondent was looking at potential income streams including the possibility of renting out the house. The claimant was shocked . Mr Sykes' evidence was that no decision had been made at that time, and he was communicating what was, effectively, a rumour.

5.10 Mr Sykes mentioned the possibility, again, in January 2017, having overheard a conversation. No formal notice was given at this stage. The claimant contacted Ms Dawn Browne, head of operations for the city division, in January 2017 and there was a meeting in early February 2007. She indicated Mr Sykes probably should not have told the claimant of the rumours. I accept that in this context, there was some discussion about the possibility of the claimant moving to other areas, including Bath and Bristol.

5.11 At that time, unknown to the claimant, there were discussions about transferring him to another pub (R1/74).

5.12 The claimant was concerned that his position was vulnerable. In April 2018, he decided to apply for the Partridge pub, which was in his hometown of Bromley. During that process, the interviewer enquired whether the claimant would have applied the Partridge, but for the uncertainty regarding his situation. The claimant decided not to proceed with the Partridge application, whilst the position at Cross Keys remained undecided.

5.13 The documentation disclosed reveals that there was an evaluation paper concerning tenanted transfers, which appears to go back to February 2017. There appears to be a recommendation that the Cross Keys should continue to be managed, but the manager should be removed (R1/76). The claimant's evidence on this is not challenged.

5.14 None of the witnesses who appeared before the tribunal were involved in the decision concerning any change to the business use of the Cross Keys pub. It is apparent, from the document, that potential action in relation to Cross Keys was part of a discussion which appears to be of a strategic nature. The document on tenanted transfers has been redacted heavily, so most of the information concerning other pubs is hidden. In any event, as the witnesses were not involved in this process, no further evidence could be gleaned. It is apparent from the document that the Cross Keys was identified as a pub with "the highest development potential of the group in the table." There is a discussion about it being valued at £1.8 million to a developer, who may attempt to build two houses. The staff house was valued at £1.4 million. There is a comparison to the trading value of £1.24 million and the combined development/sales value of £1.8 million for the plot plus the value of the flat (£1.4 million). Difficulties are envisaged as conversion to two houses would be opposed by the locals and could be subject to an "ACV." Lacking from this document is any specific analysis of the current profitability of the pub as a managed unit. What is identified is the potential development value of the asset and the likely feasibility. It is clear that what may have been contemplated is a disposal of the property, and a change of use. The claimant did not know this at the time. It does not appear that any of the witnesses understood, or knew, the detail of it. It follows that whilst aspects of the business decision can be gleaned, or inferred, from the documentation disclosed, no direct oral evidence has been given to set out the processes.

5.15 It is clear that the recommendation was to keep the pub managed, but to remove the current manager. It appears that the potential action was contemplated no later than February 2017, as that would be consistent with the internal timing of the document. It was certainly contemplated by no later than July 2017, that is consistent with the meeting on 18 July 2017.

5.16 On 18 July 2017, Mr Sykes, and Ms Christine Sandilands (the respondent's people adviser) met with the claimant, informally. It appears that Ms Sandilands may have taken minutes of the meeting, but no minutes have been produced. The claimant was told that if he wished to remain as general manager of the Cross Keys, he and his family would have to move from the house into the bedsit, or find suitable rented accommodation nearby. He was told, expressly, the alternative would be he must resign. He was told there were no other properties he could move into.

5.17 Mr Sykes did not inspect the bedsit. In his evidence, he said he had given some consideration as to whether it was suitable, but it was unclear whether he reached any conclusions. The reality is that the house is a three-bedroom house with a proper kitchen. The bedsit had one small bedroom attached to a small general living area. There was a small bathroom and a small kitchen area, which lacked proper cooking facilities. In no sense whatsoever was the bedsit accommodation comparable to the house. The claimant viewed it as unacceptable and inappropriate. Viewed objectively, his position was reasonable. On the balance of probability, I find that the respondent's managers knew that the bedsit accommodation was cramped and inadequate, and they would have expected the claimant to view it as entirely unsuitable.

5.18 The claimant explained the bedsit was not a realistic option, in any event the assistant manager was living there at the time. He was told that there were vacancies at the Admiral Nelson pub and the Blackhorse pub.

