THE EMPLOYMENT TRIBUNALS

Claimants: **Mr G Brunskill (1), Mrs L Brunskill (2)**

Respondents: **Parker Barras Bar One Limited (1)**
Eston Labour Club Limited (2)
The Trustees & Committee of Eston Labour Club (3)

Heard at: **Teesside Justice Hearing Centre** **On: 26 & 27 September & 14, 15 & 16 October 2019**

Before: **Employment Judge Morris**

Members: **Mr S Wykes**
Mr KA Smith

Representation:

Claimant: **Mr R Owen, Citizens Advice**
Respondents: **Mr J McHugh, First & Second Respondents**
Mrs B Hooson, Third Respondent

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The third respondent was the employer of both claimants throughout their respective employments.

2. The complaint of the first claimant that, by reference to section 95(1)(c) of the Employment Rights Act 1996, he terminated his contract of employment in circumstances in which he was entitled to terminate it without notice by reason of the conduct of the third respondent (ie. he was constructively dismissed) is not well-founded and, accordingly, his complaint that he was unfairly dismissed by the third respondent is not well-founded and is dismissed.

3. The complaint by the second claimant that she terminated her contract of employment in circumstances in which she was entitled to terminate it without notice by reason of the conduct of the third respondent (ie. she was constructively

dismissed) and that her dismissal was unfair by reference to sections 98(1) and (4) of the Employment Rights Act 1996 is well-founded.

4. The complaint of the second claimant that the third respondent made an unauthorised deduction from her wages contrary to section 13 of the Employment Rights Act 1996 in that they did not pay to her the full sick pay to which she was entitled in accordance with the contract of employment is well-founded.

5. The complaints of both claimants that, by reference to regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006, the reason for their respective dismissals was the transfer of the undertaking of the third respondent or a reason connected with that transfer that was not an economic technical or organisational reason, and that their employer failed to comply with its duty to inform and consult their representatives or them pursuant to section 13 of those Regulations are not well-founded and are dismissed.

6. The complaints of both claimants that they were dismissed in circumstances of redundancy are not well-founded and, therefore, their claims that they were each entitled to receive a redundancy payment are not well-founded and are dismissed.

7. The claims of the second claimant in respect of unfair dismissal and unauthorised deduction from wages as set out above will now be listed for a remedy hearing as soon as practicable.

8. Any liability in that respect did not pass from the third respondent to either of the other respondents.

REASONS

Identification, representation and evidence

1. For ease of understanding, in these Reasons:

   1.1 Where it is necessary to differentiate between the claimants the Tribunal shall refer to the first and second claimants respectively as Mr Brunskill and Mrs Brunskill.

   1.2 Eston Labour Club shall be referred to as “the Club”.

   1.3 The first respondent shall be referred to as “the Agent”.

   1.4 The second respondent shall be referred to as “the Company”.

   1.5 The third respondent shall be referred to as “the Trustees”.

   1.6 References to Mr Taylor shall mean Mr John Taylor with his father, Mr David Taylor being referred to as Mr D Taylor.

2. The claimants were represented by Mr R Owen of Citizens Advice who called each of the claimants to give evidence.

3. The Agent and the Company were represented by Mr J McHugh of Counsel who called Mr J Taylor to give evidence on behalf of them both.

4. The Trustees were represented by Mrs B Hooson who also gave evidence on their behalf.

The claimants' complaints

5. The claimants' complaints were as follows:

Both claimants

5.1 They had each been constructively dismissed: ie. by reference to section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), each had terminated their respective contracts of employment in circumstances in which there were entitled to terminate those contracts without notice by reason of the conduct of their employer.

5.2 Those dismissals were unfair by reference to sections 98(1) and (4) of the Act.

5.3 By reference to regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), the reason for their respective dismissals was the transfer of the undertaking of the Trustees or a reason connected with that transfer that was not an economic technical or organisational ("ETO") reason.

5.4 In the alternative, the reason for their respective dismissals was redundancy as defined in section 139 of the Act and, as such, pursuant to section 135 of the Act, each was entitled to receive a redundancy payment.

5.5 Their employer had failed to comply with the duty under regulation 13 of TUPE to inform and consult either their appropriate representatives or them with regard to the transfer of the undertaking of the Trustees to one or other of the other respondents.

Mrs Brunskill

5.6 Her employer had made an unauthorised deduction from her wages contrary to section 13 of the Act.

The issues

6. The issues to be determined at this hearing (said to be provisional issues and broadly framed) were identified during the course of a private preliminary hearing on 20 March 2019 at which the claimants and the first and second respondents were represented. At today's hearing a further issue, at paragraph 6.3 below, was added by consent. Although not mentioned at either the preliminary hearing or today's hearing, it follows from the claim of Mrs Brunskill that her employer made

an unauthorised deduction from her wages that a further issue needs to be considered as set out at paragraph 6.9 below. Thus, the issues are as follows:

6.1 Did the actions of the respondents either separately or cumulatively amount to a fundamental breach of any of the express contractual obligations to the claimants?

6.2 If not, did the respondents, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between them and claimants?

6.3 Did the respondents' actions amount to an actual or anticipatory breach of contract and, if so, did the respondents 'cure' that breach prior to the claimants' resignation; specifically the confusion over their job titles and duties?

6.4 Did the claimants resign, at least in part, in response to such breach without first affirming the contract?

6.5 If so, there was a dismissal, but was it for a reason connected with a relevant transfer that was not an ETO reason or does the respondent show a potentially fair reason for it?

6.6 If so, was the dismissal fair applying the test in section 98(4) of the Act?

6.7 Was there a failure to consult under TUPE?

6.8 Are the claimants entitled to redundancy payments?

6.9 Did Mrs Brunskill's employer make an unauthorised deduction from her wages contrary to section 13 of the Act?

6.10 Which respondent is liable to the claimants for each of their claims?

Findings of fact

7. Having taken into consideration all the evidence before us (both documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law, some of which was referred to by the representatives, notwithstanding the fact that in pursuit of some conciseness every aspect might not be specifically mentioned below, the Tribunal finds the following facts either as agreed between the parties or found by the Tribunal on balance of probabilities:

7.1 At the time relevant to these proceedings the Club was, and for some fifty years had been, what has described as a traditional social club. Its status was an unincorporated private members' club the business of which was conducted by a body of trustees elected by the members from time to time.

7.2 The claimants were employed by the Trustees as "steward with wife to assist". Their employments commenced on 2 August 1988 although they had worked as relief Steward and Stewardess during the previous three years. Mr Brunskill received a contract of employment [94], which is dated 22 January 1989. Mrs Brunskill did not receive a separate contract document. Amongst other things the contract given to Mr Brunskill records that the Steward was entitled to 8 weeks' full sick pay. The claimants were also provided with living accommodation above the Club.

