**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4103299/2019**

**Held in Glasgow on 30 and 31 July, 2 5, 6 and 7 August 2019**

**Employment Judge R Gall**

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| **Mr K Aitken** | **Claimant**<br>**Represented by:**<br>**Mr G Booth** |
| **Brodick Golf Club** | **First Respondent**<br>**Represented by:**<br>**Ms C Greig** |
| **Mr Douglas Robertson** | **Second Respondent**<br>**- as above** |
| **Ms Ann May** | **Third Respondent**<br>**- as above** |
| **Mr Ross Duncan** | **Fourth Respondent**<br>**- as above** |
| **Mr Jim Reid** | **Fifth Respondent**<br>**- as above** |
| **Ms Isabel MacDonald** | **Sixth Respondent**<br>**- as above** |
| **Mr William Arm** | **Seventh Respondent**<br>**- as above** |
| **Mr Brian Smith** | **Eighth Respondent**<br>**- as above** |
| **Mr Matt Dobson** | **Ninth Respondent**<br>**- as above** |
| **Mr Gordon Henry** | **Tenth Respondent**<br>**- as above** |

**E.T. Z4 (WR)**

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim of unfair dismissal brought in terms of Section 95(1)(c) of the Employment Rights Act 1996 is unsuccessful.

## REASONS

1. This was a claim of unfair dismissal brought by the claimant following upon his resignation. The case proceeded to a hearing at Glasgow on 30 and 31 July and 5, 6 and 7 August 2019. The claimant was represented by Mr Booth. The respondents were represented by Ms Greig.

2. At the hearing, reference was made in evidence by both parties to a joint bundle of productions. The claimant give evidence. He was the sole witness in his case. For the respondents, evidence was led from Mr Keir, Mr Wilson and Mr Raeside. Mr Wilson's evidence was taken via video link.

3. The following parties were mentioned in evidence: –

   (1) Margaret Roxburgh, Greens Convener, on a temporary basis between 2014 – 2016, and, for a time, Greens Convener 2016 – 2018

   (2) Nicol Hume, Captain 2012 – 2014.

   (3) Brian Smith, together with Margaret Roxburgh and Angus Raeburn, Greens Convener 2014 – 2016

   (4) John Dick, treasurer 2014 – 2018

   (5) Ann May, temporary secretary of Brodick Golf Club in September 2017

   (6) Gordon Hendry, Greens Convener for part of the period 2016 - 2018.

### Brief summary of positions

4. The claimant said that he had been bullied and harassed during 2017 in particular. He said he had intimated his dissatisfaction with the situation at various times and in a manner where those communications constituted grievances. No grievance meeting had been arranged or held. He reached

the point in December 2017 where his resignation was submitted. He maintained that the behaviour of the respondents constituted a fundamental breach of contract entitling him to resign. He sought compensation.

5. The respondents said that for a substantial period of the claimant's employment from its commencement until around 2014/2015 the claimant had conducted himself as he wished in carrying out his job. Structure, management and accountability were then introduced in relation to the claimant. The respondents as employers, they said, were entitled to adopt these measures. They had acted reasonably. There had, they said, been no fundamental breach of contract entitling the claimant to resign. If there had been a dismissal, it was a fair dismissal on the grounds of the conduct of the claimant, the respondents maintained. They also said that if there was such a breach, the claimant had delayed resigning to the extent that he had affirmed the contract. They also argued that he had not mitigated his loss nor established ongoing loss.

**Facts**

6. The following were found to be the relevant and essential facts as admitted or proved.

7. The respondents as detailed in this claim are members of the committee of Brodick Golf Club. The claimant was employed by Brodick Golf Club from 3 May 2005 until 20 December 2017. He was born on 15 March 1975 and was 42 at date of termination of his employment with the respondents. He was head greenkeeper of the respondents during time of his employment there.

8. During the time relevant to this claim, there were 2 other green keeping staff. Those were the assistant greenkeeper, Craig Thomson and the apprentice greenkeeper, Glen Mlotek. The staff members were adequate in number for green keeping of the course having regard to its length and "footprint".

**Structure of the respondents**

9. Decisions as to running of the Golf Club are taken by the committee. Membership of the committee varies from time to time. From the committee,

the Captain, Vice-Captain, Greens Convener, Match Secretary and Treasurer are appointed. A new Captain is appointed every 2 years. It is then his responsibility to fill the posts referred to. At page 189 of the bundle a note of committee members appeared. Terry Raeside was Vice-Captain in 2012 – 2014 and Captain in 2014 – 2016. Lindsay Keir took over as Vice-Captain from Bryce Walker in 2015 and became Captain for 2016 – 2018. He had been Captain at an earlier stage, in the period 2000 – 2002.

10. The claimant initially reported to the Greens Convener. The Greens Convener reported to the committee. From around March 2017 John Wilson was appointed as golf professional and golf manager at Brodick Golf Club. Soon after this it was confirmed to the claimant that he was, thereafter, to report to Mr Wilson.

11. Committee members do not conduct business on behalf of the golf club or run the operation there by being present during standard working hours. Some of those on the committee will work in their own businesses or for others during week days. Mr Raeside, for example, was a vet when first on the committee. He then retired although maintained his post on the committee. Mr Keir owned a bakery prior to his retirement. Even if retired, committee members are not expected to be at the golf club for committee business on a daily basis. Committee meetings were held monthly, on the 1st Monday of each month. They took place at 4 PM and lasted approximately 2 hours on average.

12. From time to time during his employment, the claimant attended committee meetings at the invitation of the committee. In the early part of 2017, Mr Keir as Captain was of the view that he wished to involve the claimant more in relation to discussions as to the condition of the golf course. He was conscious that at committee meetings the Greens Convener, then Mr Hendry, was asked as to works which were to be carried out on the course and was regularly reporting that there was no progress. The view which Mr Keir had was that it would be helpful to have the claimant present to have input into decisions in relation to the course and to be able to answer any questions which the committee might have.

13. As a result of this the claimant attended a few committee meetings. He asked that any matter on the agenda which involved his input was dealt with at the outset of the meeting so that he could then leave. After a few committee meetings which proceeded on this basis, Mr Keir took the view that there was little being gained by the claimant been present at committee meetings both from the point of view of the claimant and from the point of view of the Golf Club. He therefore said to the claimant that he should no longer attend committee meetings. The claimant then ceased to attend committee meetings.

**The course**

14. Brodick Golf Club is one of 7 golf courses on the Isle of Arran. It is low-lying. Some 2 or 3 times during winter it can be the case that the tide is such that seawater floods parts of the course.

15. There are some 200 members of Brodick Golf Club. The income of the club derives from members to the extent of some 35%. The balance of income, 65%, comes from visitors. In order to provide visitors with a good experience on any outing which may be organised to play Brodick golf course, it is important that the course is kept in good condition. This involves the greens being in good condition and also the fairways and tees being properly maintained. It involves decisions being taken on which areas are to constitute rough. Whilst the claimant would have responsibility for ensuring that greens in particular were in good condition through his technical expertise, he was also responsible for the condition of the fairways and tees.

16. During the period of the claimant's employment the greens were regarded as being well maintained and in good condition. Compliments were paid to the claimant on the condition of the greens by those playing the course. On the other hand, difficulties were encountered with the condition of the fairways in particular. Several were very wet. This resulted in golf balls plugging on landing on the fairway and being difficult to play or indeed to find. This was a source of very real concern to the committee and Greens Convener. Issues in relation to the course were raised with the claimant as detailed below.

**Contract of employment of the claimant**

17. Mr Raeside was familiar with the claimant prior to becoming Vice-Captain. He had played in a tournament with the claimant and had won the competition with him. He got on well with the claimant. Mr Raeside was aware from his interaction with the claimant and from observing him over the years that the claimant was very determined and "did things his own way". The view to which Mr Raeside had come was that the claimant acted as if self-employed. He managed his own time and his own day. That had been the position over his period of employment.

18. During his Captaincy, Mr Raeside had a lot of interaction with the claimant. Mr Raeside had employees when operating his vet's practice. He found the claimant, however, to be the most difficult employee with whom he had ever dealt. The claimant, in the opinion of Mr Raeside, would do things in his own way rather than as he had been asked to do by the Greens Convener, the committee or the Captain.

19. When Mr Raeside became Captain in February 2014, he was conscious that the claimant, although an employee of the respondents, did not have a written contract of employment in place. Other employees similarly did not have written contracts of employment. Mr Raeside and Ms Hart, who was secretary of the golf club at the time, prepared a contract of employment with relative handbook and job description

20. Mr Raeside met with the claimant to discuss these documents. The claimant's wife was also present. After some discussion, initial hesitancy and reluctance to sign the contract of employment, the claimant did sign the contract. A copy of the contract of employment appeared at pages 50 to 56 of the bundle. It was signed by Mr Raeside and the claimant on 13 May 2014. A copy of the claimant's job description as head greenkeeper appeared at pages 57 and 58 of the bundle, again signed by Mr Raeside and the claimant. A copy of the employee handbook appeared at pages 59 to 96 of the bundle.

21. The job description for the claimant details that he is to manage the golf course and the green keeping team as directed by the Greens Convener or

nominated person in accordance with the club's golf course maintenance policy, the health and safety policy and the Greenkeepers Code of Conduct.

22. The Employee Handbook contains within it a disciplinary and grievance procedure. The disciplinary procedure appears at pages 70 to 76 of the bundle. It contains details of the formal procedure (page 74) and sets out examples of gross misconduct (pages 71 and 72).

23. At page 77 the grievance policy appears. It details the purpose of the policy, namely to allow grievances to be raised, with it being stated that every effort will be made to reach a satisfactory settlement as soon as possible. There are 3 stages described in relation to grievances. The first of those involves the grievance being raised verbally with the line manager of an employee. Stage 2, which can be the initial stage of a grievance if the grievance involves the line manager, states that the grievance should be set out in writing and sent to the secretary. Stage 3 is, in effect, an appeal if the employee is dissatisfied with the outcome of the grievance at stage 2.

**Issues in relation to work carried out/not carried out by the claimant.**

*Fairways, spraying of weedkiller.*

24. When Mr Raeside was Vice-Captain, he noticed around April 2012 that the second fairway was turning brown. He enquired of the claimant as to why this would be. The claimant said that he had put growth inhibitor on the fairway. This struck Mr Raeside as surprising given that the grass should be growing at this time of year. 3 other fairways also turned brown. The claimant did not give any alternative explanation to that which he had earlier given to Mr Raeside. The claimant addressed the issue by sowing grass seed. The fairways recovered over a two-month period.

25. In fact the claimant had sprayed on those fairways a product which was a total weedkiller. This would kill all growth. He ought to have sprayed selective weedkiller, which would attack and kill weeds but leave grass growing. He had sprayed total weedkiller on those fairways by accident. He did not however "own up" to this mistake. Mr Raeside discussed the issue with the fairways with Mr Hume who was the Captain at that point. Mr Hume was of the view that the problem was addressed and that the golf club should "move on".

*Cutting back of rough*

26. A decision as to whether rough in a particular area of the course is cut back or not is one ultimately for the committee. Even in circumstances where the claimant in his role as head greenkeeper might regard a decision to cut back rough in a particular area as not being appropriate, if a decision to that effect was taken by the committee, it was for the claimant to implement it.

27. The committee took the view that the rough on the left-hand side of the first hole should be cut back. They so concluded as they were aware that visiting parties with golfers of a variety of skill levels within them were not having a good experience at the first hole. Drives would be hit and would, in some instances, then head left and into the rough. Whilst the rough did not look particularly severe, balls were hard to find in it. Delay would occur whilst golfers looked for golf balls in the circumstance mentioned. If they could not be found, then the golfer(s) in question would require to return to the first tee to hit a second drive. That significantly delayed other groups of golfers in teeing off as well as being frustrating for the golfer(s) who had lost a ball with his or her first shot.

