EMPLOYMENT TRIBUNALS

Claimant: Mr P Massey

Respondent: Britannia Hotels Ltd

HELD AT: Manchester

ON: 4,5 December 2018
25 February 2018

IN CHAMBERS: 10 April 2019

BEFORE: Employment Judge Porter (sitting alone)

REPRESENTATION:

Claimant: Mr D Maudsley of counsel

Respondent: Mr R Wyn-Jones of counsel

RESERVED JUDGMENT

The claimant was not dismissed. His claim of unfair dismissal is not well-founded and is hereby dismissed.

REASONS

Issues to be determined

1. At the outset it was confirmed that this was a claim of constructive unfair dismissal. The parties had not agreed a List of issues. There was a dispute as to the alleged fundamental breach of contract relied upon by the claimant. After the reading exercise it was noted that the claimant asserted that the respondent had breached the implied term of trust and confidence and relied on 4 matters, namely:

1.1. Unilateral cut in wages;

1.2. Demotion on transfer to Wigan;

1.3. Unwarranted investigation and disciplinary process;

1.4. Disciplinary procedure conducted unfairly

2. The respondent objected to the claimant relying on the alleged demotion on the grounds that:

2.1. it was a new allegation, had not been pleaded;

2.2. the issue had not been addressed in the witness statement;

2.3. the respondent's right to a fair hearing was prejudiced if the claimant was able to rely on the new allegation;

2.4. the claimant was required to apply for leave to amend the claim to include the new allegation, which the respondent opposed

3. After a short adjournment, counsel for the claimant indicated that he did not intend to pursue the allegation that the transfer to Wigan was a demotion.

4. The issues were therefore:

4.1. Whether the respondent had committed a fundamental breach of contract entitling the claimant to resign, whether it had had breached the implied term of trust and confidence by the following acts:

4.1.1. Unilateral cut in wages;

4.1.2. Unwarranted investigation and disciplinary process;

4.1.3. Conducted the disciplinary procedure unfairly

4.2. Whether the claimant had resigned in response to any such breach, or whether he had resigned to avoid the disciplinary procedure which he knew to be genuine;

Orders

5. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the

tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

6. At the conclusion of day two of the hearing it was agreed and ordered that:

   6.1. the respondent would send to the tribunal and to the claimant a copy of the electronic documents which had, with consent, been read out at the hearing and considered in evidence; and

   6.2. the claimant and respondent shall discuss and seek to agree the admissibility of the document at page 298, which is currently not agreed as part of the bundle.

7. At the commencement of day three of the hearing the representatives confirmed that:

   7.1. the respondent had complied with the order referred to at paragraph 6.1 above and it was agreed that the new documents 168 A B and C should be introduced into the bundle;

   7.2. the parties had agreed that document 298 should form part of the evidence and as a consequence Lesley Kelly would be re-called to give further evidence on that document.

8. During the course of cross examination of Miss Buck on the third day of the hearing counsel for the claimant sought to ask questions on a redacted part of a document which appeared in the bundle at page 158. He produced a copy of the unredacted document for the purpose of his cross-examination. EJ Porter indicated that as the unredacted document had not been disclosed to the respondent, had not been included in the bundle, then application should have been made before now for leave to introduce this new document. The fact that it was the respondent's document is irrelevant. The claimant must still make application as the redacted part may contain irrelevant and/or confidential information. The respondent must be given opportunity to review the unredacted document and take instructions. EJ Porter therefore rose for 10 minutes. It was agreed between counsel that the restriction on the ability of the witness to discuss her evidence during the short break was waived in relation to the respondent seeking instructions on the redacted part of the document. On return counsel for the respondent objected to the introduction of the unredacted document on the grounds that:

   8.1. The claimant is legally represented and cannot ignore the rules relating to advance disclosure;

   8.2. Miss Buck is able to answer questions on the redacted part of the document;

8.3. The claimant should not be allowed to introduce documents in breach of the rules of procedure;

8.4. The respondent is concerned that the claimant will proceed to introduce further documents

9. Counsel for the claimant replied:

9.1. The unredacted document was not available to the claimant at the time of disclosure;

9.2. As the unredacted document is a document prepared by the respondent and redacted for a reason, the questions cannot take the respondent by surprise;

9.3. The redaction of the document is relevant to the conduct of the investigation: the claimant is entitled to ask why certain paragraphs of the letter of resignation of Daryl Haughton were deliberately excluded from consideration – was this a deliberate redaction to strengthen the respondent's case or weaken the case of the claimant;

9.4. The claimant does not seek to introduce any further documents.

10. Having considered the submissions the tribunal allowed the introduction of the unredacted document into the evidence, and allowed questions in cross-examination relating to that unredacted document because:

10.1. Ms Buck is able to answer the questions;

10.2. it is not argued that the introduction of the document, even at this late stage in contravention of the Orders, will prejudice the respondent's right to a fair hearing;

10.3. the reason for the decision to redact certain parts of this document may be relevant to the issues;

10.4. it is not argued that the redacted part of the document contains confidential information;

10.5. on balance it is in the interest of justice to allow the late introduction of the document which is now numbered 158A.

Submissions

11. Both representatives agreed that there was insufficient time, at the conclusion of the Hearing, to make submissions. It was agreed that the parties should

exchange written submissions and an Order was made for that exchange and the provision of copies for the tribunal's deliberations in chambers. The tribunal has considered with care the written submissions and does not repeat them here.

Evidence

12. The claimant gave evidence. In addition he relied upon the written evidence of Eileen Downey.

13. The respondent relied upon the evidence of: -

    13.1. Mrs L Kelly, Deputy Group Controller;

    13.2. Mr Mark McMenemy, General Manager of the Prince of Wales hotel;

    13.3. Miss M Ralphson, Operations Manager of the Scarisbrick Hotel;

    13.4. Miss T Buck, Group Personnel Manager;

    13.5. Mr L Jones, Area manager

14. The witnesses, other than Eileen Downey, provided their evidence from written witness statements. They were subject to cross-examination, questioning by the tribunal and, where appropriate, re-examination.

15. The claimant relied upon the written evidence of Eileen Downey. The tribunal agreed to consider that evidence, noting that it was a question of how much weight it was prepared to attach to the evidence of a witness who had not attended tribunal and could not be questioned on the veracity of their evidence.

16. An agreed bundle of documents was presented. Additional documents were presented during the course of the Hearing, either in accordance with the Orders outlined above or with consent. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.

Facts

17. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

18. The respondent company is part of the Britannia group of companies which trades under the name of Britannia Hotels and Pontin's. The respondent is a

large company which operates a large number of hotels throughout the country and employs approximately 4000 employees in Great Britain.

19. The General manager or Operations manager of each hotel is responsible for the efficiency and overall profitability of their hotel, the behaviour of their staff and the satisfaction of guests. In practice this is monitored by strict review and accounting processes.

20. The respondent operates a main centralised account and management system. New senior managers spend at least two days at the Head office so that they can become familiar with the centralised systems which effectively monitor all the hotel sites from an accounting, bookings, health and safety and personnel perspective.

21. As an organisation the respondent devotes a great deal of time and effort every week on controlling wages. It is a fundamental principle that the way to control wages is to manage “wage hours” in relation to required activity (activity based costing).