7.3 Initially a single wage was paid to Mr Brunskill in respect of the employments of both claimants. After three or four years, however, Mrs Brunskill wanted to pay her own tax and NI contributions and the Trustees agreed that the wage would be split 60% to Mr Brunskill and 40% to Mrs Brunskill with no stipulation being made in respect of hours to be worked by either of them. In fact, Mr Brunskill attended the Club premises from the beginning until the end of each day (although not always actually performing work, for example behind a bar) and Mrs Brunskill worked as necessary with extra hours on special occasions.

7.4 Typically for a club steward, Mr Brunskill had total responsibility and accountability for the business of the Club subject to direction from the Trustees: for example, overseeing the running of the Club, cashing the tills, ensuring the security of the safe, maintaining adequate stock, ordering required stock, appointing staff, organising rotas and what might be termed 'regulatory compliance'.

7.5 The Club began to get into financial difficulties in 2012 as represented by it having given a charge to its brewery in respect of supplies. Things then came to a head in November 2017 when it was presented with an electricity bill for some £60,000, and in December 2017 the brewery took possession of its premises pursuant to its charge.

7.6 Urgent meetings of the Trustees were held one of which took place on 12 December 2017 at which presentations were made by three potential investors/business rescue consultants. The Trustees made it very clear that their primary objective was to keep the Club in operation and, additionally, they did not want to lose staff.

7.7 The Trustees unanimously agreed to appoint the Agent as consultants but more than that, for them to act as the Trustees' agents at an agreed fee with delegated powers to have full access to all aspects of the Club to "implement any cost-saving measures or any procedure they see fit without the need to refer to the committee" [170].

7.8 Mr John Taylor was employed by the Agent as consulting manager. He was the principal point of contact between the Club and the Agent. One of his functions was to identify someone to come in and take over the running of the Club's business. In the event, he decided to take over that business himself and to that end, with his wife, set up the Company, which was incorporated on 19 January 2018.

7.9 Following the appointment of the Agent, Mr Taylor commenced his activities on behalf of the Trustees towards the end of December 2017. His status at this time is a source of some considerable confusion. The claimants were clear that from the outset they were told by committee members (albeit perhaps not officially by Mrs Hooson as secretary on behalf of the Trustees) that Mr Taylor and his father were the new owners. Mr Taylor disputes that and the documentary evidence before us supports his position that the Agent was indeed the Trustees' agent and not the new owner. That there was confusion, however, is borne out by the minutes of the Trustees' meeting on page 425/6 where it is recorded that Mr Taylor was "asked if he would own the Club, the answer was yes", and the chairman asking members "if they accepted Mr J & D Taylor as new owners of Eston Labour Club", which was passed unanimously. As such the Tribunal accepts the claimants' position that, as far as they were aware, the Agent or indeed Messrs Taylor were the owners of the Club and, further, that that was a reasonable belief. That said it does not alter the legal position as evidenced by the Agent Agreement [170].

7.10 From his appointment Mr Taylor would visit the Club from time to time to observe its operations and speak to its members and staff. Additionally Mr M Gladhill, the business manager of the Agent, attended to assess the viability of the Club and implement cost savings.

7.11 On 21 December 2017 Mr Taylor contacted the brewery and arranged to order stock for the Club at a discount via the Agent's existing group purchasing arrangements. During that telephone call the brewery expressed concerns to Mr Taylor regarding payment in respect of a very large order that had been placed by Mr Brunskill in the sum of some £13,000.

7.12 Mr Taylor therefore arranged to meet Mr Brunskill on 22 December to discuss stock. During that discussion Mr Taylor became concerned that although Mr Brunskill had a good understanding of the quantity required he did not understand the financial value of the orders he was placing. One outcome of that meeting was that in future Mr Brunskill would no longer have absolute authority in respect of reordering stock. Instead, he would prepare the order and submit it to Mr Taylor for review and to make any adjustments he considered necessary before Mr Brunskill would then place the order subject to any adjustments made by Mr Taylor.

7.13 Also on 21 December Mr D Taylor asked Mrs Brunskill, in front of some committee members, why she was letting a good barmaid go: the context being that she had refused a request by a member of staff to have New Year's Eve off work and the employee had said that she would resign. Mrs Brunskill explained why it would have been unfair to allow the employee the night off. She nevertheless felt belittled and publicly embarrassed. The following day she raised this matter with Mr Taylor and Mr D Taylor when they were all in Mr Brunskill's office and asked if they were going to have a good working relationship where they could talk to each other. Messrs

Taylor responded that that would not be a problem and that was how they would like it.

7.14 A particular incident took place on New Year's Eve when the claimants were working and Mr Taylor was present in the Club. In accordance with the usual practice at the Club, when the bell was rung to indicate last orders Mr and Mrs Brunskill, together with some committee members, positioned themselves at the end of a queue to prevent new people joining it. A customer then approached the queue attended by Mrs Brunskill and she told him that he was too late so he went to the queue at which Mr Brunskill was standing. The man said that he was a friend of Mr Taylor but Mr Taylor's evidence was that he was not. Mr Brunskill then approached Mr Taylor who asked him if it was alright for the man to be served and Mr Brunskill agreed.

7.15 Another incident to which Mr Brunskill took exception was that the rules of the Club had previously provided that customers could not carry drinks up and down the staircase. A risk assessment was then undertaken by the trustees, which indicated that such a practice did not involve unacceptable risk and, therefore, this particular rule was changed. There is a conflict of evidence as to whether Mr Brunskill was informed of this change. He then noticed a customer approaching the stairs with drinks and is hand and told him that he could not carry the drinks on the stairs. Mr Taylor's father, John Taylor, interrupted him and told Mr Brunskill that the policy had now been changed, which made him feel belittled.

7.16 In January 2018 Mr Taylor convened a meeting of all staff regarding the future of the Club. He explained his role and that he was in talks with several companies, which might purchase the Club and indeed he too was considering that but nothing had been decided. He explained that staff would transfer to any new owner and that TUPE would apply meaning that there would be no changes to the terms and conditions of employment of staff and continuity of service would be preserved.

7.17 Part of Mr Taylor's role on behalf of the Agent, and therefore on behalf of the Trustees, was to secure cost-saving measures. He raised with the staff the possibility of them no longer being paid what has been referred to as overtime in respect of working on Bank Holidays although, more accurately, it was the practice of paying 'double-time' to staff who worked on Bank Holidays. The staff agreed to that change, which was to be implemented in March 2018.

7.18 Additionally Mr Taylor had identified that some staff did not have contracts of employment and that those of the staff who had contracts were out-dated. He proposed that new contracts of employment should be issued and showed those attending the meeting an example of a contract used by the Agent [136]. The Tribunal does not accept Mr Brunskill's evidence that Mr Taylor informed the staff that once they had signed the new contracts they would become employed by the Agent or that their previous service

did not count as this is contrary to the weight of evidence including in contemporaneous emails.