28. At this point Mr Raeside was a Vice-Captain. Brian Smith was the Greens Convener. The claimant was informed of the decision of the committee to cut back the rough on the left-hand side of the first fairway for the reason mentioned. He did not however carry out this work immediately or for some time after he was asked so to do. At monthly committee meetings Mr Smith would be asked about progress with the cutting back. The work had not been

carried out and Mr Smith became somewhat embarrassed that instructions had not been carried out.

29. When Mr Raeside became Captain, this work still had not been done by the claimant. Mr Raeside spoke with the Greens Convener who by that stage was Margaret Roxburgh. She spoke to the claimant, passing on once more to him the decision by the committee that the rough in question be cut back. This however did not occur and the rough remained not cut back for over 2 or 3 months after this further request that the claimant do this. When asked about this and pressed on it, the claimant said that carrying out the cutting back would result in the area looking terrible from the road. It was accepted that this would be the case in the short term however cutting back of the rough was necessary in the view of the committee for the reasons identified above. The task continued however not to be done.

30. Mr Raeside became very determined about this matter. He spoke to a member of the club who was able to lend to the club a machine to cut back the rough. Ultimately this member appeared and started to do the job of cutting back the rough. The claimant then arrived at the site and was not happy. He became agitated, shouting at Mr Raeside and waving his arms around. He said to Mr Raeside that the machine which the club member was using was not necessary as the claimant himself had a machine which he wished to use. The claimant then used that machine and did an element of cutting back of the rough over a 15 or 20 minute period. The object of the exercise, to reduce the loss of golf balls in the area, was demonstrated by Mr Raeside as not having been achieved in that Mr Raeside threw approximately half a dozen balls into the area just cut by the claimant. They could not be found. On that basis the machine supplied by the golf club member was used. Mr Raeside, his wife and Mr Mlotek raked up the grass which had been cut. From that time onwards the claimant has maintained this area on the basis of the rough being cut back.

31. Although Mr Raeside was of the view that a quiet word should be had with the claimant to say that there was no way this behaviour could be repeated, this did not occur. Mr Raeside ultimately took the view that the job had been done.

He hoped that the claimant would learn from the experience that if he was asked to do something he should just do it.

32. The experience of Mr Raeside however was that he had to chase the claimant to do other jobs and to remind him to do them.

*Condition of fairways - drainage issues*

33. Thatch occurs where maintenance of grass has not been fully or effectively undertaken. It builds up over time in that situation. If not tackled, it operates as a form of sponge absorbing water and preventing it draining away. It causes dampness or flooding to occur. Thatch was by 2017 present on many of the fairways on the golf course.

34. In particular there was an issue in relation to drainage on the ninth fairway. This had been subject of complaint by members. It was also considered to be detrimental to the visitor experience. A decision was taken by the committee that a contractor would attend to carry out work to drainage in the hope that this would assist with drying out and ultimately restoration of the fairway. The claimant was informed that no work should be done by him on the fairway until this other work had been attended to. Notwithstanding that, he commenced work with the other greenkeepers on the ninth fairway. That led to the incident with Mr Keir referred to below.

*Working time of the claimant.*

35. In March 2015, it was noted by chance one day by Mr Raeside that the claimant was not working on golf club business between at least the hours of 9:30 AM and 11:30 AM. Mr Raeside had passed the road whilst walking one way at around 9:30 AM and also when walking the other way as he returned at around 11:30 AM. The claimant was observed by Mr Raeside using golf club equipment known as the Gator to assist his friend, Graham McNicol, who is a tree surgeon and was working on trees in a nearby area. The Gator is a buggy type of vehicle with an area into which items can be placed for transport

purposes. It is used around the golf course to transport equipment and personnel.

36. This matter was reported to the committee. The committee took the view that a verbal warning should be issued to the claimant given that he had, without prior approval, carried out work for a friend of his during his working hours with the golf club and at a time when he was being paid by the golf club.

37. Page 96A of the bundle is the note of a meeting between the claimant, Margaret Roxburgh and Bryce Walker. The meeting took place on 10 March 2015, the note being wrongly dated 20 February 2015. The note records the decision of the respondents that the claimant be given a verbal warning for doing work for a friend during work time. It records that the claimant said 2 hours were involved and that the friend had permitted the golf club to use a log splitter for a few months. It goes on to say that golf club vehicles are only insured for golf club work and that the claimant was told to communicate more and to ask for permission before undertaking any such work in the future. The claimant did not say during this meeting that Ms Roxburgh had authorised him to do this work during the hours when he was contracted to work for the respondents and was being paid by them.

38. Mr Raeside was of the view that the work had taken longer than 2 hours given that it was underway when he saw the claimant at 9:30 AM and was still continuing when he saw the claimant at 11:30 AM. The claimant said nothing at this meeting as to having attended work for some 2 hours prior to doing the work for Mr McNicol. He did not say that the golf course was too wet that day for work to be done upon it. The claimant was not in a position to “do deals” with friends in relation to use of equipment such as a log splitter in exchange for time spent by the claimant assisting any such friend.

39. Within a day or two of this meeting Ms Roxburgh contacted Mr Raeside to say that she thought that giving the warning to the claimant was wrong as the claimant should have been accompanied or have been given that opportunity. This had been a point stated to her after the meeting by the claimant’s wife.

On that basis, the verbal warning was rescinded. A copy of the letter confirming it was rescinded appeared at page 96B of the bundle.

40. Within a fortnight of this incident, a further issue arose in relation to the claimant's working time.

41. Mr Raeside was driving one day on a road in Arran around 3:15PM. Mr Thomson, assistant greenkeeper, drove past him heading in the opposite direction at that point. Mr Raeside was aware that Mr Thomson should finish work at 4PM. He thought however that there must be a reason for Mr Thomson to finish work early. When timesheets were completed by employees for that week, Mr Thomson's timesheet was countersigned by the claimant. It showed Mr Thomson as finishing work at 4 PM.

42. Mr Raeside met with the claimant on 23 March to discuss this. A note of the meeting appeared at page 96C of the bundle. That meeting was referred to as a counselling meeting.

43. It was confirmed by the claimant that he, Mr Thomson and the apprentice had all finished work at 3 PM that day although the timesheet stated that they all finished work at 4 PM. The note records acceptance by the claimant that although the timesheet stated work had finished at 4 PM, work had in fact finished at 3 PM. It states:

*"It was forcibly pointed out to Keith that knowingly entering false information on the timesheets brings doubt on the necessary relationship of trust between himself and his employer.*

*In summary, it was made clear to Keith that knowingly entering false information on the timesheets for himself and/or the green staff in his charge would not be tolerated, could be deemed Gross Misconduct, and as such his employment could have been terminated."*

44. The section from the handbook refers to gross misconduct occurring if there was fraud, dishonesty or deception of any kind in the submission of information or completion or amendment of company records. This was highlighted at the meeting and in the minute of this counselling meeting.

45. It caused further concern to Mr Raeside that Ms Roxburgh said to Mr Raeside that she had seen the claimant that morning out walking his dog at a particular location just prior to 7AM. It was not considered possible that the claimant had commenced work at 6.30AM that day as he stated at the meeting. It was also not considered possible, given where he had been seen at 7AM, that he had commenced work at 7:30AM, the time he had entered on the timesheet as his time of commencement of work.

46. Given these instances Mr Raeside had real concerns about the truthfulness of the claimant. No formal action was however taken against the claimant. Mr Raeside considered that very carefully. He was concerned that if he took action against the claimant on behalf of the respondents, severe difficulty would arise both for the claimant and for the golf club. He was of the view that with Arran being a small community where everyone knew each other, the claimant would find it hard to find another job if it was known he had been dismissed for what amounted to dishonesty. Mr Raeside was conscious that the claimant's children were at the local school. He kept in mind that the consequences for the claimant would therefore be severe if he was dismissed. He was also mindful of the fact that the consequences for the respondents at the end of March would be severe in that the season was about to start and they would be left without a head greenkeeper. He did not therefore proceed with or recommend disciplinary action. His hope was however that it had been underlined to the claimant that it was important that he behaved properly as an employee and that this would be what happened.

47. As a result of these interactions with Mr Raeside, the claimant concluded that Mr Raeside "*had it in for me*". There was however no proper basis for that view.

*Enlargement of putting green*

48. Margaret Roxburgh was Greens Convener when Mr Raeside was Captain and latterly when Mr Keir was Captain. She was selected for that role by them because she had a softer more conciliatory approach than some other potential line managers for the claimant.

49. At some point, the precise date of which is unknown, it was determined by the committee that the putting green should be enlarged. As Greens Convener Margaret Roxburgh asked the claimant to undertake this task. The task was not completed for over 6 months from the time when the request was made by Margaret Roxburgh to the claimant. In the interim Margaret Roxburgh had become frustrated. She said to the claimant that she was infuriated by him and found him a "slippery customer". The claimant's view was that other priorities existed. He regularly said to Margaret Roxburgh that he would carry out the work she had asked him to do when he was able to do that. Ultimately however, for a matter of course improvement such as extension of the putting green, if the committee through the Greens Convener wished the task carried out and detailed that as being a priority, as had occurred, the responsibility of the claimant was to carry that out as a priority.

*Appointment of Lindsay Keir as Captain, 2016*

50. Lindsay Keir became Captain of the golf club for a second time in 2016. His first spell as Captain was prior to employment of the claimant.

51. When he became Captain, Mr Keir was aware of difficulties which had occurred in getting the claimant to carry out tasks which previous Captains and Greens Conveners had asked him to do. He was aware of this from general discussion and also from the number of times the failure by the claimant to carry out tasks which he had been asked to do was raised at committee level as a matter of concern. Mr Keir was also of the view that it was sensible to have Ms Roxburgh as Greens Convener as it meant that he, as Captain, was one step removed from the claimant. That in turn meant that the Captain could then conduct any hearing in relation to any disputes which arose. In February of 2017 Mr Wilson was appointed as detailed below. Part of his role was as line manager of the claimant.

*Purchase of equipment*

52. There had been some concern on the part of Mr Keir as to the purchase of equipment by the claimant. The claimant purchased a blower at a cost of £400. He did not obtain prior authorisation so to do. When asked about the

purchase he said that it had been obtained at a bargain price. The concern which Mr Keir had was that in his view the equipment was unnecessary. Mr Keir's concern was also that no prior authorisation had been obtained for expenditure of a sum which was not insignificant.

53. When Mr Wilson became line manager of the claimant in May 2017, specific terms were set down as to the authority which the claimant had in relation to purchase of equipment. This is as detailed later.

*Practice area near the 18th hole*

54. The practice area adjacent to the 18th hole was very wet. The claimant expressed the view that this area had "gone" and was not one which was worthy of time being spent upon it to try to resolve the drainage issue and to restore it.

*9th fairway incident*

55. The 9th fairway was an extremely wet fairway. Its condition had caused concern for a number of years. The committee had spoken about this on several occasions. Ultimately by March 2017 it had been decided that work would be done on the drainage ditch with a view to clearing that and enabling water better to drain into it.

56. Mr Keir spoke with the claimant when this decision had been made. He informed him that this work would be done and the position would be assessed thereafter. The claimant was informed that no other work was to be done until this drainage work had been done and the result evaluated.

57. At this point Mr Hendry was the Greens Convener. He was aware of the decision of the committee that drainage work would be done on the drainage ditch adjacent to 9th fairway and that nothing was to happen until that had been done and the position assessed.