5.19 The letter of 18 July 2017, from Mr Sykes refers to the consultation process. It states the aim of the consultation is threefold: "why the company is proposing to move the accommodation; possibilities for alternative accommodation with the company; and possibilities for alternative employment within the company."

5.20 The letter gives no details about the proposals: that is not surprising as Mr Sykes did not have any detail. As regards the second two points, it is said, in terms, that there were no alternative accommodation options. Two other pubs, outside the area, the Admiral Nelson and the Blackhorse were identified as possible vacancies, and it is said "You might be interested in applying for the vacancies there."

5.21 It is clear that a decision had already been taken to remove the claimant as the manager. It would appear there was a long-term proposal to sell the pub and the house. The extent to which the pub was, or was not, profitable does not appear to have been a significant consideration. The claimant was given no detail of the reason for the contemplated action; there was no realistic, or reasonable, consultation possible concerning any alternative business plans. The consultation was limited to potential alternatives for the claimant. The letter of 19 July 2017 stated, "as the role of general manager is not changing Cross Keys and this proposal is purely related to the accommodation, this is not a redundancy situation." It follows consultation was never viewed as being in the context of redundancy.

5.22 There were operations managers, other than Mr Sykes, who had responsibility for other pubs. The operations managers discussed the claimant's position. I was given no details of those discussions. There were possibilities: it was possible to transfer the claimant to another property by invoking his mobility clause; to give him an optional transfer to another club without competitive interview; or to allow him to have preferential application. It is unclear whether any of these possibilities

were identified or discussed. The only course identified was transfer following competitive application against internal and external candidates.

5.23 The claimant began to look for alternative roles within the respondent. He hoped to maintain the working relationship. He decided not to apply for the Admiral Nelson and the Blackhorse. Neither was suitable. Those pubs did have accommodation, the claimant's research led him to believe the local schools were poor and his wife would have to give up work as she could not commute.

5.24 He did identify one alternative, The Salutation, another pub in Hammersmith belonging to the respondent. The current manager, Jerry, was possibly planning to leave the pub, which could leave the Salutation free. The claimant's unchallenged evidence is that Mr Sykes, in February 2017, told him that the Salutation was a possibility and it could be his without interview when it was vacant, but that position had changed by August 2017,

5.25 On 23 August 2017, the claimant learned Jerry had found a new pub and the Salutation would soon be available, albeit it had not been advertised. The claimant learned of this just before the next meeting. By this time, the claimant had got his union involved. At the start of the meeting, the claimant was offered a severance package of £7,500. The claimant asked if he could go to the Salutation. He was told the Salutation was now overseen by a new operations manager, Mr Daniel Allen, and Mr Allen would have to make a decision. The claimant was told that that he had seven days to decide. No other alternatives were identified by the respondent and it remained unclear when the Salutation be advertised. The claimant is described as digging his heels in.

5.26 By letter of 11 September 2017, he was told it was not clear when the Salutation would be advertised. The letter says, "I have made the decision that the accommodation you currently occupy will be turned into an income generator for the business, either through the sale of the property or through placing it for rent on the open market." The letter came from Mr Sykes. This statement is untrue; he had not made that decision.

5.27 The letter goes on to say, "You will be required to leave this property by 5 PM on 6 November 2017." It follows the claimant was served notice to quit. He is told that the "remainder" of his terms and conditions of employment remain the same. He was given the option of moving into the bedsit.

5.28 The claimant met Mr Dan Allen, his new operations manager, for the first time on 13 September 2018. The claimant confirmed that he was likely to leave, but wished to leave the Cross Keys in a robust financial position.

5.29 On 19 September 2018, Mr Allen received the advert for the manager's role salutation. Eight days later he sent it to the claimant, the claimant replied to the advert on 27 September 2017.

5.30 It is the claimant's evidence that after he applied for the job at the Salutation, Mr Allen's behaviour became aggressive and confrontational. This is illustrated by two incidents, the first on 2 October 2017, and the second on 4 October 2017. On 2 October, Mr Allen sent a letter to a number of managers, as part of a weekly review, he set out in bold a paragraph concerned about the failure of some members of staff to be able to describe a product, American Fall, which was a guest ale.