7.19 It is agreed by the parties, however, that when reading through the draft contract Mr Taylor referred to staff raising any issues that they might have with the bar manager. Mr Brunskill reacted to that and asked who was the bar manager whereupon Mr Taylor immediately apologised and explained that he had been focussing on the wording of the document and that in referring to the general manager he meant the Steward, Mr Brunskill. The Tribunal does not accept that he informed Mr Brunskill that the role of Stewart did not exist anymore. That is contrary to Mr Taylor's reassurances to Mr Brunskill from time to time, including in writing on 27 February 2018 [217], that Mr Brunskill's contract would remain the same; and his contract refers to him as "the Steward" [95]. Mr Brunskill's evidence was that after this meeting he was left feeling belittled but given the above findings the Tribunal is satisfied that there was no basis for that.

7.20 The next day, certain staff provided Mr Taylor with their existing contracts of employment and he asked the claimants for theirs. Mr Brunskill explained that there was only one contract, which applied to them both. As there was nothing to this effect in Mr Brunskill's contract, Mr Taylor sought clarification from the Trustees and Mrs Hooson confirmed that Mrs Brunskill was a separate employee but that she did not have her own contract of employment. As Mr McHugh also put in submissions, by February 2018 the claimants had two separate and distinct and employment relationships with Club. The Tribunal is satisfied that these observations of Mrs Hooson and Mr McHugh correctly summarise the position of Mrs Brunskill; if not from the outset then certainly following the formal division of the claimants' wage in the early nineties.

7.21 On 22 January a wake was held at the Club. Mr Taylor happened to be present as he was dropping off some posters. Mrs Brunskill noticed that someone was present who had previously been barred from the Club for conduct that the Tribunal accepts, as did Mr Taylor, was wholly unacceptable including threatening their daughter. She went to Mr Taylor in the lounge bar and explained the circumstances to him, which he said he would deal with. There is some dispute as to how long this took but Mr Taylor did ask the man to finish his drink and leave and, in cross-examination, Mrs Brunskill accepted that he had done what she asked of him. Nevertheless, the incident impacted upon her very severely. She went to her husband who was in the rear office and then, once she had calmed down a little, straight to their flat upstairs as she felt unable to continue working. She then went to her GP on 24 January who prescribed anti-depressants and issued a medical certificate for "stress related to work" [214]. She never returned to work again prior to her resignation on 12 March 2018 and the termination of her employment on 28 March 2018.

7.22 A major issue in these claims, particularly in respect of Mrs Brunskill, is whether she was entitled to receive full pay or only SSP while absent from work due to sickness. After Mrs Brunskill had commenced sickness

absence, Mr Brunskill approached Mr Taylor regarding her sick pay, which Mr Taylor agreed to look into. Having done so he sent an e-mail to Mr Brunskill on 5 February to advise that Mrs Brunskill did not have a contract and, as such, she was entitled to SSP and he had informed the accountants accordingly [207]. The accountants then e-mailed Mr Taylor to inform him that Mr Brunskill had telephoned them to say that Mrs Brunskill received eight weeks' sick pay. Mr Taylor e-mailed Mr Brunskill asking for an explanation of why he had contacted the accountants to go against his instructions [208]. In Mr Brunskill's reply that day he maintained that he did not personally e-mail the accountants and did not go against Mr Taylor's instructions but would find out if Mrs Brunskill was answering a call from them [209]. The content of that e-mail is inconsistent with the evidence of both claimants, however, that it was Mr Brunskill who telephoned the accountants. Nevertheless, Mr Taylor replied that Mr Brunskill need not worry because it was sorted.

7.23 As indicated above, the Tribunal is satisfied that early in the nineties, when Mrs Brunskill began to receive her own pay, if not before, the claimants became separately employed by the Trustees. That they had separate employments is supported by them receiving separate payslips, as contained within the bundle of documents, made out individually to Mr and Mrs Brunskill.

7.24 The issue in connection with sick pay, however, is not so much whether they were separate employees but what were the terms and conditions of Mrs Brunskill's employment. Various options might apply, all of which the Tribunal considered, including as follows:

7.24.1 As Mr Taylor asserts she became employed on the standard terms and conditions of bar staff and was not entitled to sick pay. In this respect Mr Taylor's evidence was that in the absence of an express contract between the Trustees and Mrs Brunskill there was an "implied term" that a staff contract of employment would apply to her.

7.24.2 As set out in Mr Brunskill's e-mail of 7 February [210], there was one wage of £676.84 that was divided between the claimants and, therefore, if Mrs Brunskill was not being paid her share of that wage the full wage would be received by Mr Brunskill.

7.24.3 Mr and Mrs Brunskill were initially employed on a joint contract of employment with the terms and conditions set out at page 94 and when their employments were separated they both continued on those same terms and conditions albeit now under separate contracts of employment.

7.25 In this regard Mr McHugh relied upon the case law of Mears v Safecar Security Ltd [1982] IRLR 183 and Financial Techniques (Planning Services) Ltd v Hughes [1981] IRLR 32. The Tribunal had regard to both. We note that in respect of Mears the following is recorded in the headnote

"the Tribunal can and should consider all the facts and circumstances of the relationship between the employer and employee concerned, including the way in which they had worked the particular contract of employment since it was made." …. "the way in which the employment has worked in practice will generally supply the missing term on one or other of the common law principles of necessary implication." …. "In the present case therefore if there had been no factors pointing either way, nothing for or against sick pay, then the statutory duty to determine particulars of a term or condition to comply with S.1(3)(d)(i) could have been discharged only by resorting to the presumption that the wage is to be paid until the employment ended".

7.26 In this case, with regard to the first and second quotations above, the Tribunal is satisfied on the evidence before it that the way in which the Trustees and Mrs Brunskill "had worked the particular contract of employment since it was made" and "the way in which the employment has worked in practice" was that if she was absent from work due to sickness she received full sick pay for up to 8 weeks' absence. As to the third quotation above, the Tribunal notes that the presumption that the wage (in this case full sick pay) is to be paid could have been applied but it does not need to resort to that presumption as it is satisfied that there are factors that point in favour of sick pay being paid upon which it can rely. Such factors include as follows:

7.26.1 The full wage had been paid to Mrs Brunskill when she was off sick in the past and, in an analogous situation, she had received maternity pay in her own right.

7.26.2 The work rota produced by Mr Taylor [204] refers to the claimants as "Staff on Salary" and the Tribunal notes that Mrs Brunskill received what is referred to as a "Weekly Salary" of £303.30 despite not being shown on the rota to be working any hours at all. Only the claimants are shown as receiving a weekly salary, which compares with other staff who are said to receive "Hourly Pay".

7.27 Additionally, the contract of employment initially entered into [94] as well as providing 8 weeks' sick pay provided for 24 days' holiday, which Mrs Brunskill as well as Mr Brunskill received while the contracts of employment for what might be termed 'ordinary' bar staff provide a lesser holiday entitlement. Additionally, when that holiday entitlement of Mr Brunskill was subsequently increased, she too received that increase. The contracts of the other staff also provide that there should be no contractual sick pay but only SSP.