58. On 13 March 2017 both Mr Hendry and Mr Keir were in the clubhouse at the golf course. Mr Hendry came to find Mr Keir. He said to Mr Keir that something

was happening on the 9th fairway as the claimant and his assistants were out there digging ditches. He and Mr Keir were not happy about this.

59. Mr Hendry and Mr Keir got into a buggy and drove out to the 9th fairway. An exchange followed between Mr Keir and the claimant. Mr Keir asked the claimant what he thought it was doing. The exchange became heated on both sides. Both Mr Keir and the claimant were waving their arms around gesticulating as they argued. At one point Mr Keir's arm came into contact with the arm of the claimant. The claimant shouted, "Look, I've been assaulted." Contact was however accidental. There was no injury to the claimant.

60. The exchange ended with Mr Keir saying to the claimant that he hoped the work which the claimant was doing would be effective and that he should carry on with it. Mr Keir and Mr Hendry drove back to the clubhouse.

61. Mr Keir reflected on the incident. Later that day, by an email which appeared at page 142 of the bundle, he wrote to the claimant. He referred firstly to having discussed with Gordon (Mr Hendry) the possibility of purchase of a further strimmer. He said that they felt that this was unnecessary as it was a third strimmer. He went on to say: –

*"I want to apologise for my loss of temper this morning it was not very professional. I genuinely hope your scheme works for it is for all of us to benefit."*

62. The following day Mr Keir went to see the claimant who was in the greenkeepers' hut. He made the same apology. The claimant said he accepted the apology and that the matter was now closed.

*Appointment of John Wilson*

63. Towards the last quarter of the first year of the Captaincy of Mr Keir i.e. towards the end of 2016, Mr Keir decided that the arrangement in relation to the claimant was not working. Both he and the committee continued to be concerned about the condition of the course. Many of the fairways remained

very wet. The course appeared to be deteriorating. The decision was taken to employ John Wilson.

64. John Wilson was a golf professional who had also been responsible for golf club management in some of the posts which he had held. He did not have green keeping qualifications. He had been a director of golf at one course, had been responsible for an extensive overhaul of one club and course and had been involved in committee management roles in previous occupations. Given tension between the claimant and Mr Keir, and given the skill set of Mr Wilson as it appeared to the respondents, the decision was taken that it would be in the interests of all if the claimant reported to Mr Wilson. Mr Wilson was appointed in February 2017.

65. Mr Keir met with the claimant in mid-May 2017. He discussed with him the failure on the part of the claimant to carry out various tasks as asked by the committee within a reasonable timeframe. He explained that Mr Wilson was to become his line manager. He referred to purchase of equipment by the claimant with which the committee was not happy. He reflected the discussion in a letter dated 15 May 2017 to the claimant, a copy of which appeared at pages 143 and 144 of the bundle.

66. That letter detailed increasing dissatisfaction of the committee. It referred to a failure by the claimant to accept instructions given by the Greens Convener, to the claimant's agreement to do tasks but failure to carry them out. It said that tasks which had been carried out had been done in a grudging manner and not within reasonable or agreed timescales. It said that the dissatisfaction of the committee included those elements but was not limited to them. It expressed the view that these could have been disciplinary issues which might have led to termination of employment.

67. Having stated that the claimant would now report directly to Mr Wilson, the letter went on to refer to what it said had been a failure by the claimant to accept instructions of the committee in relation to purchase of equipment. It said that he had purchased equipment where not authorised so to do or indeed against strict instructions of the relevant committee member. It referred

to expenditure on the new radiator for the Gator. It referred to purchase of the blower as having been without authorisation.

68. In terms of this letter procedures for various elements were detailed. For purchase of equipment, written authorisation was to be required if purchases were for over £250. Tasks were to be put in writing with an agreed completion date being specified. Weekly meetings were to take place with any slippage in completion dates being identified. Any work which might be carried out by the claimant other than that for which he was employed by the respondents was to be authorised in advance.

69. The claimant wrote in response to that letter, also in May 2017. A copy of this letter appeared at pages 145 and 146 of the bundle. He took issue with dissatisfaction expressed, quoting a well-known amateur golfer who had played at the highest level as having stated that the greens were as good as any he had played on that year. He said that other issues related to equipment and technical green keeping issues. He also said that *"for a Captain to lift his hand under witness to the greenkeeper could have been a real embarrassment to Brodick Golf Club, if charges were pressed and the matter made public, I think that could well have led to the Captain's resignation."* He confirmed that he would report to Mr Wilson, having "no problem" in so doing. He also confirmed he had no problem with the purchasing proposal. The claimant went on to say:-

*"I feel that there is a problem with the current Captain, his acceptance of my efforts and he has made it personal and he has now managed to affect my health and home life. The Doctor has suggested that I be signed off with stress. That is the last thing I want. I feel that there are many indications of constructive dismissal within the last two years and only my love of green keeping and many friendships in the club and on Arran has stopped me taking matters to legal."*

70. Reference was made by the claimant in this letter to the course being below sea level and to the level of staff working on it. He concluded by saying that he felt strongly that this had been blown out of proportion. He said "*However*

*due to miscommunication, perhaps on both parts, this has now escalated unduly when I believe we all want the best for Brodick GC and I hope this can be resolved amicably and we can move forward, we simply can't go on like this.*"

71. The respondents did not regard this as a grievance being intimated and did not deal with it in that fashion. They held no grievance meeting. The claimant did not follow this up by seeking a meeting or by writing to the secretary in terms of the grievance procedure. He and Mr Wilson, his line manager, were in regular contact on a day-to-day basis. The Captain, Treasurer, Mr Wilson and the claimant also met following that letter and discussed the position as is documented in the email of 21 June from the claimant at page 148 of the bundle.

*Management of the claimant by Mr Wilson.*

72. Mr Wilson was the claimant's line manager for some 7 months. This was in the period from May 2017 until the claimant resigned on 20 December 2017. For the final 3 months however of that period the claimant was absent on sick leave.

73. The working relationship between the claimant and Mr Wilson was, at its outset, a difficult one. The claimant did not appear to welcome accountability to Mr Wilson. Mr Wilson was of the view that the claimant had become accustomed to working on his own under little supervision from the committee, viewing himself as, in effect, being self-employed such that he could do what he thought was necessary without any "say so" from anyone else. As set out earlier, members of the committee were not present at the golf club throughout the working day or on a day-to-day basis.

74. After a period, discussion took place between Mr Wilson and the claimant. The working relationship seemed to improve. That relationship however deteriorated once more around July and August 2017. The claimant wished instructions confirmed in writing. This led to extensive exchanges of texts between the claimant and Mr Wilson. Copies of those texts, some of which were in April, some in May, some more in June and some in September,

appeared at pages 97 to 141 of the bundle. The texts about which evidence was given were related to areas of the claimant's work responsibility. They were not said by the claimant in evidence to have been bullying in nature.

75. At time of his appointment Mr Wilson considered the course to be in some areas unplayable. He regarded there as being almost a "*last chance*" to address the course as it currently was and to look to restore it. He was concerned that if the position was not tackled a complete rebuild of the course would be necessary in some areas. He was aware of difficulties through occasional flooding of the course resulting from high tides. His view however was that this did not explain the condition of the course at that point. He regarded the condition as having resulted from many years of lack of care and attention to it and lack of general maintenance.

76. Thatch was noted by Mr Wilson as being present in several areas of the golf course. He was aware that hollow coring and scarifying could address the situation and, if carried out on a reasonably regular basis, help prevent recurrence by assisting with drainage.

77. Mr Wilson was aware that there had been discussion both in committee and amongst members in the clubhouse as to the condition of the course. He discussed the condition of the course with the claimant at time of his appointment. As stated, he was of the view that there was a potential threat to the continued existence of the golf course due in part to presence of thatch on the fairways. Mr Wilson spoke with the claimant regarding this and other problems. The claimant described the course as being a "wet bog". His view was that nothing could be done. He expressed his view to Mr Wilson that the water table and tide issues combined with lack of budget prevented the course being better than it was. Mr Wilson however disagreed. His view was that problems could be identified, solutions found and prioritisation of tasks could then take place. It was agreed that problem areas on the course would be identified with a plan of action prepared to address those areas. A written plan of action was prepared and agreed on an amicable basis between Mr Wilson and the claimant.

78. Specific instances which occurred around this time are now set out.

*Gator*

79. The claimant had reported to the committee that the Gator was “knackered”. A new machine, known as a Polaris, was purchased as a replacement at a cost of some £6000. This occurred in the very early part of 2017, prior to appointment of Mr Wilson. The claimant was informed by the committee that the Gator could be used until it stopped however when it stopped or collapsed, it collapsed. No money was to be spent on it.

80. Notwithstanding this instruction, the claimant decided that a new radiator would be purchased for the Gator. He arranged that this would occur. The cost was £457 plus VAT. The claimant passed the invoice to the golf club for payment. The claimant was asked to return the radiator as the purchase had not been authorised. He said that he could not do this. Mr Dick as the club treasurer negotiated return of the radiator. By this point Mr Wilson had been appointed. Mr Wilson, with approval, obtained a second-hand radiator for the Gator at a much reduced cost, approximately £250. Use of the Gator proved possible for a period thereafter.

*Grass cutter blades*

81. Around June 21017 Mr Wilson was approached by the claimant who said that the blades on the grass cutter needed to be replaced. Mr Wilson was of the view that sharpening of the blades was possible rather than replacement. The blades were sharpened and that proved to be effective. Cost was saved through that option being taken.

*Holiday request*

82. The claimant had in the past taken 2 weeks holiday in July of each year. Prior to 2016, he had agreed with Margaret Roxburgh that he reduce this to one week of leave in summer. He requested a week of leave in July 2017. He made this request in June 2017. The committee refused his request, being concerned about the condition of the course and the need for the claimant to

be present in the lead up to two important events, the Open competition held by their club and also the Ladies Open Competition held at their club.

83. On 21 June 2017 the claimant had a discussion with Mr Wilson. This related to refusal of his holiday request and to concerns which he had. He expressed the view that he had grounds for constructive dismissal. He followed this discussion by emailing Mr Wilson. A copy of the email appeared at page 148 of the bundle. With that email an attachment was sent relating to the request for leave in particular. A copy of the attachment appeared at page 150 of the bundle.

84. In the attachment, in relation to the request for reconsideration of refusal of leave, the claimant referred to an attached programme of work which he had prepared in relation in particular to preparation of the course for the Ladies Open. He said his family and he needed a holiday together.