22. To do this accurately it is necessary to compare every Hotel Department on a ratio basis against the activity of that department. This analysis is also used to compare every hotel nationwide against the Group standard

23. The Head Office wage forecast department, which consists of four members of staff and a manager, receive the individual hotel forecast each week in departmental detail. Those figures are then reviewed to ensure that they comply with company guidelines.

24. It is important that the Wage Forecast accurately reflects the departmental rotas. If for any reason there are discrepancies on a regular basis then that could be a cause for concern e.g. employees forecast in one department not working in that department, employees not on the forecast but on the departmental rotas week after week.

25. It is necessary to document accurately staff departmental location on the wage forecast otherwise it is virtually impossible to verify the authenticity of the forecast in relation to the actual payroll. Confusion ensues and cross charging from one hotel to the other becomes prone to error.

26. Producing the Wage Forecast is the responsibility of the General or Operations manager of the hotel. Attention to the detail from a wage forecast perspective is crucial in controlling hotel wages. Failures in this area can destroy the whole basis of the respondent’s wage control process and will effectively lead to higher wages and cost the respondent more money than is necessary.

27. It is possible to move staff between hotels and departments according to the needs of the business. However, the accurate reporting of this information to Head Office is critical to the profitability of each department and hotel. Various ratios of members of staff to various tasks within departments are set by Head office. These ratios are expected to be adhered to within departments and the accurate reporting of the same to Head office is expected and critical to the business.

28. It is important therefore that the records show the number of hours worked by each employee in each department. If a department needs additional staff to cover then the record should show when an individual staff member is not working in their own department. This is referred to as cross charging whereby a staff member should be charged to the Department they are covering.

29. The weekly wage return or "white sheet" is given to each Head of department. The Head of Department then attaches each individual's timesheet to the weekly wage return. The head of Department then ensures the employee has been costed to the correct departments or any variances need to be explained by the head of Department on the white sheet.

30. The weekly wage return is then given to Control who compare the hours claimed with the hours the employee has clocked in/out. The weekly wage return is then given to the General/Operations manager to compare the hours the department is claiming against the hours forecast for each department.

31. Cross charging which is highlighted within the weekly wage return is checked by the General manager, who is responsible to reconcile the hours worked by any department in line with the forecast.

32. The General Manager is responsible for ensuring that the white sheet accurately reflects:

    32.1. The hours worked across each department each week;
    32.2. Any transfer of staff across hotels/department and any cross-charging arising therefrom.

    [On this the tribunal accepts the evidence of the respondent's witnesses.]

33. The control function of the Britannia group is centralised at Head office and has staff members in every hotel. It is run separately from the main operations and all control accounts staff report to the financial director. The role of the control department is to safeguard the company money and ensure the company procedures are being followed. One of the tasks of control is to process the wages at each of the sites.

34. The claimant commenced employment with the respondent on 24 August 1998. He has managed different hotels within the group. In 2011 he was the General Manager of the Prince of Wales hotel in Southport, earning a salary of £35,000 per annum. At that time Eileen Downey was Operations director and the claimant's line manager. Britannia hotels then purchased Scarisbrick hotel in Southport. Not long after the purchase the claimant agreed to become the cluster General manager overseeing both hotels. Eileen Downey agreed with the claimant to pay him a monthly bonus of £250 per month for looking after both hotels. It was anticipated at the time that this would be a temporary measure while the respondent decided upon the Scarisbrick hotel management structure. In fact, the claimant continued to manage both hotels until January 2018. He did not receive any pay rise in that period. The claimant's payslips (p281 – 282) showed the monthly payments to the claimant as comprising a salary payment and a bonus of £250.00. The claimant understood that this additional bonus payment arose because he was looking after two hotels. The claimant raised no complaint about his salary level, raised no formal grievance relating to the failure to provide him with a pay rise, prior to the termination of his employment.

35. Managers are often contacted to attend Head office for a meeting with a director or line manager to consider performance. Following such meetings the manager may be issued with a performance indicator indicating areas the managers need to improve upon at the hotel to hit required standards and margins.

36. On 21 September 2017 the claimant attended an appraisal meeting with the director Mr Ferrari. As a result, the claimant was issued with an email headed "Letter of concern" dated 2 October 2017 (p87). That letter highlighted concerns discussed at the appraisal meeting relating to sales recruitment, the number of weddings booked, management structure and lounge service. The claimant was advised that he needed to take action in relation to each of these issues. The letter concluded:

    Please be aware that if performance improvements are not met then this may result in disciplinary action being taken as part of the Company Disciplinary Procedure .

37. The claimant did not seek to appeal that letter of concern, raised no complaint that the respondent had acted outside or in contravention of the disciplinary procedure. No disciplinary action was taken against the claimant in relation to the matters raised at this time.

38. By email dated 7 November 2017 Mr Ferrari wrote to the claimant in the following terms:

    The average food GP%'s for your two Southport hotels are the two worst GPs of all our hotels at 62.2% and 61.88% The average for our hotels is 72%

This is costing us a fortune

Enough is enough

You need to remedy this immediately It requires you to organise your chefs to achieve at least the company average now…

If no success disciplinary action

39. The claimant replied indicating that the problem with the GP arose from the request by Mr Langsam, the director, to keep additional food on the carvery throughout the week. The claimant indicated that if he was allowed to bring the carvery specification back in line with the other hotels in the Group then GP at his hotels would also fall back in line. Mr Ferrari replied giving that authority.

40. No disciplinary action was taken against the claimant at this stage.

41. In 2016 the respondent issued a new employee handbook. The claimant was provided with a copy and advised that the handbook could be accessed on the shared and common drive within the personnel folder. The claimant, as a General manager, was well-versed with the respondent's disciplinary procedure, a copy of which is contained within the handbook. Extracts read as follows:

Misconduct guidelines – disciplinary offences

Misconduct is defined as failure in personal conduct, persistent poor performance, or deliberate infringement of policies, rules and procedures. To ensure a consistent approach, a list of offences which will result in disciplinary action is provided below.

This list is not to be regarded as exhaustive:

..

- Failure to comply with policies, procedures and regulations, as laid down by the company, from time to time …
- Abuse or neglect of the clocking in procedure, including falsification of time records of your own or a follow employee
- Deliberate failure to carry out responsibilities and duties to an acceptable standard

For offences classed as gross misconduct please see below

The company does not give authority for any member of its management to condone breaches of these rules by others. Should any permission be given to any employee, it will be without the knowledge or consent of the Company and will not protect the employee to whom permission was given.

Gross Misconduct

Gross misconduct is defined as misconduct serious enough to destroy the employment contract between Company and employee, making a further working relationship and trust impossible.
….

Gross misconduct can result in summary dismissal

Summary dismissal

The principal reasons for summary dismissal could include but are not limited to:
…

- Deliberate falsification of any documents or claims, including timesheets, clock cards, overtime or expense forms

Disciplinary procedure

An informal meeting may be held to discuss possible shortcomings in conduct, and to encourage improvement. This meeting should be a two-way discussion, seeking to find ways for you to make sustained improvement.