7.28 Against that weight of evidence presented by the claimants, Mrs Hooson the only witness on behalf of the Trustees (who the Tribunal has found to be the employer), was only able to answer that she did not know about sick pay entitlement. The Tribunal considered that answer to be more informative than the statement in Mrs Hooson's witness statement that she

had told Mr Taylor that Mrs Brunskill was on the same terms and conditions of employment as all other members of staff as she was a separate employee of the Club. In any event, as considered above, Mrs Brunskill being a separate employee does not provide the answer as to the question of what were her terms and conditions of employment.

7.29 Mr McHugh relied upon Financial Techniques as stating that a genuine difference of opinion as to contractual entitlement does not amount to a breach of contract. To an extent that is right if there is a dispute and the time for performance of the contract is not yet due but in this case the performance of the contract of employment regarding the payment of sick pay to Mrs Brunskill was due as she was absent due to sickness. This was not an anticipatory breach in this case but an actual breach and, as the Court of Appeal held in Financial Techniques, the employer's mistaken belief as to contractual liability could not prevent the conduct amounting to a repudiation: see also Roberts v The Governing Body of Whitecross School UKEAT/0070/12.

7.30 A final factor to which the Tribunal had regard is that an employer has a statutory duty under section 1 of the Act to give to its employee a written statement of particulars of employment. Mrs Brunskill's employer was in breach of that statutory duty and, in consequence, the Tribunal is satisfied that any doubt should be resolved in her favour.

7.31 In summary of this issue, the Tribunal returns to the three options set out above as to whether or not Mrs Brunskill was entitled to receive full sick pay.

7.31.1 The Tribunal does not accept Mr Taylor's suggestion that in the absence of an express contract between the Trustees and Mrs Brunskill there was an "implied term" that the standard staff contract of employment would apply to her. To the contrary, any implied term is to be implied from, "The way in which the employment has worked in practice" (Mears), and the practice in relation to Mrs Brunskill's employment was that she received full pay during periods of absence.

7.31.2 The Tribunal similarly rejects the suggestion of the claimants that there was one wage that was divided between them and if Mrs Brunskill was not being paid her share of that wage the full wage would be received by Mr Brunskill. When giving evidence even the claimants had difficulty and became confused in attempting to particularise this suggestion and it is not supported by general principles of law in relation to contract of employment or by the evidence mentioned above such as the claimants receiving individual payslips, Mrs Brunskill receiving maternity pay, etc.

7.31.3 Thus, for the above reasons, the Tribunal finds that the third of the above options applies. It is satisfied that Mr and Mrs Brunskill were initially employed on a joint contract of employment with the

terms and conditions as set out in the document given to Mr Brunskill and when their employments were separated they both continued on those same terms and conditions; albeit now under separate contracts of employment and with Mrs Brunskill not having been given a contract document or statement of particulars by her employer. In short, the terms and conditions of Mrs Brunskill's employment were and continued to be the terms and conditions set out in the contract of employment issued to Mr Brunskill on 22 January 1989. [94]

7.32 The Tribunal next addresses an incident that occurred on 10 March 2018. Mr Taylor had attended to review matters at the Club and discovered that despite his previous instructions [203] the concert room bar was not open at 6.30pm and no staff were in attendance even though a queue of potential customers had formed. He telephoned Mr Brunskill about this who replied that the bar did not open until 7.00pm. Mr Taylor corrected him and asked him to come down to assist him on the bar to disperse the queue. Mr Brunskill did come down but rather than working on that bar opted to go and work on the downstairs bar instructing a member of staff who was working there to go up to the concert room bar. Mr Taylor found that strange but accepted it at the time without taking issue with Mr Brunskill. On 12 March, however, he sent an e-mail to Mr Brunskill drawing his attention to the events on 10 March. Mr Brunskill replied that he thought that 6.30 opening only applied to what is referred to as "ticket nights" but that is not consistent with Mr Taylor's e-mail [203]. Mr Taylor and Mr Brunskill had further exchanges in that e-mail chain on 12 March running from 11.44 to 21.27 but those exchanges came after the claimants had both tendered their resignations by letter handed to Mrs Hooson [231], which all parties accepted had been fairly early in the morning of 12 March and certainly before 11.44 when Mr Taylor first wrote to Mr Brunskill.

7.33 Those resignations gave twelve weeks' notice and went on, "We have enjoyed the 30 years that we have worked with the team of bar staff." In their letter the claimant's did not raise any concerns or provide any reasons for their resignations. Indeed, the Tribunal accepts the evidence of Mrs Hooson that Mr Brunskill explained that they felt it was the right time to move on.

7.34 On 15 March the claimants wrote again to Mrs Hooson and Mr Taylor **(**albeit only delivering the letter to Mrs Hooson) stating amongst other things, "because of the way you have treated myself and my wife Lesley we feel we are not able to work for you for the full 12 weeks, the belief that we were required to give 12 weeks' notice being a misunderstanding on our behalf. Although our thoughts are to resign with immediate effect, to give you time to find replacements we hereby give you 4 weeks' notice of our intention to resign, our employment ending on 12th April 2018". [232] The Tribunal similarly accepts the evidence of Mrs Hooson that when Mr Brunskill handed this second letter to her and she again asked him to stay, he explained that he could not as Mrs Brunskill had given him an ultimatum to leave the Club or she would leave him.

7.35 Notwithstanding the date given in that second letter of 12 April 2018, it is agreed by all concerned that the employments of the claimants ended on 28 March 2018.

7.36 Mr Brunskill attended a meeting of the Trustees committee on 15 March 2018 [436] where his second letter [232] was read out. The agreed evidence before the Tribunal, however, is that Mr Brunskill did not make the Trustees aware of his complaints regarding matters in relation to his position as Steward or that they were the reasons for the claimants' resignations. The Tribunal notes that neither had Mrs Hooson made the Trustees aware of his complaints at the time he raised them with her. Mr Brunskill only commented at the Trustees' meeting that he did not want to leave but family must come first. He accepted that in cross-examination.

7.37 The Tribunal has dealt above with the factual matters that we consider could amount to breaches of the claimants' contracts of employment. Several other matters were raised with the Tribunal but we consider it neither necessary nor proportionate to address them in these Reasons as we are satisfied that none of them could amount to conduct of an employer in the nature of a breach of contract and certainly not sufficient to amount to a repudiatory breach of such contract. Such matters relate to actions on behalf of the Agent and, therefore, on behalf of the Trustees including the following: increasing the float; having a spare set of keys cut; adjusting the payment of overtime (ie. not paying double-time on Bank Holidays); Mr Taylor communicating with Mr Brunskill by e-mail; Mr Gladhill attending at the Club; the withdrawal of staff taxis; promotional offers to customers/free drinks; paying 'the bottle man' in cash from the safe; lending kegs to other establishments.