85. In relation to more general concerns, the claimant said in this covering email of 21 June at page 148 of the bundle, in relation to constructive dismissal, that he was:-

*"reluctant to do it as I love my job and have a loyalty to Brodick Golf Club, particularly as my concerns are only with the current Captaincy and as stated many times my history of working well with previous Captains and committees for the last 10 years speaks for itself. However I am at the end of the road with the treatment, accusations and lies against me. The miscommunication and different versions of happenings and events is now intolerable. It IS defamation for the Captain to say I am a liar and that I have not done my job for ten years, never mind the issue of him raising his hand and hitting me in front of witnesses on the golf course during working hours. It is clear he has a personal issue with me. I will not be bullied or pushed out my job unfairly I do not deserve the way I have been treated and will have no hesitation taking this further if need be.*

*Nevertheless I am still hopeful that the line in the sand as promised at our last meeting with the Captain treasurer and yourself will be drawn and we can try to rebuild the trust that has been lost. You and I, I feel*

*have a good system working just now and I am happy to continue that way. I will just communicate in writing with you as we have been doing."*

86. In the letter attached to that email, addressed to the committee, at page 150 of the bundle, the claimant referred to his feeling that there was a personal agenda, stating that the last 5 months had been quite unbearable. He referred to his GP as having suggested that he be signed off with stress, stating that this was the last thing which he wanted. He said:

*"I believed since my response to your last letter we really had drawn a line in the sand at your wishes and moved on. I feel my working relationship with John Wilson has also improved the situation; we work well together and have a mutual respect."*

87. These documents were considered by the committee. By email of 23 June 2017, which appeared at page 151 of the bundle, Mr Wilson conveyed to the claimant the decision of the committee to grant the claimant's holiday request, after reconsideration of the initial refusal. The letter concluded by stating in the penultimate paragraph the following: –

*"All members of the Committee were most concerned by the nature of your email of Wednesday 21 June and the attached letter, in which you suggest there is a personal agenda against you and imply taking legal measures against the Club. The Committee is aware of an altercation between you and the Captain in the clubhouse on the evening of Tuesday 21/06/2017 which was brought about by you seeking out the Captain and demanding he reconsider your holiday request. The Committee has put in place a new reporting structure. Therefore please adhere to the Committee's previous instruction to discuss any concerns through myself."*

88. In a letter which appeared at pages 152 and 153 of the bundle, the claimant replied to the communication from the respondents confirming that his holiday request had been granted upon reconsideration. He expressed thanks for that. This communication also set out the claimant's view as to his dealings with Mr Keir as Captain. He comments on the authority given to him to

purchase equipment. He says he has no problem reporting through Mr Wilson. He goes on to state towards the end of the email at page 153: –

*"I want to rebuild the trust on either side; I have made clear that from my 12 years employment at Brodick Golf Club historically with Treasures* (sic)*, Captains, Committees and Pros the working relationship between us has been highly successful and more than amicable. I just want to move on and do my job I love at Brodick Golf Club and to be treated fairly and with some respect for my experience and knowledge of the workings this course* (sic) *I am happy to draw that promised line in the sand from here."*

89. This letter was discussed at a committee meeting, the intention to do that being confirmed by an email from Mr Wilson of 26 June to the claimant. A copy of that email appeared at page 154 of the bundle.

90. Thereafter, discussions took place between the claimant and the respondents in relation to various matters. Those comprised a protected conversation in terms of the Employment Rights Act 1996 ("ERA"). By agreement of the parties no evidence was led about those discussions.

91. By letter of 5 September 2019, a copy of which appeared at pages 164 and 165 of the bundle, the claimant raised the same area or issue with the respondents, bullying and harassment. He said in a passage towards the end of the email at page 165 that he had spoken with his lawyer and union and that they were unsure how effective a meeting would be. Reference was also made by the respondents' secretary, Ms May, in an email of 16 September 2017 which appeared at page 166 of the bundle to a possible meeting between the claimant's union or legal representative, the Captain, Mr Wilson and the respondents' professional adviser. That was referred to as being an option. A meeting did not however take place.

*Timesheets, September 2017*

92. The respondents had concerns around the middle of September 2017 regarding completion of timesheets by the claimant in respect of his own time and countersigning by the claimant of timesheets in relation to Mr Thomson.

Those timesheets were in respect of the weeks ending 10 and 17 September. A copy of the timesheets appeared at pages 166A to166D of the bundle.

93. Those timesheets in relation to the claimant showed that he had been at work all of week ending 17 September. He had in fact been an annual leave on the Wednesday and Thursday of that week. They showed Mr Thomson as being at work on the Thursday of that week. Mr Thomson had however been absent on the Thursday afternoon at a medical appointment. In addition to timesheets being inaccurate, the fact that the claimant and Mr Thompson were absent on Thursday afternoon meant that the apprentice, Glen, was the only person on course in a green keeping capacity.

94. A meeting was arranged with the claimant for 22 September 2017 to discuss these issues. The claimant was present at that meeting as was Mr Wilson. Ms May attended the meeting as notetaker. A copy of the record of what was referred to as an informal meeting appeared at pages 166E to 166I of the bundle. The meeting also discussed the issue of the batteries in relation to the buggies, as detailed below.

95. The timesheets showed the claimant as being present at work when he was on annual leave. This meant that the respondents would have no accurate record of the claimant's leave. He had not simply completed a "standard timesheet" in that 2 hours of overtime were shown for the Saturday of the week. This is in the document which appeared at page 166C of the bundle.

96. Inaccurate completion of his own timesheets and signature of timesheets in relation to Mr Thomson which were inaccurate followed upon the meeting in March 2015 referred to above involving Mr Raeside, at which the need for accurate completion of timesheets and the potential consequence of dismissal on the basis of gross misconduct if accuracy did not occur had been emphasised to the claimant.

97. During the meeting the claimant became agitated. He said at one point that he had had enough. He stood up for the remainder of the meeting.

*Buggies*

98. Golf buggies are used on Brodick golf course now and again. They are used either by golfers who require them due, for instance, to mobility issues. They are also used by staff for getting around the course.

99. The batteries on buggies should, in accordance with instructions which appear on the buggies, be checked every day and topped up. It is important that they are kept topped up and do not run dry. The claimant was however in the habit of checking the batteries every 7 or 8 weeks.

100. Mr Wilson checked the batteries in the black buggy on 22 September and found them to be completely dry. When this was raised on that day with the claimant at the informal meeting, he said that he had topped up the batteries in the black buggy on 21 September. He believed that the batteries were leaking. Mr Wilson did not believe this to be true. On 24 September Mr Wilson found batteries in the 3 blue buggies required water. The batteries in the black buggy however were "full". Mr Wilson took this as evidencing that there was no leak in these batteries, notwithstanding the claimant's statement to the contrary. It appeared therefore that there was no basis for the claimant's view and that he had potentially been seeking to mislead the respondents. The claimant however adhered to his position that there was a problem with the batteries and suggested an expert attend to look at them. This was the course followed by the respondents. The outcome of that visit is not known.

*Committee meeting, possibly September 2017*

101. On one occasion, possibly in September 2017, a committee meeting was being held. The claimant and his wife arrived at it. They had not been invited to attend. Mrs Aitken had a sheet of paper in her hand. She demanded to be heard. Mr Keir made a comment. It was not directed either at the claimant or Mrs Aitken. He said "*Oh God"* or "*Oh Christ*". A member of the committee said that attendance at this meeting of Mr and Mrs Aitken was not appropriate and asked that they leave. They did so.

*Events of 28 September 2017*

102. In course of 28 September the claimant attended his GP. He was issued with a statement of fitness for work confirming that in the opinion of the GP the claimant was not fit for work from 28 September to 29 October. A copy of that certificate appeared at page 173 of the bundle.

103. The claimant attended the golf course on 28 September to hand in this doctor's note. He did so. He then went out on the course and spoke with his assistants. Mr Wilson was aware that the claimant had submitted his sick line. Mr Wilson was on course checking what was happening with someone who was seen to be on course. It transpired that this person was addressing an issue on the course with Japanese knotweed. Whilst Mr Wilson was dealing with that matter he was informed by Glen that the claimant was on the course. Mr Wilson took advice on this as he was concerned about the claimant being on the course, knowing that he had handed in a sick line. He obtained advice by telephone. That advice was that he should request the claimant to leave the course on the basis that the claimant should not be working given that he had handed in a sick line. He also wished to ask the claimant to attend a meeting if possible the following week.

104. Mr Wilson then went to speak with the claimant. The claimant was confrontational in his approach. He held up his phone saying that he was recording the meeting. He was very agitated. He said that he was not going to speak to Mr Wilson and that Mr Wilson should speak to his legal advisers. Mr Wilson sought to contact the respondents' legal advisers at this point. Whilst he was speaking to them the claimant drove off in the Gator. Mr Wilson understood the claimant to have gone home.

105. Later that day the claimant wrote by email to the committee. A copy of that email appeared at pages 171 and 172 of the bundle. He confirmed he had been signed off with work-related stress. He said this was as a direct result of the behaviour towards him by Mr Wilson and Mr Keir. He said that he "*cannot take this any more*". He said that "*the trust has completely gone now*". He went on to say that the "*final straw for my mental health was regarding the buggies.*" He referred to the buggies having been used in wet periods in what he said was contradiction of his instructions on two occasions. Buggies had

also been used on a third occasion in wet conditions. He said that his professional opinion "*doesn't seem to be respected in the current circumstances*". He went on to refer to the interaction which had taken place earlier that day on the course between himself and Mr Wilson where he said Mr Wilson had asked if he was "*intending to stay here*". He said that he explained that he was checking up on Glen as Glen was upset at the situation. Mr Wilson, said the claimant, had continuously asked if he was fit to attend a meeting next week although he was off with work-related stress. The claimant said he responded by asking that Mr Wilson get in touch with his representative. He said Mr Wilson was goading him for a reaction and referred to Mr Wilson's behaviour as being intimidating and harassing.

106. Mr Wilson replied to that email by email sent on 29 September. A copy of that email appeared at pages 172A to 172C of the bundle. Mr Wilson set out his response in relation to use of the buggies on the course explaining that he had not contradicted any instruction from the claimant on 28 September. It had not been possible to consult the claimant that day, he said, as the claimant had been at a medical appointment and had then been signed off work. A visiting golfer was permitted to use the buggy after appropriate instruction. He was someone who could not have played golf without the use of a buggy and who was experienced in use of a buggy on the golf course. Mr Wilson said he was unaware of any instruction from the claimant not to use buggies on one of the other days and that on the third day referred to by the claimant he had driven approximate 100 yards to collect some golf balls. There had been no damage to the course of any kind. He gave his account of the meeting on course on 28 September. He concluded the email by saying:–

*"Keith, please look after yourself and get back to full health. I am sure that everyone in the club wishes you a full recovery. Please understand that any issues with the course are simply that, and there is nothing personal in any of our actions. We are simply trying to improve the condition of the golf course."*

107. The email from Mr Wilson had commenced as follows: –

*"I was concerned to be informed yesterday that you have been diagnosed as suffering from work-related stress and about your concerns for your mental health. I wish you a speedy and full recovery, and I'm sure I speak for the full Committee in this sentiment."*

108. Paragraph 2 of the email commenced: –

*"I cannot understand your claims of harassment and intimidating behaviour and can only assume your health issues at the moment are perhaps influencing your perception of events. Rest assured, the health of all of the club's employees is of great concern to the committee and myself and we will be helpful in any way we can to ensure that everyone receives any support necessary in this regard."*

*Continued absence of the claimant*

109. A sick line was submitted by the claimant in respect of the period 29 November 2017 to 5 January 2018. The respondents in the interim sought to arrange a meeting with the claimant. The claimant stated in response to that wish to arrange a meeting that he was unable on the advice of his doctor to meet to discuss his role. A review meeting was then proposed for 20 November by the respondents. It did not take place. The relevant emails exchanged between the parties are at pages 177 to 181 of the bundle.