To ensure clarity for both you and the Company the outcome of this meeting will be confirmed in writing. If this informal action does not bring about improvement, the company will reluctantly invoke the formal disciplinary procedure

Formal disciplinary procedure

Investigation/fact-finding

- No disciplinary action will be taken against you until the case has been fully investigated
- The investigation of potential disciplinary matters, will take place without unreasonable delay and to establish the facts of the case
- Dependent on circumstances, the investigation will include one or both of the following:
    - An investigation meeting with you
    - Collation of evidence
- If an investigation meeting is held, it will be conducted by your line manager or a management representative and potentially a notetaker may also be present
- The meeting will be confined to establishing the facts
- Disciplinary action will not be considered at an investigation meeting

- There is no statutory right for you to be accompanied at an investigation meeting

- You will not be notified in advance to attend an investigation and will not be invited to by writing to attend an investigation

After the meeting all evidence will be seriously considered and information gathered, before deciding if there is a case to be answered at a disciplinary hearing. You will be notified of the decision in writing

Disciplinary hearing

- You will be notified in writing of the alleged offences, the date time and place of the hearing and who will conduct the hearing
- The hearing may take place away from the normal place of work, dependent on circumstances
- You will be provided with any evidence, including witness statements and notes from investigation meetings in advance
- This request will be made in good time for employees to prepare for the hearing
- You have the right to be accompanied at the hearing by a work colleague or trade union representative
- …
- Where possible the hearing will be conducted by your line manager or a member of management who has not been involved in the investigation

If the disciplinary offence is proved to the reasonable satisfaction of the company you will be notified in writing of the action to be taken. The following options may be implemented at any stage, dependent on the severity of your alleged misconduct

Option one – letter of concern or written warning

- The notification will explain:
- The nature of the misconduct
- The change in behaviour required
- The consequence of any further offence of failure to improve – namely option 2, 3 or 4
- The time period the warning will remain on your personnel file (usually 12 months)
- Your right of appeal

Option two – first and final written warning

……..

Option three – dismissal

……

Option for sanction other than dismissal, demotion or disciplinary transfer

……

Appeal

- Your appeal must be put in writing within 10 days of the outcome explaining why you feel the decision is unfair

- An appeal hearing will be held without reasonable delay, by an impartial company representative to the circumstances of the disciplinary outcome

…

42. In early 2018 the directors of the respondent company informed Miss Buck, Group personnel manager, that a decision had been made to move several of the General/Operational Managers within the company. This affected five managers and the claimant, all of whom were required to change hotels and locations, including a reshuffle in the Midlands area. Miss Buck spoke to all the managers who were going to be rotated to different sites, including the claimant.

43. Miss Buck spoke to the claimant over the phone on 11 January 2018 and confirmed that the claimant was being transferred to be the General Manager of Britannia Wigan. This was confirmed by email on 11 January 2018 (p93) which included the following:

> Your continuous service date is 24 August 1998 and all other terms and conditions remain. I confirm your salary will remain as £35,000 per annum

44. The claimant did not object to the actual transfer to Wigan. He did however raise a query about his salary, by email dated 16 January 2018 complaining that (page 94):

> You said that nothing was going to change however I appear to now be 3K out of pocket by you taking off me one of the hotels….. As always I will do what I'm asked by the company please will you make it clear that this is [definitely] a company reshuffle and has got nothing to do with my working capabilities.

45. Miss Buck replied by email (p94), raising a query about payment of a bonus and stating as follows;

> Moving you is nothing to do with your working capabilities, you are being moved as are others, we are having a reshuffle in the Midlands as well. There are six managers changing their hotels and locations. Five managers are moving their hotels, you are not the only person moving

46. By email dated 17 January 2018 (p95) the claimant complained about losing the bonus stating

> This is not my fault that you have chosen to take off me a hotel but reducing my pay I feel it is very unfair as I believe that I have been very much misled

47. Miss Buck replied by email dated 18 January 2018 (p95) stating:

All bonus do not form part of a salary. I said there would be no change in your salary and this is correct. Your bonus was paid for running two hotels and does not form part of your salary.

Although you may feel you are being penalised this is not the case

48. The claimant started work as General Manager of Britannia Wigan on 22 January 2018. He did not work under protest. He did not raise any grievance about the transfer to Wigan or removing his entitlement to the bonus.

49. Mr Mark McMenemy was interviewed by the two directors of the respondent company, Mr Ferrari and Mr Locksam, on 11 January 2018. He was successful at interview and informed that he was being offered the position of General Manager at the Prince of Wales in Southport . His appointment was confirmed by letter dated 11 January 2018 (p285) which confirmed a start date of 22 January 2018 and a salary of £40,000 per annum. The respondent did not tell the claimant of the difference in salary prior to his resignation. Mr McMenemy had several years' experience operating hotels for different companies. He commenced employment on 22 January 2018 at the respondent's head office, attending two days' induction training. He commenced work at the Prince of Wales hotel on 24 January 2018. There was no formal handover between the claimant and Mr McMenemy, who was new to Britannia hotels and did not know their policies and/or procedures prior to the induction training. Miss Buck did not inform the claimant that Mr McMenemy was appointed at a higher salary than the claimant.

50. Miss Michelle Ralphson joined the respondent company on 1 November 2017 as Operations Manager of Wigan. She attended an induction course. She had previous experience as Operations manager for different hotel groups in the last 10 years. In January 2018 Miss Buck informed Miss Ralphson that she was being moved to the Scarisbrick Hotel in Southport, explaining that the respondent was relocating a few managers. Miss Ralphson took over the running of the Scarisbrick Hotel on 22 January 2018. There was no formal handover between the claimant and Miss Ralphson, who was relatively new to Britannia hotels and did not know their policies and/or procedures prior to the induction training.

51. On 20 February 2018 Lesley Kelly, Deputy Group controller, was contacted by Sarah Tatlock, North West area controller, regarding an irregularity on the clocking in procedure at the Prince of Wales hotel. Ms Tatlock had been alerted by Mr McMenemy with regards to irregularities on the clocking in and out of 4 members of staff. Sarah Tatlock had looked at the records and thought that the entries looked suspicious. Sarah Tatlock flagged these concerns to Miss Kelly who in turn reported the concerns to the head office personnel. Ms Kelly then carried out an investigation at the hotel and viewed the CCTV.

52. Following their appointment Mr McMenemy and Miss Ralphson notified the personnel department and Control that they had concerns that there were irregularities in the records of both the Scarisbrick and Prince of Wales hotels as to the allocation of individual members of staff to correct departments in the wage costings. Mr McMenemy expressed his concern that various members of staff were costed to the Scarisbrick hotel but worked at the Prince of Wales, or were costed to one department but worked in another. Both Mr McMenemy and Miss Ralphson reported to Head Office their genuine concerns that the White Sheets had not been completed accurately prior to their appointment and that the claimant had failed to reconcile the correct departments and hotel the employees were working within.

53. Neither Mr McMenemy nor Miss Ralphson knew the claimant prior to their appointment. Both had genuine concerns that the hotels for which they were now responsible had not been run in accordance with the respondent's policies and procedures, and that this may affect the profitability and smooth running of the hotel. They had immediate difficulties trying to allocate staff between the two hotels as the documentary evidence available to them did not accurately record to which hotel and/or department each of the employees was allocated and/or worked. They reported those concerns to Head office. Neither Mr McMenemy nor Miss Ralphson made a direct complaint against the claimant personally

54. Miss Buck discussed these concerns with the two directors who instructed Miss Buck to investigate the complaints raised with the claimant under the disciplinary procedure. The directors did not provide Miss Buck with written confirmation of this instruction or the terms of reference of her investigation. As Head of Personnel for the Group Miss Buck does from time to time conduct redundancy exercises and disciplinary procedures, including acting as dismissing and/or investigating officer. In disciplinary action against senior managers it is standard practice for Miss Buck to take the role of investigating officer.