7.38 As mentioned above, the parties were agreed that effective date of termination of the claimants' employments was 28 March 2018. On 6 April 2018 the undertaking of the Trustees, that being the Club, was transferred to the Company pursuant to the TUPE regulations.

Submissions

8. The parties' representatives made submissions that the Tribunal has taken into account. It is not necessary for us to set them out fully as they will be apparent from our decisions below but we record the principal submissions made as set out below.

9. The representative of the Agent and the Company made submissions by reference to a detailed skeleton argument, which the Tribunal took into account together with the case law cited therein, but that skeleton argument being a matter of record the submissions in it need not be recorded in detail here. The submissions he made orally included as follows:

9.1 The claimants do not seek to rely on an individual act of a fundamental breach of contract but to a breach of the implied term of trust and confidence, and in that respect rely on the 'final straw': Omilaju.

Mr Brunskill

9.2 The difficulty is that the final straw relied upon by Mr Brunskill in his claim and witness statement came after the letter of resignation. It might be said that the real issue is what occurred on 10 March leading to Mr Taylor's email of 12 March [226] but Mr Brunskill accepted in evidence that it was legitimate for Mr Taylor to write as he had done provided that it was done professionally and to give feedback even if critical. There is no suggestion that Mr Taylor gave Mr Brunskill a dressing down on the night. Mr Brunskill agreed that Mr Taylor raised matters with him privately and professionally after the fact. It would be an error in law for the Tribunal to disregard Mr Brunskill's pleaded last straw and go back and ascribe last straw status to a previous incident; and nothing took place on 10 March that constitutes a last straw.

9.3 As to the issues with ordering stock: first, it cannot be a breach of contract in perilous financial circumstances to exercise some financial restraint particularly when the premises have been repossessed by the brewery and, secondly, beyond Christmas and New Year there was no further contemporaneous complaint that this was an issue.

9.4 Mr Taylor communicating with Mr Brunskill by email was not unreasonable. He had a computer and an iPad and was not IT illiterate.

9.5 Individually or cumulatively the following matters are so small that they cannot be a breach of contract: the introduction of Mr Gladhill; serving the customer on New Year's Eve; changing opening times; withdrawal of staff taxis; advertising offers and price changes; paying cash to the bottle man.

9.6 At the staff meeting Mr Taylor did refer to the Bar Manager but then immediately apologised and assured Mr Brunskill that he would continue to be Steward; and he confirmed in writing that his contract of employment, job title and role would not change. If there was a breach of contract it was anticipatory rather than actual and the threat was withdrawn (Harrison v Northwest Holst Group Administration Limited [1985] IRLR 240) and Mr Brunskill accepted that Mr Taylor subsequently, prior to his resignation, apologised and said that he was still the Steward and not Bar Manager.

9.7 There was ongoing dialogue regarding Mr Brunskill's terms and conditions during which Mr Taylor gave repeated assurances that there would be no change. There had been informal amendments to Mr Brunskill's contract of employment and it cannot be a breach of contract for Mr Taylor to enquire what were its terms. Mr Brunskill takes issue with having to take two days off each week but what would a reasonable employee make of that? If it was an amendment it was positive by Mr Taylor saying that he should take two days off to be with his family and there were concerns about his health.

It cannot be said that to offer more time off on the same pay would be a breach of contract. No employee, objectively, would say that this was an outrage.

Mrs Brunskill

9.8 Mrs Brunskill is even less specific in her claim and witness statement as to what is the last straw. At best, it is the meeting on 13 February but at that stage there is no final decision regarding her contract of employment [213]. By February 2018 the claimants had two separate and distinct employment relationships with the Club and it is right that Mr Taylor wanted to discuss with her, when she returned to work, the issue regarding her contract. That is not capable of being a last straw because it is only setting out the facts. At no point were changes actually made to Mrs Brunskill's contract prior to her resignation. An offer to provide her with the same terms and conditions at the same or slightly increased salary cannot be said to be a last straw. Mrs Brunskill cannot establish that her resignation was triggered by the last straw or that it contributes something to a course or repudiatory conduct so her claim must fail.

9.9 If the Tribunal does not accept that, the incidents relied upon by Mrs Brunskill in her claim and witness statement do not amount to a fundamental breach of contract: the question asked by Mr D Taylor about the resignation of a barmaid could not be a breach of contract and, in any event, the following day he and Mrs Brunskill agreed to have a good working relationship going forward (Cantor Fitzgerald v Bird [2002] IRLR 267); Mrs Brunskill said that she was abused by a customer on New Year's Eve but she did not tell anyone about this; upsetting though it was for Mrs Brunskill to find a barred customer attending the wake, the question is whether Mr Taylor's actions amounted to a breach of contract or conduct designed or likely to undermine the implied term of trust and confidence and during cross examination, Mrs Brunskill accepted that Mr Taylor had not acted inappropriately and had dealt with the situation properly; Mrs Brunskill did not have her own written contract of employment and never raised any queries in relation to sick pay with either Mr Taylor or the Club, and when he enquired of the committee he was told that her contract was the same as other staff so believed genuinely that Mrs Brunskill was only entitled to SSP but was prepared to meet with her on her return to work to discuss things. In this latter respect, a genuine difference of opinion as to contractual entitlement does not amount to breach of contract: see Financial Techniques. An employer would be required to say, "I am not bound by the terms of the contract", but this employer simply says that it accepted liability to pay sick pay but is just not sure how much, and at no point does Mrs Brunskill say that she was not being paid enough. Everything was raised via Mr Brunskill and he was confused regarding what was the situation in respect of sick pay.

9.10 As to causation, the real operative reason behind the claimants' resignations was Mrs Brunskill's ill health. There is no mention in the resignation letter of any breaches and Mrs Hooson said that Mr Brunskill

had stated that he had been given an ultimatum by his wife: it was the Club or her. Further, Mr Brunskill agreed in cross-examination that he had to put his family first. Everyone agrees that he said that. It was time to move on.

9.11 Turning to the unlawful deductions, it is for Mrs Brunskill to show a contractual right – that it was either expressly or impliedly agreed that she would be paid contractual sick pay. That was not put to Mr Taylor or Mrs Hooson, and Mrs Brunskill's evidence was vague and inconsistent.

9.12 It was not put to Mr Taylor or Mrs Hooson that the claimants were redundant or that the employer's requirements for a steward and stewardess had ceased or diminished. Mr Taylor's position was that there was no change in their roles and Mrs Hooson said that once the financial crisis was resolved things would go back to how they were with Mr Taylor taking a back seat. In any event the Tribunal would first have to find a dismissal; and even if redundant and entitled to a redundancy payment the claimants would have to demonstrate that they had not refused alternative employment. There were suitable employments available in the same roles that the claimants would carry out going forward: the same roles, the same pay and better terms.