*Resignation of the claimant*

110. By letter of 20 December 2017, which appeared at page 184 of the bundle, the claimant intimated his resignation.

111. He commenced by stating that he was resigning with immediate effect. He concluded the letter by seeking to make arrangements to obtain his personal possessions. The body of the letter stated: –

*"Your campaign against me, at the instruction of Lindsay Keir, has been designed to target and isolate me, undermine my position and push me to the edge of my limits. Coupled with physical assault and the company purposely*

*damaging my reputation through the spread of lies are, in my opinion fundamental and unreasonable breaches of contract on your part.*

*I have been left with no option to resign my position and I consider myself constructively unfairly dismissed due to:*

- *Fundamental breaches of contract in my treatment in relation to how others have been treated;*
- *Purposeful and wholly inaccurate manufacturing of allegations against me;*
- *Unfair handling of disciplinary matters;*
- *Breach of trust and confidence and resultant reputational damage;*
- *Physically assaulted by Captain Lyndsay Keir*
- *Ignored or failure to reasonably investigate and treat seriously complaints raised by me;*
- *Correspondence informing me that the physical assault was of my own doing;*
- *Solicitors notification that the Committee "totally backed" the Captain in everything he did therefore confirming that no member of the Company would treat my complaints objectively;*
- *Your actions culminating in intolerable working environment and untenable future working relationship.*

*The actions of the Company have caused me significant ill-health, to the point that I have been medicated and, for a period of time, found myself unable to make any decisions hence the delay in my resignation.*

*If it is not already clear, I wish to highlight that I am utterly disgusted in the actions of the Club and committee."*

112. The claimant's employment terminated therefore on 20 December 2017.

113. There was no medical information before the Tribunal as to any inability on the part of the claimant to make decisions in September 2017 or between then and 20 December 2017.

*Follow-up to incident on 13 March between Mr Keir and the claimant.*

114. After the incident on 13 March the claimant reported this to the police. He did that however several weeks after the incident. His view was that the committee might deal with the incident. He made at least two approaches to the police seeking that they became involved in the matter. The police said that he should have reported it soon after it happened. The reports by the claimant to the police were in June and July or August. The police visited Mr Keir in December to charge him. He was offered the opportunity to accept a warning from the fiscal rather than proceed to trial. Due to health reasons he chose to proceed on that basis. A warning was duly issued to him by the fiscal.

*The claimant's position after termination of his employment*

115. The claimant commenced working on his own behalf in March 2018. He trades under the name of Real Garden FX. He carries out garden work for individuals. They pay him in the main by credit transfer to his bank account. Occasionally he is paid by cheque. Occasionally payments are made to him in cash.

116. Page 233 of the bundle is a spreadsheet prepared by the claimant's wife and confirmed by the claimant as accurately showing his income and expenditure between April 2018 18 March 2019. Pages 219 to 232 showed the accounts on a monthly basis, those then being summarised in the document which appeared at page 233 of the bundle.

117. The claimant obtained two loans, one from his father and one from his father in law to the extent of some £18,000 in total. He has no bank borrowings. The accounts disclose him taking no money by way of personal drawings.

118. The gross annual pay of the claimant whilst employed by the respondents was £26,660.01. His net annual pay was £20,321.34. On a weekly basis, those sums comprise £512.69 gross and £390.80 net.

119. The claimant has obtained universal credit from 8 January 2018. Pages 199, 202, 205 and 208 show universal credit being received of £829, £1000, £1044 and £1020.

120. The claimant maintains that he has received no income in January, February and March 2019. He received however an amount from Lisa Remington by cash in respect of work carried out during January 2019. The amount paid to him is uncertain. The work involved was cutting of a hedge. In April 2018 the claimant carried out work for Teresa Beckett. That involved turfing work. Payment was received from Ms Beckett for this work. There is, however, no trace of any sum received from either Ms Remington or Ms Beckett in any of the schedules prepared by the claimant's wife on his behalf and submitted to the Tribunal in this case. A copy of the Facebook page showing confirmation from Ms Remington and Ms Beckett that they were pleased with the work carried out by the claimant appeared at page 248 of the bundle.

121. During the winter months, when the claimant worked for the respondents, Mr McNicol had used his services. That occurred, for example, in March 2015. Mr McNicol continues to trade.

122. The claimant's income in 2018 occurred mainly in the months of June, July, August and September. In those months he earned £2378, £1481, £2002 and £3479.

**The issues**

123. The issues for determination by the Tribunal were: –

(1) Did the claimant resign following upon fundamental breach of contract by the respondents? If so, was this a particular fundamental breach of contract or did resignation follow upon a "last straw"? If there was a "last straw", what was that?

(2) Had the claimant by any of his action or inaction affirmed the contract and therefore precluded ability on his part to found upon the breach of contract by the respondents, if it existed?

(3 If dismissal had occurred through the claimant's acceptance of repudiation of contract by the respondents, was the dismissal nevertheless fair?

(4) If the dismissal was unfair, what compensation would be awarded to the claimant? Was any amount appropriately deducted in respect of contributory conduct? Further, was any deduction appropriate on the basis that there was a risk of fair dismissal of the claimant by the respondents at some point?

**Applicable law**

124. Section 95 (1) (c) of ERA provides a right on the part of an employee to resign and to claim constructive dismissal in circumstances where the conduct of the employer is such that he is entitled to terminate the contract without notice. Such an occurrence is known as a constructive dismissal.

125. For a claim to be successful, the claimant must establish that there has been a fundamental breach of contract by the employer. The onus therefore is upon the claimant.

126. The test as to whether there has been a fundamental breach of contract is an objective one. It is for the Tribunal to assess the facts and circumstances and to come a view on that.

127. The well-known case of *Western Excavating v Sharp* 1978 IRLR 27C sees the Court of Appeal through Lord Denning state that for constructive dismissal there must be conduct by an employer "*which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*"

128. Another well-known case, that of *Malik v BCCI SA* 1997 IRLR 462 provides the basis of there being an implied term of trust and confidence in the contract of employment. It states that an employer is not, without reasonable and proper cause, to conduct itself in such a manner as is calculated or is likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

129. The intention of the employer is not a factor in assessing whether there has been fundamental breach of contract.

130. If there has been fundamental breach of contract entitling an employee to resign, consideration is to be given by the Tribunal to whether the delay in bringing a claim by a party is such that the right to advance such a claim may have been lost. In the alternative the Tribunal can consider the actings of an employee and consider whether affirmation of the contract has taken place.

131. In relation to these two points, the cases of *Lewis v Motorworld Garages Limited* 1986 ICR 157*, Omilaju v Waltham Forest London Borough Council 2005 ICR 481*, *JV Strong and Co. Ltd v Hamill* EAT 1179/99, *Logan v Commissioners of Customs and Excise* 2004 ICR 1 and *Lochuak v London Borough of Sutton* EAT 0197/14 are of relevance.

132. The case of *Kaur v Leeds Teaching Hospitals NHS Trust* 2018 IRLR 833 and that of *Omilaju* are of relevance in relation to "last straw" cases. *Kaur* is a Court of Appeal case. It details how the Tribunal should approach a situation where an employee has been constructively dismissed in his or her view.

133. In terms of *Kaur,* the Tribunal should identify the most recent act or omission which the claimant says caused or triggered resignation. It should then go on to consider whether the claimant has affirmed the contract since that time. If affirmation has not occurred, then the Tribunal should ask itself whether the act or omission was a repudiatory breach of contract. If the Tribunal concludes that it was not, it should then ask itself whether that act was part of a course of conduct which, viewed cumulatively, amounted to a repudiatory breach of contract. If the Tribunal is of the view that it did indeed constitute part of a course of conduct which cumulatively amounted to repudiatory breach, there is no need for separate consideration of possible previous affirmation. This means that it is, in principle, possible to refer to earlier alleged "straws" when considering whether resignation in a particular case properly founds a claim of constructive dismissal.

134. The final straw does not of itself require to be a repudiatory breach of contract.

135. Given the findings of the Tribunal that there has been no repudiatory breach of contract, cases in relation to whether a constructive unfair dismissal can nevertheless be fair, deductions from any award which might be made by the

Tribunal and calculation of compensation itself are not set out. On a similar basis, principles applicable to affirmation of contract do not apply. Nevertheless, the relevant cases have been mentioned for completeness.

136. There is no specific wording required for an issue raised by an employee to constitute a grievance. In terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015), it is stated in paragraph 1 that "*Grievances are concerns, problems or complaints that employees raise with their employers.*" Employment Tribunals properly take this code into account when considering relevant cases.

137. Failure to deal with a grievance can be a fundamental breach of contract entitling an employee to resign. *Blackburn v Aldi Stores* 2013 IRLR 846 saw the Employment Appeal Tribunal ("EAT") state that a failure to adhere to a grievance procedure is capable of amounting to a breach of the implied term of trust and confidence.

**Submissions**

138. Both parties, helpfully, tendered written submissions. They both also lodged copies of relevant cases. That again was helpful.

139. The submissions were spoken to on the final day of the hearing. The import of the submissions for each side is now summarised. Matters relevant to calculation of compensation are not however detailed given that the case did not reach the stage where compensation required to be considered. This was as the view of the Tribunal was that the claim was unsuccessful.

*Submissions for the claimant*

140. Mr Booth said that there had been fundamental breach of contract by the behaviour of the respondents. He founded upon the fact that the claimant had not been afforded access to a meaningful grievance resolution procedure. He also founded upon bullying and harassment by the respondents. There had been breach of the fundamental term of trust and confidence, said Mr Booth.

141. Mr Booth referred to *Blackburn*. There had been no grievance hearing arranged in this case. It had been clear from the terms of the correspondence submitted by the claimant that he was seeking to pursue a grievance. The grievances were constituted by the correspondence at pages 144 – 145 of the bundle, pages 148 – 149, page 150, page 165 and pages 171 – 172 of the bundle. The test in *Sweetin v Coral Racing* 2006 IRLR 252 had been met. All that was required was articulation of the grievance. That had happened.

142. The claimant deserved an explanation so that he could understand what had happened to his grievance. This had been no particular response to his grievance. If he knew that the grievance had been upheld or in the alternative had not been upheld then he would know where he stood. He could then appeal if he so wished. He could be accompanied at any grievance hearing. The respondents had a grievance procedure in place. They had simply failed to follow it. There was no reason why the grievance procedure had not been followed.

143. The case of *Malik* made it clear that an employer was not, without reasonable and proper cause, to conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The situation as described was what had occurred here. It gave a valid basis of claim.

144. The breach by the respondents was sufficiently serious to justify resignation. The claimant had resigned in response to the breach. He had not delayed too long in resigning.

145. The Tribunal should keep in mind that the grievance related, amongst other things, to the claimant being assaulted by the Captain. The claimant talked of constructive dismissal, stress, resolving the matter and to not being able to go on like this. He had said in June 2017 that he was at the end of the road.

146. In addition to failure to deal with grievances, Mr Booth pointed to the claimant's references in correspondence and his evidence at Tribunal that there had been bullying and harassment. The claimant said that there had been a breakdown in communication, said Mr Booth.

147. A breach of the implied term of trust and confidence always constituted breach of a fundamental term. The case of *Morrow v Safeway Stores plc* 2002 IRLR 9 confirmed this. Whether the respondents intended to act in that fashion did not matter. That was confirmed in the case of *Bliss v South East Thames Regional Health Authority* 1987 ICR 700. Any circumstance which induced a respondent to act in breach of contract was also irrelevant to the issue of whether fundamental breach of contract had occurred. The case of *Wadham Stringer Commercials (London) Ltd v Brown* 1983 IRLR 46 confirmed this.

148. Mr Booth then referred to the letter of resignation from the claimant. This appeared at page 184 of the bundle. He departed from his submission to the effect that the circumstances disclosed in an email at page 171 of the bundle constituted the final straw. He accepted that there had been no evidence to that effect. The final straw had been the issues surrounding the buggies.

149. The case of *Logan v Commissioners of Customs and Excise* 2004 ICR 1 was referred to as support for the principle that there is no need for proximity in nature between the last straw and the previous act of an employer founded upon. Remaining in post did not waive the breaches. The case of *Lochuak* confirmed that.