    [On this the tribunal accepts the evidence of Miss Buck, *bearing in mind that the directors have not been called to give evidence, bearing in mind that Miss Buck's evidence is not supported by any documentary evidence. There is no satisfactory evidence to contradict that of Miss Buck, who worked at head office and had regular contact with the directors.]*

55. By email dated 23 February 2018 Miss Buck asked the claimant to attend a meeting with her on 27 February 2018 at Head office. Miss Buck did not explain the reason for the meeting, did not provide the claimant with any documentary evidence prior to the meeting.

56. At the meeting on 27 February 2018:

56.1. a notetaker was present and prepared handwritten notes of the hearing. The handwritten notes have not been disclosed. Typed minutes were provided to the claimant after the meeting (p104). He was not given the notes at the end of the meeting to review and agree;

56.2. the claimant was told at the outset of the hearing that this was an investigation hearing. The claimant confirmed that he understood the format and was ready to proceed;

56.3. the claimant was not told at the outset of the hearing what were the allegations being investigated, was not provided with any documentary evidence or witness statements for review or comment;

56.4. Miss Buck asked the claimant about the clocking in and out procedure and asked the claimant to explain why several members of staff at the Prince of Wales and Scarisbrick hotels did not follow the procedure. Miss Buck did not provide the claimant with details of the members of staff involved, or the scale of the failures in the clocking in and out procedure and provided no specific examples of times and dates, did not provide copies of the relevant timesheets;

56.5. Miss Buck asserted that one member of staff, Mo, had been breaching the clocking in procedure for years. The claimant said that he had dealt with that. He was asked to provide evidence of any discussion between himself and Mo. The claimant asserted that there was no paperwork about the discussion with Mo, that he did not have time to document every discussion with staff;

56.6. the claimant said he did not know what was going on, he was not responsible for the timesheets but he understood Miss Buck's concerns;

56.7. Miss Buck said that the new managers Mark and Michelle could not work out which staff members belonged to which hotel and asked why that was. The claimant replied

> They were never going to it was a balancing act between the two hotels

56.8. Miss Buck asked "shouldn't this information have been recorded? The claimant replied "we were just trying to manage without running the hotels into the ground";

56.9. Miss Buck asked "I want to know why things aren't documented, we have waiters who are on reception?" The claimant replied "I know";

56.10. Miss Buck asked "Nothing matches up with the Sales & Labour?" The claimant replied: "I had to manage with the people that I had, nothing was hidden but I had to run the hotel as best I could"

56.11. Miss Buck asked "So the sales and labour are accurate?" The claimant replied "As accurate as I could make it";

56.12. Miss Buck asked "Staff were in the right department doing the right jobs? " The claimant replied "I don't know. When the forecast came in we had to keep as close as possible to it and run the hotel as best we could";

56.13. Miss Buck asked about Ian Berry, who was a night porter but was operating as Duty manager. The claimant was asked why he was putting people in departments that they should not be in. The claimant replied that "people got moved into different departments for the good of the business";

56.14. the claimant accepted that he was responsible for ensuring that people were in the right departments but said that the documentation was down to the Head of departments;

56.15. the claimant confirmed that there was no documentation to say that Ian Berry was a duty manager and that the fault for that would lie at the claimant's feet;

56.16. Miss Buck did not question the claimant about any overspends, did not question the claimant about the alleged overspends of approximately £21,000.00 in the period 4 November 2017 to 6 January 2018, as identified at pages 250 and 251);

56.17. the claimant did not ask that the meeting be closed or complain that he was being ambushed or did not understand the matters under discussion;

56.18. the claimant did not assert that he did not understand the procedures or that he had asked for training in completing the procedural requirements of the role.

57. The tribunal accepts that the notes at pages 104 – 112 are an accurate summary of what was said during the course of the investigation meeting on 27 February 2018. They are not a verbatim account. Miss Buck did not act towards the claimant in an aggressive and intimidatory manner

[On this the tribunal accepts the evidence of Miss Buck. The claimant's challenge to the accuracy of the notes is not supported by any satisfactory evidence. He provides no satisfactory evidence to support the assertion that Miss Buck acted in an aggressive and intimidatory manner.]

58. After the meeting Miss Buck prepared a handwritten file note summarising her views on the investigation (p113). The file note appears as a haphazard series of abbreviations, barely legible or understandable. It is clearly written as a note for Miss Buck personally. It is not set out in the format of an investigation report, it does not set out the extent of the investigation or the evidence relied upon. In the file note, Miss Buck sets out her recommendation for action in relation to 4 points:

    58.1. clocking in and out - not following procedure;

    58.2. Mo Ali – allowed- not responsible conduct by the general manager to allow breaches of procedure;

    58.3. failure to provide documents for the positions leading to issues for new managers- again not following procedure;

    58.4. the claimant admitted that he did not follow cross charging procedures

59. Miss Buck sent the investigation meeting notes and accompanying evidence to Mr Lee Jones, Area manager. He was asked to decide whether the claimant should be called to a disciplinary hearing. Mr Jones, as an Area manager, is senior to General Managers and Operations managers in his area. In that role he understood the roles and requirements of the managers, and had the seniority to deal with General Manager and cluster manager disciplinaries. Mr Jones considered the evidence including:

    59.1. notes of the investigation hearing with the claimant (104-112);

    59.2. Staff lists supplied by Control department (pages 120-124);

    59.3. Entries from personnel file of Mo Ali;

    59.4. statement from Mr McMenemy (p157);

    59.5. a redacted letter of resignation from Daryl Aughton (p158);

    59.6. time sheets (at pages 168, 169-172)

    [On this the tribunal accepts the evidence of Mr Jones, noting that the respondent has not disclosed the email exchange between Miss Buck and Mr Jones whereby the documents were sent to Mr Jones, and that Mr Jones is not clear if he had sight of some documents, including Miss Buck's handwritten file note recording the outcome of her investigation, contrary to paragraph 5 of Mr Jones' witness statement. On balance, the tribunal finds that Mr Jones was a credible witness, largely consistent, who answered

questions in cross-examination openly, admitting certain errors in his statement when put to him.]

60. Having considered the evidence Mr Jones decided that there was sufficient evidence to call the claimant to a disciplinary hearing because:

60.1. the claimant was a very experienced and senior manager and yet he appeared that he:

60.1.1. was not monitoring any clocking in and out;

60.1.2. was failing to take action against employees;

60.1.3. was failing to document employees records properly;

60.1.4. was incorrectly completing the control department's cross charging procedures;

60.1.5. was leaving new managers responsible for completing forecasts unable to do so because staff were working between the two hotels and in departments they were not recruited to work in;

60.2. the claimant had appeared to be blasé about this at the investigation hearing, when he admitted he had not followed procedures;

60.3. the claimant had been responsible for instigating procedures for other staff under his control for many years and it was not possible he did not know what he was supposed to be doing;

60.4. there was sufficient evidence to call the claimant to a disciplinary hearing and hear his responses and explanations as to what had been going on and why;

60.5. each hotel has to financially run correctly. The General Manager is required to accurately record staffing costs under the established procedures to ensure that Head Office receives the correct information.