9.13 There was consultation for the purposes of TUPE. At the meeting in January 2018, TUPE was discussed and the arrangements for the transfer were discussed. The Tribunal should prefer Mr Taylor's evidence. Additionally there was ongoing dialogue with subsequent meetings and emails regarding what was happening in respect of Mr Brunskill prior to the transfer. Regarding Mrs Brunskill, importantly, shortly after the initial meeting she was signed off sick and did not return to work although Mr Taylor indicated that he was happy to meet with her when she was well enough. Mr Brunskill cannot show a dismissal linked to TUPE because it was related to financial savings and if he can show it was a dismissal it was for an ETO reason. Similarly, Mrs Brunskill must be an ETO reason because it relates to terms and conditions going forward. Also, the usual test of fairness of a dismissal should apply: whether the respondent was within the band of reasonable responses. In respect of both claimants it cannot be said that the actions of the respondents were outside that band. The Club had to modernise or go out of business. Changes were necessary and reasonable to save the Club: for example, providing written terms and conditions updating the contract of employment. That cannot be near to being outside the range of reasonable responses.

9.14 Finally as to liability, the Agent is not the employer: see the consultancy agreement. The Agent was the agent of the Trustees who gave the authority; it could be that a breach by the Agent meant that the Trustees are liable. In cross-examination Mr Brunskill accepted that as of the meeting in January 2018, when Mr Taylor talked about finding alternative buyers, Mr Taylor and the Agent were not the owners.

9.15 The Company can only be liable under TUPE if there was a dismissal pre-transfer connected with the transfer. If there was no dismissal or not a

dismissal connected with the transfer, liability cannot pass to the Company. If there is liability, it is with the Trustees who were the employer at the time of the resignations.

10 The claimants' representative made submissions including as follows:

10.1 The context is important. The club had been a traditional club for some 50 years and had had the same steward and his wife for 30 years. They lived on the premises and were on the job seven days a week. A steward has a high level of responsibility and correspondingly accountability.

10.2 Both claimants had been credible and honest witnesses and the Tribunal should prefer and accept their evidence.

10.3 It is understandable why the claimants thought Mr Taylor and his father were the owners of the club. Mr Taylor had free reign to do what he saw fit and had unrestricted access to the bar, which was more than the committee members. That was at odds with the claimants continuing in their traditional roles. It is accepted that the owners are entitled to run the Club as they see fit and there was an urgent need to address its parlous state but the effect was to undermine and diminish the roles of steward and stewardess.

10.4 Mrs Hooson said that they were assured that there would be no change but Mr Brunskill would have someone over him; Mr Gladhill and then Mr Taylor himself in the short term for 2 to 3 months. He was assured that his position would not change but people coming into the Club at will put the claimants at risk because of their accountability. There was unrestricted access to the bar, cellar and safe, and stock was removed and once cash without a receipt. Mr Brunskill's large order before Christmas triggered the change in the ordering practices and, from then on, he first had to submit orders to Mr Taylor and he would regularly cut them down. The reason was purely financial and was done without discussion. This was a major change as ultimately the decision about how much stock to order was not Mr Brunskill's as it had been for a number of years previously but was Mr Taylor's.

10.5 By reference to the issues arising from the preliminary hearing of 20 March 2019:

[*Note: the numbering of the sub-paragraphs below reflects that in the Notes of the preliminary hearing*]:

3.1 There were anticipatory breaches arising from the proposed new contract. Mr Brunskill's hours were severely curtailed and he was told that he must take two days off. The loss of overtime for staff meant, for the claimants, a loss of an extra day holiday for Bank Holiday working. Also, Mrs Brunskill would receive SSP only in the future, in respect of which Mrs Hooson had referred to full pay being added to Mr Brunskill's wages. Then there was a change in job title and status for them both; Mr Brunskill having been told that the reference to Bar Manager was a reference to him and

that the role of steward would not exist anymore. Although Mr Taylor explained that he would still be Steward, the reality was that he would, in effect, be the Bar Manager. Finally, the changes would continue going forward with someone else being over the claimants.

3.2 There was a course of conduct to the beginning of March that cumulatively destroyed trust and confidence. The final incident was 10 March relating to opening every night at 6.30 whereas previously it had only been 6.30 on ticket nights. Mr Brunskill says that this is another example of something being introduced on the spot without prior notification or discussion. What triggered the resignation letter could only be the incident on Saturday 10 March. The letter is joint [231] and does not give reasons whereas that on 15 March does. Mr Brunskill says that that letter was read to the meeting and he explained why he was leaving. The notes of the meeting do not help but it is surprising if, having read out the letter, someone did not say, "What do you mean – the way you were treated". There was a breakdown of trust and confidence: there are the incidents from December to March and the introduction of changes, rather than the changes themselves. There is no evidence that Mr Brunskill refused to comply but the effect was to diminish and undermine his and his wife's roles; that was the inevitable effect. Mrs Brunskill has the additional incident at the wake, which she says was dealt with inappropriately.

3.3 The claimants did resign in response to the breaches. The suggestion that the resignations came from an ultimatum from Mrs Brunskill is ludicrous. Anyone in the role for 30 years would not want to retire at such short notice bearing in mind the loss of job and accommodation. The objective was to make the Club viable but the Club and Mr Taylor must have known the effect would have the effect that it did; particularly as Mr Brunskill was making Mr Taylor and Mrs Hooson aware of his concerns. The manner of introducing the changes was manifestly unfair.

3.6 There was no meaningful consultation. Mrs Hooson agreed that she was not involved at all. At best Mr Taylor set out the changes that would be imposed on the claimants and the Club staff.

3.7 No formal process had been followed. There had been no statement from the respondents that they regarded it as a redundancy situation but the changes to the roles were so substantial to, in effect, amount to redundancy; and Mr Taylor said that the position of Club Steward did not exist. That was the correct situation: a traditional working men's club was being replaced by a different type of beast and would not be any more after incorporation. So a redundancy payment is an option the Tribunal could consider.

3.8 It is clear that at the point of resignation the Trustees were the employer but the transfer was well advanced. Mr Taylor's changes were to get the club on a better financial footing and a transfer to another owner. It quickly became clear that it was one of the Parker Barras group. Had the claimants served 12 weeks' notice that would have gone beyond the

transfer but they asked to foreshorten their notice period so terminated prior to the transfer.

10.6 Finally, as to the unlawful deduction in respect to sick pay, Mrs Brunskill should receive full pay for eight weeks maximum. Mr McHugh had suggested that they would go back to the way things had been before but clearly not as someone was now over Mr Brunskill.

11 The Trustees' representative stated that she had thought long and hard about this situation and only wished to make two points:

11.1 She had been with the claimants for 30 years and thought that they got on very well. Their resignation been a great shock and she still could not believe that they were here.

11.2 The employer is the Trustees.

The law

12 Given the Tribunal's findings in respect of TUPE, the principal statutory provisions of relevance to the remaining issues in these claims are found in the Act and include as follows:

13 ***Right not to suffer unauthorised deductions.***

(1) An employer shall not make a deduction from wages of a worker employed by him unless -

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

95 ***Circumstances in which an employee is dismissed.***

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
……..
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

94 ***The right.***

(1) An employee has the right not to be unfairly dismissed by his employer.