5.31 There was then an exchange of what appeared to be innocuous emails. Mr Allen's original email was at 09:20. The claimant responded at 11:09 saying that it was a "forced drop with very little to no warning" he doubted tasting notes were sent out. At 11:27 Mr Allen responded sending a copy of what he believed were the notes. At 11:37, the claimant said he checked, and it didn't appear to have been sent out. At that point, Mr Allen decided to telephone the claimant and their accounts then vary. Mr Allen statement says, "I was concerned that he was sending quite a few emails about tasting notes and this was not a very important matter." He goes on to say that, as the call progressed, he "mentioned managing up." Mr Allen explained to the tribunal that he treated it as a simple "coaching exercise" explaining to the claimant the need to obtain the information. He saw it as a positive conversation, and he believed the claimant understood the message and received it. Nevertheless, on 4 October 2017, at the next meeting, Mr Allen accepts that he revisited the call about the tasting notes to check if the claimant understood the position.

5.32 The claimant's case was that he was berated both on 2 October and on 4 October 2017.

5.33 I considered the evidence carefully and I decided on the balance of probability that Mr Allen's account is inaccurate and misleading. Had Mr Allen truly believed that there had been a constructive general coaching discussion on 2 October, there would be no reason to revisit it on 4 October. The reality is that Mr Allen reacted angrily and negatively to the claimant's suggestion that he had not received the notes. There was a negative conversation on 2 October, and on 4 October Mr Allen continued the general negativity and he brought up the conversation again. When the claimant suggested that Mr Allen misunderstood his intent, he replied to the effect "It's my perception of the email, my perception of my reality."

5.34 During the conversation on 2 October, Mr Allen said to the claimant "How do you think this makes me view you." He agrees that words to this effect were used, but he was unable to offer any cogent explanation as to why he asked the question. I find his intention is clear. This reflected an aggressive, negative, and intimidating stance. He was disapproving of the claimant's attitude and approach. The claimant was reasonable in viewing these exchanges as hostile and negative.

5.35 During the entirety of this time, the claimant sought to maintain cordial and amicable relations with the respondent and its managers. He saw no advantage in behaving negatively. He still hoped to find a solution and remain employed by the respondent. However, he was extremely anxious and concerned about his position. He had no possibility of renting accommodation in Hammersmith, the equivalent house would cost in the region of £2,000 a month and would have obliterated his salary. He needed to find a new job and new accommodation that was suitable for his family and was in an appropriate area. The area needed reasonable schooling, and should be close enough to allow his wife, who was four or five months pregnant, to keep her job. He had limited resources, and the only realistic option was a new job outside Hammersmith, in an area where he could afford to live.

5.36 In the meantime, changes were made to the pub without the claimant being consulted. Sport was removed, the kitchen was closed.

5.37 The claimant received less than a week's notice to interview for the Salutation role on 4 October 2017.

5.38 At a further meeting on 10 October 2017, the claimant states that he "begged" Ms Christine Sandilands and Mr Adam Sykes to allow him longer in the house to secure alternative employment, as he would be stuck if he were not successful in the Salutation. Their response was to refer to the severance package.

5.39 On 13 October 2017, claimant was told by email that he would not be allowed to stay beyond 10 November 2017. Following this email from Ms Sandilands, the claimant decided not to proceed with the Salutation application. He formed the view that Mr Allen was negative and hostile towards him. This was based on the events of 2 and 4 October, and subsequent criticisms made by Mr Allen concerning matters the claimant had raised as problems caused by a reduction in staff. He formed the view that Mr Allen would not give him a fair interview.

5.40 The claimant raised a grievance on 23 October 2017. As part of the grievance, he did seek to negotiate a severance package. He was told to resubmit the grievance without that reference.

5.41 On 24 October 2017 the claimant collapsed with chest pains, which led to him being signed off sick. The claimant did not move out of the house on 10 November. He resigned on 14 November; he moved out of the house on 16 November 2017.

5.42 After the initial meeting in July, the claimant had also considered external posts. Towards the end of October, he was invited, by telephone to consider a pub, the King Harry in St Albans. He had not specifically applied for this role, but he had been pursuing opportunities with Mitchells and Butlers. He attended an interview and was offered the position on 1

November 2013. He accepted the post. Before accepting the post, he took steps to secure housing in St Albans. The house was rented in St Albans £1,100 per month. The rental started on 8 November 2017. After tax he earned £2,164.99. He accepted the job as he had no other alternative.