61. The tribunal accepts the evidence of Mr Jones and Miss Buck that the decision to call the claimant to a disciplinary hearing was made by Mr Jones, who did not know the claimant prior to his decision to call him to a disciplinary hearing, and who did bring an independent judgment to bear There is no satisfactory evidence to support the assertion that it was Miss Buck's decision, that she originated the complaints against the claimant or acted in a way to secure the claimant's dismissal because she had had a disagreement with the claimant over an employee Ann A. The exchange of emails between the claimant and Miss Buck at pages 295-297 of the bundle is not satisfactory

evidence to support an assertion that Miss Buck was biased against the claimant and/or performed her duties in a way to secure the claimant's dismissal. In accepting the evidence of Miss Buck and Mr Jones on this point the tribunal has considered with care:

61.1. the inconsistency in evidence of Miss Buck in relation to the dismissal of Mr Berry (see paragraph 74) and her letter dated 17 April 2018 (see paragraph 75). There was clearly an error and/or misrepresentation in that letter: Miss Buck had dismissed Mr Berry on a related matter. In fact, a number of other employees had also been dismissed. However, the letter dated 17 April 2018 was written after the claimant's resignation and is not satisfactory evidence to support the assertion that Miss Buck had, prior to the claimant's resignation, acted in a way to secure the claimant's dismissal;

61.2. the inconsistency in the evidence of Mr Jones as to the documents considered by him in reaching his decision;

61.3. the fact that, in reaching his decision to proceed to disciplinary action, Mr Jones did not notice that some of the documents were wrongly dated or unsigned. However, Mr Jones was a credible and largely consistent witness who readily admitted in cross-examination that he had made this mistake;

61.4. the fact that Mr Jones, in evidence, said that the evidence relating to Mourad Ali did not impact on his decision, whereas the letter inviting the claimant to a disciplinary hearing retained reference to Mourad Ali. Mr Jones spends many hours travelling as part of his job. He reported his decision to Miss Buck by telephone. Miss Buck drafted the letter. Each of the allegations, and any error in the letter, would have been addressed at the disciplinary hearing. These matters do not support the claimant's assertion that the disciplinary action was dictated by Miss Buck

62. Mr Jones reported his decision to Miss Buck by telephone on 1 March 2018.

63. The exact financial consequences of the alleged breach of procedures had not been established or quantified at the time the claimant was called to the disciplinary hearing. Evidence put before the tribunal about alleged overspends was not available prior to the claimant's resignation. Those overspends were identified after the event and were not put to the claimant at the investigation meeting, did not form part of Mr Jones decision to proceed to disciplinary, did not form part of the disciplinary procedure. That evidence is irrelevant to the issues to be determined in this case.

64. By email dated 2 March 2018 (117) Miss Buck sent to the claimant a letter inviting the claimant to a disciplinary hearing together with copies of notes of

the investigation hearing, the disciplinary procedure, employee timesheets and clock cards; staff lists supplied from control department (p120-124); Mo Ali's personnel file, statement from Mr McMenemy, a redacted letter of resignation from Daryl Aughton (p158). Miss Buck did not provide the claimant with a copy of her handwritten file note of the outcome of her investigation (see paragraph 58 above).

65. Extracts from the letter of invitation read as follows:

> The company have made an allegation in relation to your conduct. I am therefore writing to invite you to attend a disciplinary hearing to give you the opportunity to provide an explanation for the following matters:
>
> - It is alleged you are failing to comply with policies, procedures and regulations as laid down by the company from time to time, whilst General Manager at the Prince of Wales and Scarisbrick. Examples of which are below:
>
> - Allowing staff to clock each other in out of the building
>
> - Not taking the appropriate disciplinary action when this has been brought to your attention i.e. Mourad Ali
>
> - Failing to document staff changes i.e. changes of departments, promotions
>
> - Not appropriately cross charging staff to the correct hotels which has led to problems with sales of labour, which could be seen as a falsification of company accounts and records
>
> - Based on the above it is alleged you are failing to carry out your responsibilities and duties to an acceptable standard.
>
> We view the above matters as potentially serious misconduct. Your disciplinary hearing will be heard as below:
>
> Date: Thursday 8th March 2018
> Time: 10 am
> Venue: Britannia Hotels, Daresbury
> Panel: Lee Jones, Area Manager
>
> ….
> You have the right to be accompanied by a fellow employee or trade union official. Should you wish to do so, it is your responsibility to make the arrangements. The purpose of the hearing is ensure a fair and consistent procedure has been applied and you are given the opportunity to state your case. No decisions will be made during the hearing as further investigations may need to be conducted as a result of your evidence

I put you on notice that a potential outcome to the hearing could be that you are issued with a first written warning, final written warning, dismissal, disciplinary transfer, demotion or no further action.

If you wish to contact any employees who you feel could assist you in preparing an explanation for the allegations made against you then please contact me in order that I can arrange to take witness statements from.

66. By email dated 5 March 2018 (p182) the claimant was provided with a copy of a statement from Miss Ralphson (p183), described as "further evidence in relation to the allegations put to you."

67. By email dated 7 March 2018 (p184) the claimant notified Miss Buck that he had been "put on the sick for four weeks due to my blood pressure"

68. by letter dated 13 March 2018 (p185) Miss Buck wrote to the claimant rescheduling the disciplinary hearing for 4 April 2018. The letter concludes:

> Please note that if you are unable to attend this rescheduled hearing he (Mr Jones) will need to either:
> - consider the issues of concern in your absence and make a decision on the basis of the evidence available to me; or
> - request a medical report and prognosis from your GP (we will write you again in this regard should this be necessary)
>
> If you have any queries regarding the content of this letter please contact me

69. The claimant instructed Mr David Mawdsley, barrister at law, of Defence Barrister Direct, who sent to the respondent a Letter before Claim dated 14 March 2018 (p186) together with the claimant's letter of resignation dated 16 March 2018 (p231).

70. In the letter before claim Mr Mawdsley stated that:

70.1. the claimant had been ambushed by the investigation hearing;

70.2. the respondent had failed to carry out a fair investigation and had breached the ACAS guidance;

70.3. the allegations made against the claimant were not justified and in any event were performance -related as opposed to conduct related;

70.4. the claimant was claiming constructive dismissal on the grounds that the employer had fundamentally breached express and/or implied terms of the contract by

70.4.1. Imposing a £3000 per annum salary reduction;

70.4.2. acting in a high-handed and aggressive manner towards the claimant;

70.4.3. accusing the claimant without foundation of inability to do his job;
70.4.4. failing to progress the disciplinary progress fairly;
70.4.5. failing to follow its contractually binding disciplinary procedure.

71. Extracts from the letter of resignation read as follows:

I am writing to inform you that I am resigning from the post of General manager.. I anticipate that the 12 week notice period set out in the employee handbook will apply…

For the reasons set out in the attached letter of claim, I believe that the decision to subject me to disciplinary procedures, as communicated by your correspondence dated 2 March 2018, represents a fundamental breach of contract in that it has destroyed the relationship of trust and confidence which must exist between the parties to an employment contract. In short, I believe that the decision to invoke the disciplinary procedure was both unnecessary and oppressive. I feel that the criticisms expressed regarding my work performance could have been resolved on an informal basis. As it is, I still have not been informed who it was that instigated the complaints made against me. Furthermore, I remain convinced that the employer has failed completely in its duty to exercise an objective, fair and thorough investigation into those complaints. The manner in which the disciplinary process has been managed leaves me in no doubt that the decision to dismiss me has already been taken…
…
You will be aware that I was signed off by my doctor on 7 March for a month with work related stress… It is for this reason that I am currently unable to work. I will inform the company if and when my fitness to return to work is confirmed. In the circumstances, the company may wish to consider paying me notice.