98 ***General.***

(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) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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 unreasonably 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."

135 ***The right.***

(1) An employer shall pay a redundancy payment to any employee of his if the employee—

(a) is dismissed by the employer by reason of redundancy, or

(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.

139 ***Redundancy.***

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.

Application of the facts and the law to determine the issues

13 The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

Dismissal

14 The Tribunal takes as the structure for its consideration of the claimants' claims of having been dismissed the longstanding guidance of Lord Denning in Western Excavating (ECC) limited v Sharpe [1978] IRLR 27 (at risk of oversimplification: the fact of a breach of the contract of employment; that being a fundamental or repudiatory breach (Morrow v Safeway Stores plc [2009] IRLR 9); the breach causing the resignation; there not having been any affirmation) and apply also the decisions in Malik v BCCI [1997] IRLR 462 and Lewis v Motorworld Garages Ltd [1985] IRLR 465.

15 The Tribunal considers, first, the alleged dismissal of Mr Brunskill and then, secondly, the alleged dismissal of Mrs Brunskill.

Mr Brunskill

16 As indicated above, the Tribunal is satisfied that many of the matters to which Mr Brunskill took exception could not amount to repudiatory breaches of his contract of employment. These include the matters referred to above of the Agent increasing the float; having a spare set of keys cut; not paying double-time on Bank Holidays; Mr Taylor communicating with Mr Brunskill by e-mail; Mr Gladhill

attending at the Club; the withdrawal of staff taxis; promotional offers to customers and free drinks; paying 'the bottle man' in cash from the safe; lending kegs to other establishments.

17 In this regard, the Tribunal noted that in cross-examination Mr Brunskill accepted that many of the above matters (for example the float, the taxis and the spare keys) were matters that the Trustees could have introduced and insisted upon in any event whether or not the Agent and Mr Taylor had been appointed to act on their behalf. That being so, none of those matters can amount to a breach of his contract of employment. Likewise, the incident when the customer was served on New Year's Eve after the bell indicating last orders had been rung cannot constitute a breach of contract as, when Mr Taylor asked Mr Brunskill if it was alright for the man to be served, he agreed. The Tribunal is similarly satisfied that Mr Taylor requiring that Mr Brunskill's hours of work should reflect the Working Time Regulations 1998 cannot amount to a breach of his contract of employment, especially given the health and safety genesis of those Regulations in European law; and in that respect Mrs Hooson's evidence was that she had told Mr Brunskill that it would do him good.

18 There are, however, issues in this case that the Tribunal considers might legitimately have been of concern to Mr Brunskill following the introduction of the Agent; particularly Mr Taylor's and Mr Gladhill's involvement in the day to day affairs of the Club. Notwithstanding the fact that that was authorised by the Agent Agreement, it nevertheless might have cut across and diminish his role and responsibilities as Steward; and indeed his evidence was that it did. The following are examples:

18.1 As Mrs Hooson stated in evidence, Mr Brunskill would have someone over him and would have to take instructions from such person.

18.2 When Mr Brunskill raised his concerns with Mrs Hooson she told him to the effect that he would need to adjust, accept the changes to save the Club and he had to go forward.

18.3 Mr Brunskill's total responsibility for ordering beer and other drinks and other supplies was removed and became subject to Mr Taylor's oversight and any amendments that he considered appropriate.

18.4 The change in the rules of the Club regarding members carrying drinks up and down the stairs, which caused him embarrassment when he took issue with members of the Club whom he considered to be in breach of the rules.

19 Furthermore, certain of these issues might have amounted to a fundamental breach of Mr Brunskill's contract of employment, particularly the first of the above of having someone over him and being required to take instructions from him. In these respects the Tribunal does not accept the submissions made on behalf of the Agent and the Company to the effect that measures taken to address perilous financial circumstances of the Club cannot amount to a breach of contract. It is well-established that an employer's motive for the conduct that caused the

employee to resign is irrelevant: Wadham Stringer Commercial (London) Ltd v Brown [1983] IRLR 46.

20 Mr Brunskill did not however resign at the time in response to that issue or to any other issues including those to which the Tribunal has referred above. Indeed, the Tribunal notes that Mr Brunskill does not rely on any matters between 27 February and 10 March 2018 during which time he confirmed in cross-examination that nothing of concern had occurred. This therefore becomes what is often termed a 'last straw' situation.

21 That leads to the question of what was the last straw prior to the resignations of the claimants early on 12 March 2018. Mr McHugh submits that Mr Brunskill relies only on the matters referred to in his claim form at paragraphs 42-45 [37] and in his witness statement at paragraphs 42-44. The Tribunal accepts that Mr Brunskill does rely upon those matters, particularly the e-mail exchange of 12 March, but it considers that he also relies upon the events of 10 March 2018.

22 The e-mail exchange of 12 March and the matters referred to in the claim form and witness statement after that email cannot be the last straw, however, as they post-date the claimants' resignations. The events of 10 March are, however, sufficiently proximate to the resignations some 40 hours or so later such that they could constitute the last straw.

23 As noted above, on the evening of 10 March 2018, Mr Taylor attended at the Club to find that his previous instructions regarding opening the concert room at 6.30pm had not been actioned and there were some 30 waiting customers whom he had to begin to serve himself. While that seems to be the final event before the resignation of Mr Brunskill, the Tribunal finds that, in fact, nothing untoward occurred between Mr Taylor and Brunskill on 10 March and, to the contrary, Mr Taylor merely required Mr Brunskill to do what had legitimately previously been asked of him: ie. to open and therefore rota staff to work in the concert room at 6:30pm. In this connection Mr Brunskill's evidence was that he had not been previously made aware of this change and in the submissions made on his behalf it was suggested that he saw this as another example of something being introduced on the spot without prior notification or discussion. That evidence and that submission are, however, contrary to the contemporaneous email from Mr Taylor to Mr Gledhill and Mr Brunskill dated 28 January 2018 [203] the subject of which is, "Concert Room Bar" and the first point in which is, "Bar to open at 6.30"; and Mr Brunskill did accept that he received notice of the change in advanced by email but that he had not opened the email. Perhaps most importantly, if there was any criticism of Mr Brunskill by Mr Taylor, the Tribunal is satisfied that that was done professionally and privately by e-mail from Mr Taylor to Mr Brunskill on 12 March, which Mr Brunskill accepted was appropriate even if it was critical; and the Tribunal repeats that that e-mail came after the resignations.