5.43 I do not need to consider the progress of the grievance in detail. The respondent did not accept the claimant's grievance. The outcome letter does not specifically give him any right to appeal; the claimant decided not to pursue an appeal as he wished to get on with his life, and thought it pointless.

The law

6.1 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

6.2 **Western Excavating ECC Ltd -v- Sharp [1978] ICR 221** confirmed employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

> **If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.**

6.3 In summary there must be established first, that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract expressly, or as evidenced by delay.

6.4 I must consider what causes the resignation, the employee must show that he has accepted the breach, the resignation must have been, at least in part, caused by the breach. If there is a different reason causing the employee to resign there may be no constructive dismissal. Where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principle reason for the resignation, but it must be part of it and the breach must be accepted (see **Logan v Celyn House UKEAT/069/12** and in particular paragraphs 11 and 12).

6.5 In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

> **…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.**

6.6 I should note that it is generally accepted that it is not necessary that the employer's actions should be calculated and likely to destroy the relationship of confidence and trust, either requirement is sufficient.

6.7 In **Malik** the House of Lords held that the trust and confidence may be undermined even if the conduct in question is not directed specifically at the employee and second, it was not even necessary for the employee to be aware of the wrongdoing whilst employed. Third, the term may be broken even if subjectively the employee's trust and confidence is not undermined. Whether the term is broken must be viewed objectively.

6.8 The approach to fairness is set out in section 98 Employment Rights Act 1996

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it—**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
> **(b) relates to the conduct of the employee,**
> **(c) is that the employee was redundant, or**
> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or un-reasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

6.9 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones [1982] IRLR 439** and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of

the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.10 An implied term is as much a part of a contract as an express term. There are a number of tests for considering whether terms have been implied. They can be summarised as follows: the term is necessary in order to give the contract business efficacy; it is the normal custom and practice to include such a term in contracts of that particular kind; an intention to include the term is demonstrated by the way in which the contract has been performed; and the term is so obvious that the parties must have intended it.

6.11 When it is alleged that the term has been included by reference to custom and practice the traditional requirement for implication under this head is that the custom in question must be reasonable, notorious and certain (**see Devonald v Rosser and Son 1906 2 KB 728, CA; and Sagar v H Ridehalgh and Son Ltd 1 Ch 1931 310, CA**).

Conclusions

7.1 The first question is whether the claimant was constructively dismissed. The initial issues identified in the hearing record the specific clauses of the 2004 contract said to be relevant express terms. It was also said that the approach to the consultation constituted a breach of the implied term of confidence. During submissions, I identified that the case appeared to be pursued on the basis that if the right to occupy the house was not incorporated as an express term, the right of occupation of the house may be an implied term, or in the alternative requiring him to leave the property could be seen as a breach of the implied term of mutual trust and confidence.

7.2 I discussed with the parties whether any of this required an amendment. Ultimately, we agreed that any relevant amendments would be granted by consent. I recorded that, to the extent it was necessary, the claim would be amended to include the allegation that giving notice to quit the house in September 2017 was a breach of the implied term of mutual trust and confidence. Further, to the extent there was no express term that the claimant had a right to occupy the house, there was an implied term.

7.3 I first need to consider whether the respondent breached the claimant's contract; in order to do this, I need to consider whether occupation of the house was an express or implied term of the contract.

7.4 The original contract from 2004 identified the premises to be occupied. In contrast, there is no express written contract, or letter, concerning the house attached to the Cross Keys pub. It is clear that the respondent viewed the general terms and conditions of the 2004 contract as applicable to the assignments to both the Whistle and Flute, and thereafter Cross Keys. He would continue as a manager living in. The house to be occupied during the Cross Keys assignment was identified and was certain.

7.5 It is respondent's case there was no contractual right to occupy the house. It is not the respondent's case that there was a contractual right retained by the respondent to nominate either the house or the bedsit as the property to be occupied.

7.6 It is possible that occupation of the house was an express term supplemental to the original written terms and was either an additional clause, or a variation of the original contract. It is clear that the Cross Keys position was offered and accepted on the basis of the claimant occupying accommodation as a live-in landlord. There is no suggestion that he was not required to live-in, or that the transfer to the new property would lead to him losing the right of occupation. Whilst the identity of the house and the right of occupation is not expressly recorded in writing, there can be no doubt that the obligation to occupy, and the right to occupy, was the clear understanding of all parties. There was a clear intention to enter into legal relations. The house to be occupied was certain. In the circumstances, I find that the right to occupy the house was incorporated as and an express term of the contract based on the discussion at the time; it matters not whether it is seen as a supplemental term, or a variation of the original contract.