150. Turning to his observations on witnesses, Mr Booth said that it was understandable if sympathy existed for all parties. The respondents could have managed the position better. A committee was in a different position to that of others running a business. Mr Raeside had tried to put some systems in place in relation to the claimant. Mr Keir had discussed matters with him. The appointment of Mr Wilson had however made matters worse. Mr Wilson was not a good manager. He was an “loose cannon”, Mr Booth said. He had made a difficult situation worse.

151. Mr Wilson had not been a credible witness, Mr Booth submitted. He had been evasive and obstructive when cross examined. He had given self-serving answers. It appeared he had formulated his evidence in advance. He was not prepared to consider alternative views on things. He did not, for example,

regard there as having been a grievance submitted by the claimant. Mr Keir and Mr Raeside had however accepted that a grievance had been raised.

152. The letter from Mr Wilson which appeared at page 172A of the bundle showed no understanding or empathy. It did not address the situation of the claimant himself but dealt with generalities. It made assumptions about the claimant's health. Those were very condescending and unnecessary. Discussion would have clarified the claimant's health position. The texts sent showed bullying.

153. In assessing the claimant's evidence, Mr Booth recognised that it could have been better. He said that the claimant was stressed. He had a diabetic condition. The claimant had however been honest in his evidence.

154. In the event of success, read short, Mr Booth referred to the schedule of loss, page 247 of the bundle.

*Submissions for the respondents.*

155. Ms Greig set out the position detailed in ERA and also summarised the principles applicable to cases of constructive dismissal. She referred to *Western Excavating, Kaur* and *Omilaju*.

156. The individual instances which were said to build the case for the claimant were then considered by Ms Greig. In assessing these matters, it was relevant to have regard to witness evidence and to assess the evidence given both by the claimant and by witnesses for the respondents.

157. In relation for instance to the clash between Mr Keir and the claimant on 13 March 2017, the Tribunal should prefer the evidence of Mr Keir. There had not been an assault. There been contact, however no punch. The Tribunal was entitled to have regard both to the evidence given and also to the difference in stature and physique between the claimant and Mr Keir.

158. The respondents accepted that a physical assault was capable of being a fundamental breach of contract. If the Tribunal concluded there had been such an assault, it was significant that the claimant continued to work for the

respondents and had accepted the apology from Mr Keir made on the day by email and the next day in person.

159. Mr Wilson had said in evidence that the claimant hoped in his view to undermine Mr Keir resulting in either his removal as Captain, his resignation as Captain or a reprimand being imposed upon him by the committee. The incentive from the claimant's point of view was that if Mr Keir and Mr Wilson were removed the claimant would be likely to be able to return to his former less supervised method of working.

160. There had been no bullying or harassment of the claimant. Over a period of time the respondents had sought to achieve acceptance by the claimant of the need to carry out instructions and to control expenditure. The respondents had taken steps in that regard before Mr Keir became Captain and before Mr Wilson was employed.

161. It required to be borne in mind by the Tribunal that the claimant had been treated leniently. He had inaccurately completed timesheets. He had admitted that. This had been a repeated offence. He had not been dismissed however in 2015. It was quite possible that disciplinary action and possible dismissal would occur as a follow up to the meeting on 22 September 2017.

162. Expenditure had been incurred which had caused an issue. The claimant had not maintained expensive equipment satisfactorily, namely the batteries in the buggies. The appointment of Mr Wilson had been a reasonable step taken by the respondents. The situation with regard to the golf course was very serious. The Tribunal should accept the evidence of Mr Keir, Mr Raeside and Mr Wilson as to the problems which existed with the golf course. Further, it was clear from their evidence that the claimant had been asked to do various tasks and had decided himself that he did not wish to do them and therefore had not carried them out. Being pressed in that regard and being asked to explain expenditure did not constitute bullying and harassment.

163. Although a failure to deal with grievances might constitute a fundamental breach of contract, there had been face-to-face dialogue on a regular basis, Ms Greig said. Mr Keir and Mr Wilson had spoken to that. Further, the

correspondence did not amount to a request that a grievance be dealt with in terms of the grievance procedure. There were mixed messages in the correspondence. It was stated, for example, that the working relationship with Mr Wilson was good. The claimant, from the terms of the correspondence, had trade union advice. The respondents' evidence was that if a grievance hearing had been asked for, it would have taken place. The first time the word "grievance" was used by the claimant was on 5 September 2017 in the letter which appeared at page 165 of the bundle. There was no reference however to that letter being a formal grievance.

164. In Ms Greig's submission the claimant was seeking to pursue his ulterior motive i.e. removal of Mr Wilson and Mr Keir.

165. Turning to the issue of potential breach of the implied term of trust and confidence, Ms Greig emphasised that this was an objective test. Applying that objective test, there had been no breach.

166. The most recent act which the claimant said triggered resignation was the issue around the buggies as described in the letter at page 171 of the bundle. There was a period of nearly 12 weeks from that time until resignation. The claimant was absent on sick leave, in that time accepting sick pay. Further, if the claimant had not affirmed the contract, the proper interpretation of the events complained of was that they did not constitute repudiatory breaches of contract. There been no course of conduct breaching the principles of *Malik*.

167. Ms Greig next turned to assessment of witnesses. She urged the Tribunal to accept the evidence of Mr Keir, Mr Wilson and Mr Raeside where there was any conflict between the evidence they gave and that of the claimant. The claimant was not particularly credible. Examples of difficulties in this regard were given by Ms Greig.

168. She referred to the claimant's evidence in relation to use of weedkiller on the second fairway. The claimant had given evidence about greenkeepers on the island borrowing chemicals from one another. He referred to the chemicals possibly being past their shelf life. He then abandoned those possible

explanations. He did not accept that what had happened was a serious mistake for a professional greenkeeper.

169. His evidence about the circumstances which had led to the warning being given in 2015 changed. He referred to it having been too wet to be working on the golf course. He also said however that he and his assistants had carried out a couple of hours work before working for Mr McNicol. He had not detailed either of those positions when the matter was explored with him at the time.

170. When evidence was given by the claimant in relation to the radiator for the Gator, he said that the representative for the company had left it in the shed whilst the claimant sought approval. That was not however the evidence he gave at the time when asked. It was simply not credible.

171. These examples and the way in which the claimant gave his evidence illustrated the type of approach which he had adopted with the respondents when they sought to manage him.

172. The most damning passage of evidence as far as credibility for the claimant was concerned related to the accounts which he lodged, Ms Greig submitted. Although his wife had prepared the accounts, they were in straightforward terms. The questions which raised problems for the claimant were ones about facts known to him. They related to work which had been carried out and payment made for that work.

173. The claimant said that payment for work carried out was, initially in his evidence, paid exclusively by way of credit to his bank account. Two customers who had given favourable reviews in April 2018 in January 2019 had dealt with him as individuals rather than whilst wearing any other hat, he said. Payment by them would therefore show with the source being the individuals themselves. There was no entry showing any such payment. The claimant then said he was paid occasionally by cheque. He was adamant he was not paid in cash. He then referred to payment in cash potentially by these parties. He could not however get away from the fact that the accounts

showed no payments being made by either party. It appeared therefore quite clear that the accounts were inaccurate.

174. This passage of evidence cast doubt both on the accounts lodged, and therefore the loss of the claimant, and the credibility of the claimant. Ms Greig submitted that the claimant had dishonestly misrepresented his earnings to the Tribunal for the purposes of obtaining compensation.

175. Considering the claimant's resignation, it was significant that he had resigned just before Christmas at the point when he was aware that the police had visited Mr Keir and charged him.

176. The claimant was absent on sick leave from 28 September 2017 until resignation. Although Mr Booth had referred to the respondents making no effort to meet with the claimant, in fact they had attempted to arrange such meetings. The claimant had said in the document at page 177 of the bundle that he could not meet with them. He did not say, for example, that he would meet them to deal with a grievance.

177. There had been no final straw after 28 September identified by the claimant in evidence. The last act was therefore set out in the claimant's letter at the end of September.

178. The position for the respondents was that there been no breach at that point entitling resignation. If the Tribunal regarded there as having been such a breach however, affirmation had taken place. The claimant referred in his letter of 28 September, pages 171 to 172 of the bundle, to the trust having completely gone now. He referred to further harassment and intimidating behaviour. In evidence he referred to the behaviour of Mr Wilson on the golf course. He accepted that he had recorded the exchange. That recording however was not available for the Tribunal. The behaviour of Mr Wilson was described by the claimant as being goading and intimidating and harassing. The absence at Tribunal of the recording was however of significance.

179. Although the claimant referred to the final straw relating to buggies on 28 September, Mr Wilson's evidence set out in his response at page 172

explained why he had used buggies. The claimant had been unwilling to engage in a meeting at that point.

180. In assessing the reason for the claimant deciding to take the action which he did in resigning, the Tribunal should keep in mind that there had been a meeting on 22 September with the claimant. That related to submission by him of inaccurate timesheets. It also dealt with the issue of failing to maintain equipment and misleading his line manager about filling up batteries. The claimant had not welcomed the meeting on 22 September. Mr Wilson had then written taking issue with the claimant's explanation as to batteries (page 169 and 170 of the bundle). Four days later the claimant was signed off work and had emailed stating that "*trust has completely gone now*", referring to a "*final straw*".

181. Ms Greig submitted that the motivation in the claimant's decision to resign was to avoid disciplinary action rather than any view on his part that there had been a fundamental breach of contract to which he was reacting. He had continued to encourage a police charge against Mr Keir.

182. The Tribunal should note the description of harassment and intimidating behaviour given by the claimant in evidence. He had referred to Mr Wilson sitting outside the shed waiting for him after lunchtime and to Mr Wilson going around the course in an arrogant manner. He said that Mr Wilson was always checking and that he felt this was intimidation. He also said that he felt he was always being watched. Considered objectively, Ms Greig submitted, these actions individually and cumulatively could not be viewed as amounting to a breach of the implied term.

183. Whilst the claimant had been absent through sickness, attempts to meet him had taken place. No such meetings however occurred.

184. It was difficult from the claimant's evidence to understand what had prompted him to resign on 20 December. He simply said that it was untenable. He was unable to point to any final straw in cross examination. When questioned further he simply said that he could not take it any more and that his health was suffering severely. There was therefore, said Ms Greig, no evidence of

any other factor, incident or final straw which might have had a bearing on the timing of his resignation. The last act, on the claimant's own evidence, had been in September 2017. The Tribunal should also find that resignation did not relate to any alleged breach at that point. It was for a different reason, avoidance of disciplinary action, because sick pay was exhausted and because Mr Keir had been charged by the police.

185. Ms Greig then addressed the Tribunal on the basis that there had been a fundamental breach. She said that the claimant's delay in resignation meant that he had affirmed any breach. He ought to have resigned on 28 September given the circumstances he set out in his email of that date at page 171 of the bundle. By way of explanation for the delay he had said that he "*for a period of time, found myself unable to make any decisions hence the delay in my resignation*.". This was in his letter of resignation at page 184 of the bundle. There was no medical evidence to support any difficulty in decisions being taken. The letter from the claimant's GP at page 185 of the bundle dated 20 June 2018 with no reference made to the claimant having been unable to make decisions.

186. Ms Greig referred to the case of *Mari (Colmar) v Reuters Ltd* UKEAT/0539/13. In analysing what she recognised were conflicting authorities, Ms Greig referred to Harvey on Industrial Relations and Employment Law at Division D1/3/F/(6). That concluded that each case depended on its own facts in a conclusion being reached as to whether a period of sickness absence and acceptance of pay during that time amounted to affirmation. Ms Greig's submission was that in this case the claimant had affirmed the contract in that he had clearly set out his view that there had been a fundamental breach of contract. He had not resigned but rather had stayed in employment and had accepted contractual sick pay.