Please be advised that settlement proposals are being prepared on my behalf.

72. Mr Ferrari, Financial director, wrote to the claimant by letter dated 22 March 2018 (p234) acknowledging the claimant's resignation. Extracts read as follows:

The notice period that will apply in respect of your resignation will be from 16 March 2018 for a period of 12 calendar weeks. As such your leaving date is confirmed as 8 June 2018….
As you are aware you are required to work your notice period at your place of work Britannia Wigan and it is important that your role as GM is covered adequately by other staff in your absence…
It is expected currently that you will return to work on the 3 April 2018 to perform your role of GM of Britannia Wigan…

Disciplinary

Before receipt of your resignation letter you were sent a letter requiring you to attend a rescheduled disciplinary hearing on 4 April 2018. Please note that this hearing has now been rescheduled to be held ;
date [date of return] April 2018.
All contents of our letter dated 2 March 2018 remain applicable to the above hearing.
If you do remain certified as off sick on the above hearing date the disciplinary hearing will thereafter be held at 12 AM on the first day you return to work (signed as fit by your doctor) within your notice period.
[If you are not signed as fit to work during your notice period a decision in your absence on the basis of evidence available, can be made by the panel leader on the last day of your employment. Such decision made will then be added to your personnel record and a copy sent to you]
…
May we take this opportunity to wish you a swift recovery and success in your future employment plans
…

73. By letter dated 25 March 2018 (p236) the claimant replied to Mr Ferrari, confirming his view that Tina Buck had failed to carry out an objective and impartial investigation, and the manner in which Tina Buck had carried out her investigation convinced him that the decision to dismiss had been taken before the disciplinary procedure was engaged. The letter concludes:

In the light of my decision to resign, your insistence that the disciplinary procedure be resurrected upon my return to work seems perverse. I will not subject myself to a procedure which I know to be stacked against me. In any event, you should know that my illness has worsened to the extent that my medication has been doubled and my sick note extended.

Clearly, there is little prospect of my returning to work in the near future. In the circumstances I must inform you of my decision to resign with immediate effect and without notice. For the purpose of my constructive dismissal claim, and all other relevant matters, I will rely on Monday, 26 March 2018 as my effective termination date

74. By letter dated 26 March 2018 (p292) Miss Buck advised Mr Ian Berry of her decision to dismiss him because he had been found guilty of falsification of documents by clocking two members of staff in an out of the building and had breached the company's clocking in procedures. This is one of the matters put to the claimant at the investigation meeting on February 2018 and the documents formed part of the documentary evidence to be considered at the claimant's disciplinary hearing.

75. By letter dated 17 April 2018 (p239) Miss Buck wrote to Mr Mawdsley in the following terms:

We are sorry that Phil Massey has felt that he should resign and enter into litigation. After 19 years of service, this is a sad end to what has been, from our view at least (and we believe also Phil's), an excellent relationship. Phil can rest assured he will

get a great reference from us regardless of whether or not we can resolve our differences over the circumstances of his leaving

Phil was not the only person we invited to investigatory and disciplinary hearings, as part of our attempts to understand why it was that staff at one of our hotels were not following the correct clocking in and out procedures. Those enquiries are at an end, and Phil is the only person to no longer be employed by us. Had he not so hastily resigned on 16 March, he might not have faced any sanction, and even if he had, it is very unlikely that he would have been dismissed

I say 'very unlikely', rather than been able to tell you with certainty what the outcome would have been, because of course a full process has to be followed before decisions can be made. I take your point that matters might have been no more than performance related, but there was evidence, including from others, that it might have gone beyond that. In particular, one other employee was quick to allege widespread misconduct on the part of others, and we could not fairly deal with our concerns over that other person without fully investigating what he said.

I do wish Phil had stayed, but if our paths must diverge here, I would really rather it was on good terms. To that end, while we disagree with much of what you say about our treatment of Phil, I would rather not get into a squabble over it. If Phil is insistent on bringing a claim, then we are prepared to resist it.

The Law

76. The tribunal has considered the relevant law including in particular:

    76.1. ss 95(1)(c) and 136(1)(c) Employment Rights Act 1996 ("ERA"); and

    76.2. **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221;** and

    76.3. the summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**.

77. The first question is whether the employer committed a fundamental breach of the terms, express or implied, of the claimant's contract of employment. A Tribunal must decide in each case whether a breach of contract is sufficiently serious to enable the innocent party to repudiate the contract. This is a question of fact and degree.

78. There are a number of implied duties placed on an employer including the duty of mutual trust and confidence.

79. In **Malik and anor v Bank of Credit and Commerce International SA 1997 ICR 606** the House of Lords held that a term is to be implied into all contracts of employment stating that an employer will not, without reasonable and

proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. A breach of the implied term of trust and confidence is "inevitably" fundamental. **Morrow v Safeway Stores plc 2002 IRLR 9**. Brown-Wilkinson J in **Woods v WM Car Services (Peterborough) Limited [1981] ICR 666** EAT described how a breach of this implied term might arise: "*To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*".

80. The tribunal notes that a course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident even though the "last straw" by itself does not amount to a breach of contract. In **Lewis v Motor World Garages Limited 1985** IRLR 465 Neill LJ said that "the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term "of trust and confidence." Glidewell LJ said "*(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so…. The question is, does the cumulative series of acts taken together amount to a breach of the implied term?*"

81. The employers' repudiatory breach must be the effective cause of the employee's resignation but it does not have to be the sole cause. **Jones v FSirl & Son (Furnishers) Ltd [1997] IRLR 493 EAT**. It is not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for his or her resignation. It is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned in response to the employers' breach rather than for some other reason. **Weathersfield Ltd t/a Van and Truck Rentals v Sargent 1999 IRLR 94**.

82. The tribunal has considered and where appropriate applied the authorities referred to in submissions.

Determination of the Issues

83. The determination includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

84. The issues were identified on the first day of the hearing as set out at paragraph 4 above. The claimant's written Statement of issues, presented at the outset of the hearing, confirmed that the claimant asserted that he was relying on a breach of the implied term of trust and confidence and identified the alleged cut in salary as one of the circumstances relied upon. Counsel for the claimant did not, at the outset, make it clear that he was asserting that there had been a breach of an express term of the contract. Written submissions show that the claimant does seek to rely on the alleged cut in salary as a fundamental breach of an express term of his contract which entitled him to resign. The respondent has addressed this in the written submissions. Accordingly, the tribunal has considered whether the alleged cut in salary amounted to a breach of an express term of the contract. Evidence was heard about the alleged cut in salary. The respondent is not prejudiced by the identification of the issue at this late stage.

85. The claimant was entitled to an annual salary of £35,000.00. From 2011 he was entitled to a bonus payment of £250.00 per month because he was managing two hotels. Correspondence and payslips show that the claimant was fully aware that the £250.00 was a bonus payment, not part of his salary, and was paid because he managed two hotels.

86. The respondent did not impose a £3,000 per annum salary reduction. Withdrawal of the payment of the bonus was not a breach of an express term of the claimant's contract of employment. His entitlement to the bonus was conditional upon him managing two hotels. When the claimant moved to Wigan and was in charge of only one hotel he was no longer contractually entitled to the bonus payment.