7.7 If I were wrong about the incorporation of an express term, I would then consider whether the right to occupy the house was an implied term of the contract. I have formed the view that it would be an implied term; there are three possibilities. The first is it is a necessary term because of business efficacy. Part of the overall contract between the parties was that he was a live-in manager and he should be required to live-in for the performance of his duties. My Sykes was unable to suggest that there had been any changes in the arrangements between the parties that would have modified this agreement. Further, the accommodation was part of the overall remuneration. The business arrangements envisaged by the parties would be fundamentally different, and unworkable, if the right of occupation was not a contractual right. Second, the right to occupy the house was such an integral part of the overall relationship that an officious bystander would be bound to say that occupation was a clear contractual term. Third, occupation of the house satisfies the general test that it should be reasonable, notorious, and certain. Transfers between

pubs are common. Live-in managers are given accommodation. The practice is notorious. There is no doubt as to which house was occupied, therefore, there is certainty. The right of occupation is also reasonable having regard to the relationship between the parties and the fact it was an integral part of the claimant's remuneration; he would be paid more if he did not live-in.

7.8 I find that if the occupation of the house was not an express term of the contract it was an implied term.

7.9 It may be possible to argue that occupation of the house was neither an express term of the contract nor an implied term, and that the occupation of the house is severable from the other employment terms. That is certainly the position adopted by the respondent when issuing the notice to quit by letter of 11 September 2017 (served on 12 September 2017). If that is the case, it is necessary to consider the implied term of mutual trust and confidence. The claimant's salary was circa £28,000. The occupation of the house was a financial benefit. On the open market, it would have cost the claimant in the region of £2,000 to rent a similar property in that area. It follows that removing his right of occupation, effectively, reduced the overall renumeration package by around a half.

7.10 The term of mutual trust and confidence is breached if the employer behaves in a way which is either likely to, or calculated to, fundamentally undermine mutual trust and confidence that exists between the parties. This respondent behaved in a way which was calculated to force the claimant to resign by requiring him to vacate the house and either accept accommodation, which was unsuitable, or rent a property. No respondent manager could have believed, even after a moment's reflection, that it was feasible for the claimant to rent privately. The net effect, as accepted at the July meeting, was the claimant would be forced to resign. It is clear that the behaviour of the respondent was calculated to force his resignation.

7.11 Serving notice to quit was a breach of any express term, or implied term that gave the claimant the right to occupy whilst employed. Serving notice to quit breached the implied term of mutual trust and confidence, as it was calculated to force a resignation. The reality is that the respondent was in breach of contract by forcing the claimant to leave the property.

7.12 The next question is whether the claimant affirmed the contract by reason of delay otherwise. At the start of the hearing the respondent clarified that the claimant should have resigned immediately after receiving notice to quit on 12 September 2017 and that the subsequent delay was affirmation of the contract. It is no part of respondent's case the claimant expressly affirmed the contract.

7.13 I find the respondent's submission is unsustainable. It is necessary to consider each case on its merits. The nature of the breach must be considered, account must be taken of the effect on the employee and of

the feasibility of resignation. It is difficult to imagine how an employee could be put in a more difficult position. Loss of a job is often traumatic, that trauma will, no doubt, be significantly increased when the loss of a job also involves a loss of the home. In this case, resignation would have led to the claimant losing, immediately, his right of occupation, pursuant to clause 23 the contract. He and his family would have been homeless and without his income. The claimant was settled in Hammersmith. There was a good local school, his wife had a job, and she was pregnant. It is difficult to overstate the seriousness of the position from the claimant's perspective.

7.14 Faced with the inevitability of losing his house, the claimant started to explore his possible options. The respondent was unsupportive and simply identified the possibility of other positions for which he could apply. The potential safety net of the Salutation, as discussed in February, was removed, unilaterally. When he did apply for that pub, Mr Allen adopted a hostile and negative attitude towards claimant and the claimant believed that he would not get a fair interview.