24 Thus although the Tribunal finds that the events of that night of 10 March could have constituted the final straw they cannot in fact amount to a final straw given that nothing untoward occurred that evening between Mr Taylor and Mr Brunskill. As was held by the Court of Appeal in Omilaju v Waltham Forest London Borough Council [2005] ICR 481, the last straw must contribute, however slightly, to the

breach of the implied term of trust and confidence. In any event the Tribunal is satisfied on the evidence before it (including the circumstances at the time, the content of the resignation letter and particularly what Mr Brunskill said first to Mrs Hooson when he gave her his resignation letter and then at the Trustees meeting) that the true cause of his resignation was not his experiences as Steward and the changes introduced by Mr Taylor but was his concern over his wife's ill-health and his understandable decision that, as he put it, "family must come first".

25 In short, with regard to Mr Brunskill, the Tribunal is satisfied that whilst certain matters might have entitled him to resign he did not do so and, when he did resign, his resignation was not caused by an event capable of being a last straw. In the circumstances Mr Brunskill was therefore not dismissed by the Trustees. Accordingly his claim that he was unfairly dismissed must obviously fail.

Mrs Brunskill

26 As intimated above, and for the reasons given, the Tribunal is satisfied that Mrs Brunskill was entitled pursuant to her contract of employment to her full pay for eight weeks if she was absent due to sickness in any one year. Mrs Brunskill went off sick on 23 January 2018 and only received SSP from the Trustees from that date until her termination date of 28 March 2018.

27 It is a fundamental principle underlying any contract of employment that the employer will pay the employee in accordance with that contract. The Trustees failed to do that and there was therefore not only a breach of Mrs Brunskill's contract of employment but a repudiatory or fundamental breach of that contract: Malik.

28 The Tribunal has considered whether there was delay from 23 January until 12 March 2018 when Mrs Brunskill resigned and whether that could constitute an affirmation of her contract of employment but it is well established that the principle of affirmation will not apply where the employee is absent from work due to certified sickness absence for a relatively short period, certainly less than his or her entitlement to contractual sick pay.

29 Thus, in the case of Mrs Brunskill, the Tribunal is satisfied, adverting to Western Excavating, that there was a breach of contract, it was a fundamental breach, it caused her resignation and she resigned sufficiently timeously without having affirmed the contract of employment. As such, applying section 95(1)(c) of the Act, Mrs Brunskill was entitled to terminate her contract of employment without notice by reason of the conduct of the Trustees. She was therefore dismissed.

30 That however only deals with the question of whether there was a dismissal. The next question for the Tribunal becomes whether that dismissal was fair or unfair with reference to section 98(1) and (4) of the Act. The burden of proof is on the employer to establish the reason for the dismissal. No reason for Mrs Brunskill's dismissal has been advanced by the employer and it follows, therefore, that her dismissal was unfair.

Unauthorised deduction from wages

31 It is convenient next to address Mrs Brunskill's claim of unauthorised deduction from her wages contrary to section 13 of the Act.

32 It follows from the above analysis that she was entitled to receive full pay throughout her sickness absence and only received SSP, that her employer did make an authorised deduction from her wages in respect of which she is entitled, under section 24 of the Act, to be paid the amount of any deduction.

Redundancy

33 The first point to be made in this connection is that redundancy is not a free-standing concept as an employee is only entitled to a redundancy payment if he or she is dismissed by reason of redundancy. The Tribunal has found that Mr Brunskill was not dismissed and therefore he can have no entitlement to a redundancy payment.

34 The Tribunal has, however, found to the contrary that Mrs Brunskill was dismissed. We repeat that (not unusually in a constructive unfair dismissal claim) the employer has not advanced a reason for the dismissal and, therefore, her dismissal was unfair. Even though no reason has been advanced, and even accepting the statutory presumption applied by section 163(2) of the Act that a dismissal is for redundancy, the Tribunal is satisfied that that presumption has been rebutted in this case and that the circumstances of Mrs Brunskill's dismissal did not fall within section 139 of the Act, particularly that the requirements of the employer's business for, in this case, a steward or his wife to assist had ceased or diminished or were expected to do so. As the definition of redundancy is not met, that cannot be the reason for Mrs Brunskill's dismissal and, therefore, she has no entitlement to a redundancy payment. In any event any entitlement to a redundancy payment would fall to be set off against the basic award of compensation for unfair dismissal to which Mrs Brunskill is likely to be entitled.

Transfer of undertaking

35 Finally, there is advanced on behalf of the claimants, a failure to consult with them pursuant to regulation 13 of TUPE. In this respect the claimants' evidence was vague in the extreme but even they accepted that Mr Taylor had convened a meeting of all staff and that the transfer of the business had been raised although neither of them could recall any detail. In contrast, Mr Taylor was clear in his evidence, both written and oral, that on behalf of the Trustees and the Company (which eventually became the transferee of the undertaking) he had, engaged in consultation with all the staff including the claimants. Further Mrs Hooson confirmed that this had occurred and that Mr Taylor had offered one-to-one meetings with any member of staff who wished to pursue that. Mrs Hooson too spoke to the staff about the changes and reassured them that their jobs were safe and they would be transferred to the incoming business; although it is probably right that she did not expressly refer to TUPE. The Tribunal accepts that evidence and therefore the claimants' contentions that there had been a failure to consult with them under regulation 13 of TUPE are not well-founded and are dismissed.

36 For completeness, the Tribunal records that at no point in these proceedings (for example, in the claimants' complaint forms, at the preliminary hearing on 20 March 2019, in the issues arising therefrom, in respect of the amendment of those issues at the commencement of this substantive hearing or in their witness statements) have the claimants raised any complaint with regard to either the duty to inform representatives or the election of employee representatives pursuant to, respectively, regulations 13 and 14 of TUPE. That being so, these matters are not addressed in the Judgement or Reasons of the Tribunal.

Liability – The employer

37 The final question for the Tribunal is which of the respondents is liable in respect of its findings in favour of Mrs Brunskill with regard to both her unfair dismissal and the unauthorised deduction from her wages.

38 At the very beginning of the Tribunal hearing on 26 September Mr Owen conceded on behalf of the claimants that the Agent could not be liable as employer given the existence and content of the Agent Agreement [170]. That leaves the Trustees and the Company.

39 Although the Company was incorporated on 19 January 2018, the transfer of the undertaking of the Club to it did not take place until 6 April 2018 and the termination dates of the claimants' employments were 28 March 2018.

40 As such the Company was never the employer of Mrs Brunskill and, as Mrs Hooson said in evidence and submissions, Mrs Brunskill (like Mr Brunskill) was at all times an employee of the Trustees.

41 That said liability can transfer under TUPE if the reason for the dismissal of Mrs Brunskill was the transfer of the undertaking of the Trustees or was a reason connected with that transfer that was not an ETO reason. In this case, however, the Tribunal is satisfied that the reason for Mrs Brunskill's dismissal was not the transfer or a reason connected with it and, therefore, liability must remain with the Trustees.

Remedy

42 This case shall now be listed for a remedy hearing in respect of the findings of the Tribunal with regard to Mrs Brunskill's claims of unfair dismissal and unauthorised deduction from her wages.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON: 23 November 2019

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