87. The definition of wages under section 27 (1) Employment Rights Act 1996 is of no relevance and does not assist the claimant. The wages to which the claimant was entitled while he was the manager of two hotels was his salary of £35,000.00 and the bonus payment of £3,000.00 per annum. The wages to which the claimant was entitled while he was the manager of one hotel was his salary of £35,000.00 per annum. From 22 January 2018 the claimant was the manager of one hotel and he was contractually entitled to payment of the salary of £35,000.00. He was not contractually entitled to the payment of the bonus.

88. The respondent acted with reasonable and proper cause by terminating the bonus payment when the claimant was transferred to be the General Manager of a single hotel. There is no satisfactory evidence to support the assertion that the claimant was treated with contempt in the withdrawal of the bonus payment. To the contrary, the email exchange with Miss Buck shows that the respondent was seeking to reassure the claimant that the transfer to Wigan was part of a reorganisation affecting other managers and was not a capability issue. The claimant raised no complaint about his level of pay

and/or the failure to reward the claimant better for running two hotels prior to the termination of employment.

89. The claimant in written submissions challenges the decision of the respondent to appoint a new manager, Mr McMenemy, to the position of General Manager of the Prince of Wales at an annual salary of £40,000, when the claimant's salary for managing that one hotel was £35,000.00. The claimant did not at the outset of the hearing identify the difference in salary between himself and Mr McMenemy as an issue relevant to his decision to resign, did not list it as an action of the respondent which contributed to a fundamental breach of the implied term of trust and confidence. The circumstances in which Mr McMeneny was paid a salary of £40,000 for the management of one hotel was not therefore part of the evidence. The respondent has not had the opportunity to address this complaint. In any event, the claimant was contractually entitled to an annual salary of £35,000. The payment of a higher salary to the claimant's successor is not a breach of an express term of the claimant's contract of employment or of the implied term of trust and confidence. The respondent did not tell the claimant of the difference in salary prior to his resignation. The claimant asserts in cross examination that he obtained a copy of Mr McMenemy's offer/acceptance letter in or around 22/23 January 2018 from an employee whom he refuses to name. It is certainly not the claimant's case that the respondent deliberately told him about Mr McMenemy's salary in an attempt to undermine or belittle the claimant or destroy or seriously damage the relationship of trust and confidence. There is no satisfactory evidence that the claimant was aware of the difference in salary before he resigned. The tribunal does not accept the claimant's evidence on this point. In any event, the difference in salary clearly was not in the mind of the claimant when he resigned. Neither the letter of resignation, nor the letter before claim, written by the claimant's barrister, contains any reference to it.

90. The directors acted with reasonable and proper cause by asking Miss Buck to investigate the matters raised about the management of the Prince of Wales and Scarisbrook hotels in early 2018. The information received from Lesley Kelly, Deputy Group controller, regarding an irregularity in the clocking in procedure at the Prince of Wales hotel, and the information from Mr McMenemy and Miss Ralphson about the difficulties they were experiencing in operating the Prince of Wales and Scarisbrook hotels, did raise questions about how those hotels had been managed under the claimant. No decision was made at that stage that this was a conduct rather than a performance issue. The only decision was to conduct an investigation. The fact that neither Mr McMenemy nor Miss Ralphson made a direct complaint against the claimant personally does not call into question the reason for the investigation. Employees raised with Head office matters of concern which the directors decided needed investigation. The directors acted with reasonable and proper cause.

91. There is no satisfactory evidence to support the assertion that there was a plan between the directors to engineer the claimant's removal from the company. The "Letter of concern" dated 2 October 2017 (p87) highlighted concerns previously discussed relating to sales recruitment, the number of weddings booked, management structure and lounge service. Although the claimant was advised that if performance improvements were not met this may result in disciplinary action being taken, no such disciplinary action was taken. The claimant raised no complaint about the actions of Mr Ferrari at the time. The claimant raises no complaint, no satisfactory evidence, of unacceptable pressure being placed on him to achieve performance targets. The email exchange in November 2017 between the claimant and Mr Ferrari is not satisfactory evidence of any breach of the implied term of trust and confidence, or of any plan to engineer the claimant's removal from the company. Clearly Mr Ferrari expressed his view about GP in fairly strident terms. However, the claimant was able to answer the criticism with a complaint about the actions of Mr Langsam. The claimant openly laid the blame for the problem with Mr Langsam. Mr Ferrari clearly acknowledged the problem and gave the requested authority for the claimant to take action. The claimant raises no complaint, adduces no satisfactory evidence, about either Mr Ferrari or Mr Langsam pursuing this matter any further. No disciplinary action was taken against the claimant in relation to this matter.

92. The fact that the directors appointed Mr McMenemy as General Manager of the Prince of Wales at interview on 11 January 2018 is not satisfactory evidence to support the assertion that there was a plan between the directors to engineer the claimant's removal from the company. Transfer of management between the hotels was common. The claimant was transferred to act as General Manager at Wigan at the same time. This was part of a number of management transfers. The claimant was not the only one affected. The transfer of the claimant to a different hotel is not evidence of a plan to dismiss the claimant.

93. The respondent acted with reasonable and proper cause by asking Miss Buck to conduct the investigation. She was the senior HR manager. It was normal practice for her to act as investigating officer in disciplinary action against senior managers. There is no satisfactory evidence to support the assertion that it was Miss Buck who was the complainant or "accuser", who was pursuing this action without reasonable and proper cause. The clear evidence is that the reports of Lesley Kelly, Mr McMenemy and Miss Ralphson raised genuine concerns about how the hotels had been operated under the claimant and there was a genuine need to investigate the extent of the problem. The respondent could have acted differently, could have considered the problem under the performance procedure, could have called the claimant to an informal meeting with the new managers to iron out any problems. However, the fact that the respondent did not take alternative steps is not a

breach of the implied term of trust and confidence. It may have been that the problems could have been identified and ironed out earlier had there been a formal handover between the claimant and Mr McMenemy and Miss Ralphson. However, there is no assertion, no satisfactory evidence to support an assertion, that it was standard business practice for managers to conduct such handovers. This was not an issue raised by the claimant at the time.

94. The respondent acted with reasonable and proper cause in conducting the investigation. Miss Buck acted in line with the respondent's disciplinary policy by inviting the claimant to an investigation meeting without notice, without notice of the allegations, without being given the right of representation. The claimant indicated that he was ready to proceed. At no time did the claimant, a senior manager, ask that the meeting be closed or complain that he was being ambushed or did not understand the matters under discussion. These are complaints raised after the event. The tribunal accepts and finds that the notes of the investigation meeting (p104-112) are an accurate summary of what was said during the course of the meeting. They are not a verbatim account. Miss Buck did not act in an aggressive and intimidatory manner. Miss Buck did address the matters of concern with the claimant: the discovery that staff had been failing to carry out the proper clocking in and out procedure, the problems relating to the allocation of staff between the two hotels, the failure of the claimant to properly document the use of staff across different departments, the failure to properly adhere to the cross-charging reporting procedures. The claimant was given opportunity to respond. Miss Buck did not, at the investigation stage, put specific allegations to the claimant, did not, at the investigatory meeting, provide the claimant with the appropriate documentary evidence to support the matters of concern she was raising. However, the tribunal is satisfied and finds that any defects in the conduct of the investigation procedure were minor and did not destroy or seriously damage the relationship of trust and confidence between the employer and employee.