7.15 The claimant looked for other work with a new employer; he eventually accepted a job with a new employer, without accommodation.

7.16 Affirmation of a contract can be demonstrated by delay. If the employer changes the employee's contract, for example a change of hours or pay, and the employee continues to work without express objection, the passage of time may be taken as affirmation. It is envisaged that the contract can and does fundamentally continue. Delaying a resignation, for a short period, to avoid homelessness whilst the employee, in some desperation, seeks alternatives to provide an income and a home is not affirmation. There was no realistic possibility of the claimant accepting the changes to the contract and continuing to work. The claimant made it plain that if the house was removed, he could not continue to work at Cross Keys, and all parties knew this. The claimant cannot be criticised for seeking to find alternative ways to resolve the situation both with his employer and thereafter by seeking alternative employment. This is not affirmation. Both parties knew that the actions of the respondent made continued performance impossible.

7.17 The respondent also suggests that the true reason why the claimant left was because he got another job, and therefore, he did not resign in response to the breach. It is suggested that this represented his true desire. It is clear that the claimant took the job because it was the only viable option. The fact that an individual is forced to look for, and obtain, alternative employment because the employer has breached contract is not evidence of affirmation. Nor can it be said that the fact the claimant takes another job in order to secure some income and a home indicates that this was the desired position, and the real reason for leaving.

7.18 It has been suggested that the claimant was looking for other opportunities and he intended to leave anyway. There is no viable evidence that

suggests he would have considered any other positions but for the fact it was initially indicated to him in December 2016 that the house may be taken away. I accept the claimant's evidence that he would have stayed in Hammersmith long-term but for the respondent's breach of contract, which forced his resignation. It follows he resigned in response to the fundamental breach of contract; he was constructively dismissed.

7.19 The next question is whether the respondent has established a substantial reason. I have, as noted in my finding of fact, received very little evidence about the business reason. The evidence of the witnesses was that the primary reason revolved around profitability of the Cross Keys. That evidence was, incomplete and unpersuasive; it came from individuals who were not the decisions makers. At best the evidence was opinion based on hearsay.

7.20 Mr Allen's evidence would suggest the removal of Sky Sports and the closure of kitchen returned the Cross Keys pub to profitability. However, whether that would have been enough to influence any business reason is unclear. None of the witnesses who appeared before the tribunal were decision-makers, they simply implemented decision made by others, and they were not privy to the full reasoning.

7.21 The most helpful document is the heavily redacted "tenanted transfers evaluation paper." To the extent that any reason can be gleaned from the content, it was not the profitability of the operation that was at issue. Cross Keys was identified as land which had a development potential. It is perhaps obvious that Cross Keys is in an area where the property prices are high, and there is a real possibility of generating significant capital from sale. However, whilst the potential is identified, there is no evidence concerning the decision taken, or the reason for it. The respondent has given no evidence confirming why it was necessary, reasonable, or appropriate, to require the claimant to leave in November 2017. There is a business reason in the sense that freeing up the property created possibilities for extra income and/or sale of the property. On the limited evidence that I have, the possibility of sale appears to have driven the respondent's actions. In that sense it can be said that there is a reason, albeit the evidence on it is severely limited. I should observe that after the claimant left, the house was unoccupied for around a year. It was not sold. I have no evidence to suggest there was any effort to rent it out or to sell it. The only evidence I have is that no action was taken. I was told that Cross Keys has now become a tenanted pub. I have seen no figures to demonstrate how that has affected profitability, and I do not know the business rationale. It appears the tenant occupies the house. All this simply serves to obscure the true nature of any business reason. It is for the respondent to prove the reason. There must be some evidence to establish the reason. Where, as in this case, the respondent has chosen to call no evidence from the actual decision makers, whilst it may be possible to ascertain some of the surrounding circumstances, there may be insufficient evidence to establish the actual reason. The respondent

has not established its reason for dismissal; I will consider below to what extent the respondent has shown a reason.