187. Ms Greig made submissions as to the dismissal being fair on the basis that it was due to conduct. She made submissions as to compensation in the event of success, highlighting the view of the respondents that the claimant had failed to mitigate his loss and that there was a risk of a fair dismissal.

**Discussion and decision**

188. This was a somewhat sad case. The claimant was a long serving employee. He appeared to enjoy his job. The golf course had however deteriorated. There was an issue as to why this had occurred. The claimant maintained that the effect of tides and the location of the course had essentially caused the problems. The respondents accepted that those elements affected the course to a degree. They said however that there were steps which could and should have been taken by the claimant to avoid or mitigate those factors and to improve the course or prevent its deterioration. Tackling of thatch was one such element as was addressing drainage. Those steps were not taken or were not undertaken effectively. There was also a difference of view over staff numbers. The claimant said that green keeping was under resourced. The respondents regarded there as being an adequate number of staff. The claimant was of the view that more funds should be made available. The respondents pointed to what they saw as unnecessary expenditure by the claimant, for example upon a blower.

189. In this case the employment relationship between the parties was slightly unusual as it played out in practice. The claimant had expertise as a greenkeeper and was present carrying out his work on a day-to-day basis. The respondents were the committee as constituted from time to time, headed by the Captain and with a Greens Convener having particular responsibility for the condition of the course, albeit the Greens Convener did not physically work on the course. The Captain and committee changed on a biannual basis. It seemed that until the appointment of Mr Raeside, and subsequently Mr Keir, as Captain, the claimant had virtually a free hand in deciding when and how he would carry out his role. That situation altered again when Mr Wilson was appointed. By the time Mr Raeside was appointed the claimant had been in post for almost 9 years.

190. A further complication was that the golf course is on Arran. Whilst a reasonably sizeable island, the population is not particularly large. The claimant's family were integrated into the community. He had children at school.

191. Although many employers may hesitate before seeking to deal with what might be perceived by them as an employment issue with an employee, the circumstances which pertained, as those have been mentioned, in the employment situation of the claimant made this an even more difficult situation for both parties.

192. The claimant said that there were two elements each of which amounted to a fundamental breach of contract entitling him to resign. He maintained that he had resigned in response to those fundamental breaches.

193. The fundamental breaches of contract were, the claimant said, the failure to address properly grievances lodged by him and bullying and harassment.

*Dealing with grievances*

194. It is certainly the case that no formal grievance procedure meeting was set up. For that to have occurred a letter of invitation would require to have gone to the claimant inviting him to such a meeting. That did not happen.

195. Equally however, it is not the case that any concerns or issues which the claimant raised were simply not addressed by the respondents. On the evidence, there was a lot of informal contact and discussion between the Captain, the Greens Convener and Mr Wilson on the one hand and the claimant on the other. The claimant also attended committee meetings from time to time. Correspondence also makes reference to discussions. In addition, correspondence also sees the claimant confirm either that any past issues have been resolved or that he has a good working relationship with Mr Wilson. In the later stages, it was the claimant who expressed doubt as to the effectiveness of a possible meeting. There continued to be discussion of a possible meeting, albeit that then appeared to develop into a meeting associated with a protected conversation. Parties correctly refrained from any evidence around that area.

196. By way of illustration of these elements, reference is made to the grievances and responses.

197. The first time it is said that a grievance was lodged was in May 2017. The letter from the claimant at pages 145 and 146 of the bundle was a reply to the letter from the respondents at pages 143 and 144 of the bundle. That letter confirmed the appointment of John Wilson as manager of the claimant. Both the letter from the respondents and the letter from the claimant referred to there having been a meeting before the letter had been prepared by the respondents.

198. In the claimant's letter, he sets out difficulties. No formal meeting resulted. Mr Keir referred to there having been a meeting however. The claimant in his letter of 21 June at 148 of the bundle refers to what happened at the last meeting with the Captain, Treasurer and Mr Wilson. From the correspondence therefore it appears that there was a meeting. Importantly it is said by the claimant in his email of 21 June that he is hopeful that the line in the sand as promised at this meeting will be drawn. He says that he and Mr Wilson have a good system working just now and that he is happy to continue that way. In his accompanying letter he expresses the view to the committee that since the response to their last letter (which appears to have been a reference to the committee's letter at pages 145 and 146 and the claimant's response at pages 148 and 149), "*we really had drawn a line in the sand at your wishes and moved on. I feel my working relationship with John Wilson has also improved the situation, we work well together and have a mutual respect*."

199. I did not regard it as possible given this exchange to come to the view that the claimant's grievances at this point were not being addressed and indeed to conclude that he was not satisfied with the position. This was not a situation of the claimant being ignored or there being no contact in relation to his communications. He appears to have been willing to draw a line in the sand, as he refers to it. It appears that this occurred in his view. More than that, he is positive about his working relationship with Mr Wilson. It is certainly true that he refers in his letter to the committee of 21 June to the last 5 months as having been quite unbearable. That however is in the same paragraph as he states that he believed a line in the sand had been drawn and comments favourably in the terms detailed above as to his working relationship with Mr

Wilson. At this point the issue from the claimant's perspective was that he had been denied holidays as requested by him. This was in effect his appeal against that decision of the committee. The committee considered that appeal and granted the request of the claimant who therefore obtained the holidays as requested by him. Whilst relevant to bullying and harassment, this interaction is also relevant to the issue of whether grievances raised by the claimant were addressed in some form by the respondents.

200. The letter sent by the claimant on 5 September 2017, pages 164 and 165 of the bundle was said to constitute a grievance in respect of which the grievance procedure should have been applied. There had been reference in the letter from Mr Keir at page 163 to a meeting taking place. It was that letter to which the claimant replied in his communication of 5 September.

201. Whilst this letter from the claimant raises concerns and says that every time a line is drawn something further unhelpful happens, the letter also states that the claimant's lawyer and union "*are unsure how effective a meeting would be*". He seeks further clarity on that. A reply is sent to the claimant, a copy appearing at page 166 of the bundle. That appears to have led to the meeting associated with the protected conversation.

202. There was a meeting between the claimant and the respondents. This however took place on 22 September and dealt with the issue of timesheets and buggies/batteries. It was not said that the claimant at this meeting made any reference to concerns on his part as to there being no grievance meeting. There is no note to that effect in the record of that meeting.

203. The next communication said on the claimant's behalf to constitute a grievance was that on 28 September, pages 171 – 172 of the bundle. That was the letter sent the day the claimant commenced sick leave. It referred to use of the buggies. It said that the claimant had been signed off sick "*as a direct result of the behaviour towards me by John Wilson and Lindsay Keir*." On 7 November the respondents expressed a wish to meet with the claimant. That was to be in connection with his prognosis and regarding his return to work. The reply from the claimant of 8 November at page 177 of the bundle

states that he is unable to meet to discuss his role due to the impact on his anxiety and stress levels. In later correspondence a meeting was also proposed, again relating to health and potential return to work of the claimant. No such meeting took place.

204. In my view the terms of the communications from the claimant did raise matters which a prudent employer ought to have addressed by either arranging a grievance meeting or at least clarifying with the claimant whether he wished to have such a grievance meeting arranged. That did not occur. As mentioned above, however, this was not a situation where, at the other extreme, the respondents did nothing on receipt of those communications. They met, albeit informally with the claimant. They replied to him. The response by those means led the claimant to state that a line had been drawn. The claimant himself expressed the view at various points that his working relationship with Mr Wilson was good.

205. There will be situations in any working relationship in which one party or the other, or indeed both, do not behave as they might or should in an ideal world. That may irritate the other party. It may lead to discontent on the part of one party or both. It becomes a more difficult position for an employer in that situation if it is said that the behaviour of the employee warrants dismissal. Similarly, it becomes a more difficult position for the employee if that employee alleges that the behaviour of the employer is such that there has been a fundamental breach of contract entitling the employee to resign. Then, looking at the employee's position as being relevant in this case, the employee has to point not just to dissatisfaction and a degree of failure by the employer but to circumstances in which he is entitled to terminate the contract by reason of the employers' conduct.

206. Where the conduct is a failure to adhere to the grievance procedure, the Tribunal requires to consider the circumstances and whether any failure is such that there has been a breach of the implied term of trust and confidence. That is the situation in this case given that the grievance policy was not part of the claimant's contract. It is always a matter for the Tribunal of weighing the circumstances. It is a question of degree in determining whether the failure is

such that the behaviour of the respondents was calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

207. Looking at the matter objectively, I did not regard the failure by the respondents to arrange a grievance meeting or to explore with the claimant whether that was what he wanted, as being a breach of the term of trust and confidence implied into the employment contract. This is my view given the interaction between the parties at the time and, in particular, the response by the respondents to the dissatisfaction made known by the claimant. The respondents replied to the claimant and on occasion did meet with him, albeit not in a formal grievance meeting. The claimant appeared to accept that the relationship was back on an even keel. He had union advice and a representative, it appears. Certainly, the handling of what should have been treated as grievances under the grievance procedure was not ideal. Given the interactions and outcomes following the communications from the claimant there was, viewed objectively, no fundamental breach of contract, whether of an actual term of contract or the implied term of trust and confidence.

*Bullying and harassment*

208. In assessing the relationship between the claimant and the respondents, in particular between the period 2015 and 2017 when difficulties arose and were, it was particularly relevant to note that the working relationship between the respondents and the claimant altered.

209. In 2014 Mr Raeside became Captain. In course of that year there were discussions with the claimant regarding his contract of employment and putting in place a document comprising that contract, with relevant employee handbook. That occurred despite resistance from the claimant expressed mainly through his wife. In that regard I prefer the evidence of Mr Raeside to that of the claimant.

*Credibility*

210. It is perhaps convenient at this point to deal with the question of credibility.

211. I regarded Mr Raeside in particular and also Mr Keir as being credible and reliable witnesses. I also accepted Mr Wilson as being credible, and in the main, reliable. Both Mr Raeside and Mr Keir gave their evidence in a straightforward fashion. They were prepared to make concessions where they believed that that was appropriate and to reflect, it seemed to me in a fair way, upon what had happened and decisions made, together with communication with the claimant. Mr Keir accepted both at the time and in Tribunal that his behaviour on 13 March 2017 was not as it should have been. He had become angry and shouted at the claimant. I accepted his evidence that there was physical contact between himself and the claimant but by way of accident rather than, as the claimant had it, by Mr Keir punching the claimant on the chest. Mr Keir's description of both parties becoming angry and agitated and both he and the claimant waving their arms with Mr Keir's arm striking that of the claimant in course of mutual arm waving, struck me as entirely credible. It was consistent with Mr Raeside's description of a difficult encounter with the claimant where the claimant had become angry and had waved his arms. It was not impossible of course, despite looking to their respective physical statures, that Mr Keir had punched the claimant. It seemed odd however that the claimant had not reacted by referring to that, either at the time or in later correspondence, as having occurred. The claimant mentioned the incident in his letter of May 2017 at page 145 and 146 of the bundle where he referred to it potentially having been a real embarrassment for the Captain to "*lift his hand*" to the greenkeeper. He referred in his email of 21 June at page 148 of the bundle to Mr Keir "*raising his hand and hitting me*". I found it hard from the evidence to accept that Mr Keir had punched the claimant. I did not accept that this had occurred.

212. Important in my assessment of the elements of evidence just mentioned was my view as to the credibility of the claimant.

213. The claimant was not an impressive witness. I appreciated that grasp of detail might not be his strong point. I also appreciated that he was speaking about events which caused him significant upset both at the time and at one point

during the Tribunal hearing. I also took into account that the claimant's wife prepared the spreadsheet with information as to income of the claimant after his employment with the respondents ended. On that latter point and upon others however the claimant's evidence was simply not credible.