95. The tribunal has considered whether the respondent acted with reasonable and proper cause in calling the claimant to a disciplinary hearing to answer the allegations of misconduct. The tribunal notes in particular as follows:

    95.1. Mr Jones was a senior manager who had no prior knowledge of the claimant;

    95.2. The tribunal is satisfied and finds that Mr Jones did bring an independent judgment to bear on the issue before him;

    95.3. In his position Mr Jones was aware of the duties and requirements of the claimant as a General manager;

95.4. Mr Jones gave to the tribunal a credible explanation as to why he considered that there was a case to answer, that the documentary evidence reviewed by him did require an explanation from the claimant;

95.5. Mr Jones did have genuine concerns that the evidence showed that the claimant as a senior manager with many years' experience had been engaged in misconduct as opposed to exhibiting problems with understanding and/or performance;

95.6. There is no satisfactory evidence that, before these allegations were raised, the claimant had alerted the respondent to any problems he was facing with completion of the required paperwork;

95.7. During the course of the investigation hearing the claimant did not assert that he did not understand the procedures or that he had asked for training in completing the procedural requirements of the role;

In all the circumstances the tribunal finds that the respondent did act with reasonable and proper cause in calling the claimant to a disciplinary hearing to answer the allegations of misconduct.

96. The tribunal has considered whether the respondent acted with reasonable and proper cause in the manner in which it called the claimant to a disciplinary hearing to answer the allegations of misconduct, including advising the claimant of the possible outcomes of the disciplinary hearing, including dismissal. The tribunal notes in particular as follows:

96.1 the letter of invitation complied with the disciplinary procedure by

96.1.1 notifying the claimant in writing of the alleged offences, the date time and place of the hearing and who would conduct the hearing;

96.1.2 giving the claimant time to prepare for the hearing;

96.1.3 advising the claimant of his right to be accompanied at the hearing by a work colleague or trade union representative;

96.1.4 confirming that the hearing was to be conducted by a member of management who had not been involved in the investigation;

96.2 the claimant was provided with the evidence, including witness statements from Mr McMenemy and Miss Ralphson, and notes from the investigation meeting in advance of the disciplinary hearing;

96.3 the wording of the invitation letter made it clear to the claimant that dismissal was one of the possible outcomes. Although the letter did not expressly state that the charges amounted to allegations of gross misconduct the claimant was reasonable in his belief that he was facing a charge of gross misconduct. The respondent identified that one of the allegations - Not appropriately cross charging staff to the correct hotels which has led to problems with sales of labour - could be seen as a falsification of company accounts and records. That is one of the examples given in the disciplinary policy of a reason for summary dismissal, in other words, an example of gross misconduct;

96.4 there is no satisfactory evidence to support the assertion that Miss Buck and/or Mr Jones grossly exaggerated the allegations to put the claimant in fear of dismissal, or to secure the unjustified dismissal of the claimant. The respondent's witnesses held the genuine view that this was a very serious matter. In reaching this decision the tribunal has noted the letter dated 17 April 2018 (p239) from Miss Buck to the claimant's barrister. The tribunal agrees with the claimant that the promise of a good reference for the claimant, in light of the pending disciplinary action, is perhaps at odds with a manager who recommended that the claimant should be charged with serious misconduct with dismissal as a potential outcome. However, that letter is also at odds with the claimant's assertion that dismissal was a foregone conclusion. The tribunal also notes that Miss Buck's letter dated 17 April 2018 is incorrect in that she had dismissed Mr Berry by this time. The letter of course post-dated the claimant's decision to resign and therefore could not have formed any part of his decision, and is not part of the respondent's conduct relied upon as contributing to the breach of the implied term and confidence.

96.5 there is no satisfactory evidence to support the assertion that dismissal was the inevitable outcome of the disciplinary hearing. There is no satisfactory evidence to support the assertion that the decision to dismiss had already been taken;

96.6 Miss Buck did not provide an investigation report which set out the allegations and evidence in a clear manner. She did not provide the claimant with a copy of her handwritten note of the outcome of the investigation;

96.7 The claimant makes much of not knowing the identity of the "accuser". However, that is not of relevance in this case. This was a decision by senior management, Mr Jones, that there was a case to answer by the claimant in relation to genuine matters of concern raised by Ms Kelly, Mr McMenemy and Miss Ralphson. By the time of the claimant's resignation the claimant knew the specific allegations of

misconduct, had been provided with the relevant documentary and witness evidence. By the time of the claimant's resignation the claimant knew the case he had to answer;

96.8 The exact financial consequences of the alleged breach of procedures had not been established or quantified at the time the claimant was called to the disciplinary hearing. Those were identified after the event and were not put to the claimant at the investigation meeting, did not form part of the disciplinary procedure, did not form part of Mr Jones decision to proceed to disciplinary. Evidence was heard in tribunal about the extent of financial losses identified subsequently but this was irrelevant to the decisions taken before the claimant's resignation, irrelevant to the claimant's decision to resign. The claimant cannot rely on the conduct of these proceedings as conduct which prompted his decision to resign;

96.9 An employer has the right to take disciplinary action against its employees when it is faced with evidence that well established procedures may have been broken, with potential financial circumstances. In this case the respondent was faced with evidence that a long serving General manager had failed to take appropriate steps to ensure accurate reporting of hours worked in the various departments across the two hotels. The respondent acted with reasonable and proper cause in taking disciplinary action against the claimant before the exact financial circumstances were known. The exact financial consequences were not relevant to the disciplinary action.

97. The tribunal has considerable sympathy for the claimant, who as a long - serving senior manager with a good knowledge of the disciplinary policy, was facing disciplinary action with dismissal as a potential outcome. However, the tribunal does not accept that calling the claimant to a disciplinary hearing in these circumstances amounted to a breach of the implied term of trust and confidence. In all the circumstances the tribunal finds that the respondent did act with reasonable and proper cause in the manner in which it called the claimant to a disciplinary hearing to answer the allegations of misconduct, including advising the claimant of the possible outcomes of the disciplinary hearing, including dismissal. There may have been minor defects in the procedure at the investigation stage. The claimant was not provided with specific allegations of misconduct at the start of the investigation, the claimant was not provided with documentary evidence at the investigation meeting, Miss Buck did not provide the claimant with an investigation report. Miss Buck may therefore have acted in breach of the ACAS guidelines, and that would have been considered had the claimant been expressly dismissed and brought a claim of unfair dismissal. However, that is not the appropriate question

when considering whether the respondent acted without reasonable and proper cause in a manner intended or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

98. Having considered all the circumstances the tribunal finds that the respondent did not, without reasonable and proper cause, conduct its business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

99. There was no fundamental breach of contract entitling the claimant to resign.

100. In any event, the clear evidence is that the claimant resigned, not in response to any fundamental breach of contract, but to avoid disciplinary action and, in particular, the risk of dismissal. It is noted that the claimant was prepared to serve notice until the respondent indicated that the disciplinary action would continue during the notice period. That prompted the immediate resignation of the claimant. The claimant did not resign in response to a fundamental breach of contract. He resigned in anticipation of such a breach.

Employment Judge Porter

Date: 24 April 2019

RESERVED JUDGMENT SENT TO THE PARTIES ON

30 April 2019

FOR THE TRIBUNAL OFFICE