7.22 The respondent asserts there was a business reason. It is clear that the respondent took the view that this necessitated terminating the claimant's right to occupy the house. The result of the reason is clear, even if the basis for it is not. In that context I next consider whether the respondent acted fairly in treating the reason as a sufficient reason to dismiss. Under section 98(4), the burden is neutral. For the reasons I have noted above, it is not possible to fully identify the respondent's reason, or the reasoning applied to any decision. Before me, the witnesses suggested that the primary reason for the decision being taken was it related to profitability of the premises. There is difficulty with this argument. None of the witnesses had direct knowledge of the true reason, or the thought processes of the decision makers. It is unclear why it was necessary to remove the claimant from the house in November 2017. Nothing was done with the property for at least a year. There were no renovations. Approximately a year after the claimant's resignation, the pub was turned into tenanted property. I have no information on whether that improved or inhibited profitability. The intention is unclear. It does not appear the house has been sold. It follows that I have no credible evidence telling me why the respondent chose to remove the claimant from the property when it did.

7.23 I considered the procedure adopted. The claimant has not given full and frank disclosure of the business reasons. The suggestion that he was consulted about the business reasons, which gave him an opportunity to present any alternative arguments, is not sustainable. The reality is the decision had been taken and there was no meaningful consultation about the business reasons.

7.24 The respondent formed the view that its action did not create a redundancy. Why the respondent's managers arrived at this conclusion and the rationale applied are both unexplained. There is a possibility there was a diminished need for live-in managers, as part of the overall business strategy. However, there is no direct evidence on this, and it is unclear to me whether the claimant was targeted because he was in some manner disliked, or whether the nature of his role was part of a larger strategy about repositioning. The claimant has not argued that there was a redundancy situation and so I need not consider it further. All I can note is that the rationale is unclear and unexplained.

7.25 The remainder of the consultation concerned identification of the posts. It is difficult to see that the respondent engaged with this in any constructive or meaningful way. The totality of the respondent's attempt to secure alternative employment revolves around identifying other pubs for which claimant could apply. It appears that all of those applications were advertised externally, in any event.

7.26 It is appropriate to have regard to the entire resources of the respondent when considering whether it was within the band of reasonable responses to treat the reason as a sufficient reason to dismiss. There was no attempt to find the claimant a suitable alternative that did not require a competitive application. The respondent did not explain why this possibility was either rejected or not considered at all. It is apparent that the respondent's resources are considerable. The Salutation was a pub to which the claimant could have transferred. Before the formal process started, the Salutation had been identified as a pub to which the claimant could transfer without the need for an application. This option was removed unilaterally, apparently because there was a change of operations manager. It is not clear why the commitment could not be honoured. To the extent the possibility remained, Mr Allen showed such hostility to the claimant that the claimant could have no reasonable confidence that his application would be considered fairly.

7.27 It would have been possible to transfer the claimant to another pub; the respondent chose not to use its resources in that way but has not sought to offer any explanation.

7.28 It is also apparent that the consultation was brief. The claimant could have been told of the potential for removing his accommodation at a much earlier stage. This is important, as he would have had a much longer period to explore his options. By July 2018 the decision had already been taken and the consultation was essentially meaningless, save to the extent it identified other pubs which claimant could apply.

7.29 To the extent that a business reason can be discerned from the documents, it revolved around the possibility of using the pub as a capital asset; however, the plans were at an early stage and it is unclear why it was necessary to require the house to be vacated in November 2017. It is not for me to substitute my view. However, I have to consider whether this respondent acted within the band of reasonable responses. It appears that the business reason may have had two potential strands. The first is the need to generate more income by renting out the property. This did not happen and the evidence is unconvincing. In any event the pub returned to profitability without any rental income. The second strand is the need to vacate the house in order to realise the value of the property by sale. This did not happen either, and there is no evidence of the respondent taking steps to sell the premises.

7.30 Whatever the intention or the rationale behind any business decision, the respondent adopted a course of conduct designed to force the claimant's resignation by removing his accommodation, thus making it impossible for him to remain.

7.31 This case is complicated by the house. One way of viewing this is to recognise that the claimant's total remuneration included the value of the house. The respondent may seek to justify its action as an opportunity to

increase profitability, but the method employed was to unilaterally reduce his remuneration.

7.32 Unilaterally reducing the pay of employees is a tactic that could be repeated across many different industries, and in many different contexts. Reducing pay would no doubt lead to some saving of expense, and therefore potentially an increase in profit. If such a process is to be pursued, it should be recognised by employers that it involves a fundamental breach of contract, and a proper process should be followed. Such processes may involve consultation, restructuring, and redundancy. If an employer were to adopt the general policy of simply unilaterally reducing pay in order to force resignations, it is difficult to see how that would be seen as good industrial practice or a reasonable approach, but that is exactly what the respondent did here. The respondent acted in a way calculated to make it impossible for the claimant to remain and then asserted that the provision of the contract was not a fundamental part of the relationship. It did so even though there was no clear or pressing business reason.

7.33 I have considered the respondent's approach in the context of the reason adduced and I have had regard to its resources. I have considered the procedure adopted. In my view, no reasonable employer would have acted in this way. The respondent intentionally breached the claimant's contract with the express intention of forcing him to leave. It is outside the band of reasonable responses. It follows I find the dismissal unfair.

7.34 I should deal with a number of matters that have been raised, for the sake of completeness.

7.35 As regards breach of contract, it is not necessary to consider whether the approach to consultation was itself a breach of the implied term of mutual trust confidence. It is not in any meaningful way severable from the breach which culminated in the notice to quit. It was part of the same breach.

7.36 There is a suggestion that the respondent did not breach any implied term of the contract because the claimant was kept abreast of the respondent's proposals in respect of the Cross Keys house, his accommodation. It is no answer to the claimant's case to say that the respondent continually made it clear that it intended to breach his contract by removing his accommodation. In any event, prior to July onwards, when the respondent indicated the house would be removed, the claimant was not kept abreast, in any meaningful sense, of the respondent's business decision.

7.37 The fact that the claimant in some manner accepted that the business decision had been made does not mean that the respondent's conduct was not a breach of his contract, it simply reflects his positive and pragmatic approach. He recognised that he could not challenge the

decision, regardless of whether it was a breach, and the what he needed to do was to find a new job and new accommodation.

7.38 The respondent's submissions suggest delaying resignation beyond 10 November until 14 November demonstrates a waiver of the breach. I cannot accept this. The primary breach occurred when notice to quit was given. There was no affirmation, for the reasons I have given. He resigned because of the breach.

7.39 There is some criticism of the claimant for not continuing with the interview for the Salutation pub. That criticism is unwarranted. Mr Allen's approach to the claimant was hostile and it was reasonable for the claimant to withdraw.

7.40 The respondent alleges the claimant contributed to his dismissal by doing the following: withdrawing his application for the Partridge pub in Bromley; refusing to apply for the A**dmiral pu**b, Blackhorse pub or the Market Stores pub[1]; withdrawing his application for the Salutation pub; and failing to pursue his grievance and appeal. I suggested during submissions that these appeared to be matters which were more relevant to mitigation, but this was not accepted. I should, therefore, deal with these points.

7.41 The dismissal occurred because of the breach of the contract, which was accepted by resignation. It is therefore the respondent's reasons for breaching the contract which provides the reason for dismissal. The claimant's application to the Partridge pub was made when he considered there was a rumour that his accommodation may be removed; this did not contribute to the dismissal. Neither the application for the Partridge, nor the withdrawal of it, contributed.

7.42 The claimant had good reasons for not pursuing applications for the Admiral Pub, the Blackhorse pub, or the Market Stores pub. The pubs were not suitable. His refusal to apply for those positions, which all required competitive interviews in any event, had no bearing on the respondent's reasons for breaching his contract and hence did not contribute to the dismissal. The withdrawal of his application to the Salutation pub occurred a long time after the contract was breached, and it did not contribute to dismissal.

7.43 The claimant's grievance and appeal occurred a long time after the breach of contract and did not contribute to the dismissal. There was no realistic prospect, in any event, that the pursuit of the grievance could lead to reinstatement of any form.

7.44 I have considered the respondent supplemental submissions carefully. I have taken those submissions into account when considering whether there was a breach of contract, and in considering what were the relevant

[1] I have heard little about this pub which is in Reigate; it was unsuitable as a three people were living in the accommodation and there was no on-street parking.

terms in relation to the house. As regards any contributory conduct, the submissions state "had the claimant pursued to their conclusion job opportunities internally in the respondent, and/or the grievance process, it is possible that he would have achieved another internal position." It is my view this is not an allegation of contributory fault. This is an assertion of failure to mitigate, and I need say not more about it at this stage.

_____

Employment Judge Hodgson

Dated: 17 April 2019

Sent to the parties on:

18 April 2019

.....

For the Tribunal Office