214. The claimant's evidence in relation to income from Ms Remington and Ms Beckett was distinctly unsatisfactory. He could recall doing work for those individuals and what the nature of that work was. He said that he had been paid for the work. Payment had come from the individuals themselves rather than through any corporate entity or third-party. There was no sign however in the accounts of any payment being made. He could not explain that. His evidence as to how he was paid by any customer changed. Firstly he said that he was always paid by credit to his bank account. He then said that he was occasionally paid by cheque. He denied that he was ever paid in cash. He then said that he was occasionally paid in cash. His evidence appeared to alter as it perhaps became more apparent to him that he was going to be unable to explain the absence of entry in the accounts showing payment by these 2 individuals. Had it come to assessment of loss, this passage of evidence would have made it extremely difficult for much weight to be attached to the accuracy of his accounts. As it was, evidence on this matter served, with the other instances mentioned below, to dent the credibility of the claimant to a significant degree.

215. The claimant's evidence as to what had happened in relation to weedkiller applied to the fairways was such that in my view it was properly regarded as being evasive or misleading.

216. Under cross examination the claimant referred to an issue regarding labelling of the product. He referred by way of explanation for the incident to the product possibly having been past its shelf life. He said that greenkeepers on the island borrowed each other's stock. Under further cross examination however he departed from these explanations. He said that it had been a mistake by him. He did not accept however that it was a very serious mistake. He said that others did worse and that this was human error. He said that the ground would recover and did so and that he knew how to fix it. Mr Raeside said that

the claimant did not own up at the time to having made a mistake. Mr Raeside was the Vice- Captain at the time of the incident. It was Mr Raeside's evidence that the claimant had said to him that he had sprayed the fairways with growth inhibitor. The claimant accepted that if he had said that, it was untrue. He said he could not remember speaking with Mr Raeside but had spoken with Mr Hume.

217. It seemed to me very odd that the claimant gave evidence about labels, sell by dates and stock from other greenkeepers. Those were not matters referred to by him at the time. They appeared simply to be statements made by the claimant to direct attention away from what had been a serious mistake. His failure to recognise the mistake as being a serious one was also instructive. What, it seemed to me, the respondents were seeking to do through this passage of cross examination of the claimant was to illustrate that he found it hard to give a straight answer and that he was inclined to change his story. They also sought to undermine his credibility. This passage of cross examination illustrated precisely those elements.

218. Similarly, in relation to the time in March 2015 when the claimant had been absent from the golf course for 2 hours carrying out work for Mr McNicol, the way in which the claimant answered questions in cross examination significantly undermined his credibility. He said that he had prior permission from Ms Roxburgh. That appeared to be the first time this was alleged by the claimant in that he had not said that at the time. He said he had worked on the course for some 2 hours before 9:30AM when he was spotted doing work for Mr McNicol. Again he had not said that at the time. He also said, however, that the course had been too wet to work on that morning and therefore working for Mr McNicol was a possibility on the day. If however the golf course was too wet for work to be undertaken on it, the problem which then arose for the claimant was that he had to explain his statement that he had been working for 2 hours before taking up work for Mr McNicol. On the evidence I heard, he was not able to explain that. He also said that he had learned a lesson from this episode which was that the exact hours of work were to be entered on the timesheets. That, however was not at all borne out in that in

September 2017 the claimant did not enter on the timesheets days when he was on leave, entering those as days worked.

219. On various other matters it seemed to me that the claimant's recall became less when he was faced with situations difficult to explain. He would answer in that circumstance that he did not remember. His evidence regarding the radiator and the Gator was one such example. At the very least this undermined the claimant's reliability. It seemed to me it also undermined his credibility given the circumstances in which his memory appeared to recede.

220. As a further instance of concerns about his reliability, he stated that holiday leave had been granted to him with that decision then being overturned but then the ultimate decision being to reinstate the initial granting of holiday leave. A confused passage of evidence followed where it ultimately became clear that the claimant's evidence was, consistent with the respondents, that he had sought a week of leave in the summer of 2017 but had been refused that. He then asked for the position to be reconsidered and the respondents had done that, granting him a week of summer holiday leave in the summer of 2017.

221. Unfortunately therefore, I came to the view that the claimant could not be viewed in general terms as being reliable or credible. Where there was a conflict in evidence between the claimant and the respondents, I preferred and accepted the evidence from the respondents.

222. I found Mr Wilson's evidence harder to evaluate. He talked at some length when asked a question. His answers were relevant to the question asked however he tended to expand into other areas. Occasionally in evidence in chief he was redirected back to the question. That did not happen so much in cross examination. Mr Booth urged me to view Mr Wilson as having been evasive. He was certainly reluctant to accept that documents sent by the claimant, whether letters or emails, constituted grievances. I did not however regard him as evasive in the sense that he was covering something up or lying in his evidence. He is now in an entirely different post unconnected with the respondents. His evidence therefore has the advantage of not being open to

any allegation that he was protecting the respondents who remained his employers. I recognised that his own actions were to an extent being considered in that he had worked closely with Mr Keir and those in the post of Greens Convener.

223. I formed the view however that the steps taken by Mr Wilson in relation to the claimant were part of proper and reasonable steps taken by the respondents as employers, particularly given issues which arose during the period involved, essentially 2014 to 2017.

*Management of the Claimant*

224. I concluded, on the evidence, that the claimant had largely suited himself as to what he did or did not do prior to 2014 or thereabouts. He decided at what times he would work. That is not to suggest that he worked under the required hours. He would however start and stop as he regarded appropriate, overall carrying out required hours. He would also do tasks as he considered them necessary in terms of his experience and expertise as a greenkeeper. If the Captain for the time being, the committee or the Greens Convener requested him to carry out a task which might assist a better playing experience, particularly for visitors (an essential income stream), he would do this as and when he was able to do it or indeed if he felt inclined to do it. If he disagreed with the decision he would simply never get round to doing the particular task. For the reasons identified above, namely it being a small island, time in office of those who occupy the committee/office bearing posts at any point being of relatively short duration and desire not to “rock the boat”, the claimant was never called to account in earlier times, despite being asked to do various tasks several times without those being carried out.

225. Enlargement of the putting green and cutting of the rough on the left hand side of the first tee were two examples of that type of scenario. In relation to the latter task, it was only when Mr Raeside forced the issue that the claimant reluctantly and without good grace carried out the work. This was despite there being an understandable drive for the work to be carried out given that

visitors were experiencing delay and frustration at the first tee, reducing enjoyment of their experience.

226. Mr Raeside was the person who tackled this issue by looking to put in writing with the claimant his contractual terms and conditions. He met resistance from the claimant initially. The claimant ultimately signed his contract after discussion with his wife and with Mr Raeside.

227. Mr Raeside and the claimant had been on good terms, playing together in and winning a competition in the past. It was in my view significant that the claimant said in cross examination that his view was that Mr Raeside "*had it in for him".* That view seemed to stem from steps taken by Mr Raeside to put in place what seemed to me to be standard employment systems and then to ensure that the claimant was working appropriately as an employee.

228. Between the time of signing of the contract of employment, May 2014, and the claimant's resignation the claimant did not, on the evidence, entirely embrace accountability. He did not entirely accept, certainly by his actions, that the respondents were his employers and that he was to do as was reasonably asked by them. The respondents were clear that they would bow to the claimant's expertise and give him credit in respect of preparation of the greens. They were no longer however prepared to accept excuses for not carrying out tasks as instructed by them, for leaving the course unauthorised to do other works for other people during working hours, not accounting accurately for working time and spending money in excess of £250 without prior approval. They were concerned at some elements of judgment by the claimant in relation to expenditure. His view was that the Gator was beyond repair. A replacement was purchased. He then sought to spend and did spend money on a replacement radiator for the Gator. He refused to return the radiator and the treasurer had to undertake that task. He wished to replace blades on a different machine but ultimately sharpening of the blades proved sufficient to enable the machine to continue its work.

229. In all of the instances about which I heard evidence, there were reasons why the claimant's behaviour was being monitored or challenged. The way in

which that was done by the respondents was not unreasonable. The claimant did not seem, despite the previous incidents with timesheets in 2015, and despite what he said in evidence, to understand the need to complete those accurately. In 2017 he completed them showing an element of overtime yet did not show that he was on leave on particular days. He countersigned his colleague's timesheets on the basis of his colleague being at work although he had been at a medical appointment. His explanation was that overall time was made up with extra hours being put in. That however did not address the fact that the claimant's time was wrongly recorded as working when he was on leave and that accuracy was required on completion of timesheets showing times actually worked, something which had been emphasised to him in 2015 and apparently accepted by him as being essential.

230. It appeared that the position in relation to topping up the batteries on the buggies was not being accurately reported by the claimant. Use of the buggies by Mr Wilson in the lead up to 28 September perhaps upset the claimant but was explained by Mr Wilson. Use by Mr Wilson of the buggy on 28 September occurred when the claimant was not available and had not "banned" buggies on the day in question. Equally the interaction between the claimant and Mr Wilson on the golf course on 28 September was, in my view on the evidence, not insensitively conducted by Mr Wilson. He was keen to understand why the claimant was on the golf course given that he had been signed off sick. If his behaviour had been as described by the claimant, it is surprising that the recorded footage which the claimant had was not present at Tribunal. It was not said by the claimant, for example, that he had deleted this footage. Potentially the version given by the claimant of Mr Wilson's behaviour and words he used would, if supported by the video footage, have been of real significance in supporting his position.

231. Whilst the letter from Mr Wilson of 29 September at page 172A – 172C might perhaps have been better worded, it was not in my view unreasonable in its terms.

232. In relation to the claimant's decision to resign on 20 December, he was unable to point to anything which had led him to intimate that decision that day as

opposed to the day before or the day after. There had been no interaction with the respondents in the period immediately preceding 20 December. They had sought to meet with the claimant towards the end of November.

233. I was left therefore with the claimant's evidence that the last matter which had been of any significance whatsoever was what had happened on 28 September when the claimant had been signed off work. He said he had visited work. He had his view on what had happened with the buggies. He had then had a brief on course discussion with Mr Wilson.

234. The claimant said in his letter that he had not been able to take decisions prior to 20 December. He gave no evidence about difficulty in that regard nor did he produce any medical evidence to assist him. He did not say why he could not or had not resigned on 28 September. He produced no medical evidence supporting there being any difficulty with such a decision being taken by him at that point.

*Conclusion*

235. I considered both elements alleged to constitute fundamental breach of contract, bullying and harassment and failure to afford the claimant access to a meaningful grievance procedure. I considered them and their alleged constituent elements both as stand-alone events and as cumulative occurrences. I could not see, however, that whether viewed individually or taken together, fundamental breach of contract had occurred.

236. In my view the behaviour of the respondents was a reasonable exercise by them of their role as employers in managing the claimant as an employee. I recognised that the claimant was suspicious of the respondents and, it seemed to me, was distinctly unhappy with and perhaps resented the controls which were put in place. What happened however was that he was being treated far more in line with the way an employee would normally be treated. That was certainly different from the days when he could largely suit himself and when he was, as the respondents' witnesses put it, of the view that he was essentially self-employed. This was not however a case where the respondents had "clamped down" on the claimant unreasonably and had

micromanaged him, resulting in upset and justifiable resignation. Rather, they had sought to have accountability and to have the claimant act as an employee adhering to what were set out as principles upon which he was to operate, including completion of timesheets accurately, obtaining prior permission for certain more expensive purchases and doing as he was asked to do by those empowered to manage him and entrusted with that task. An employer is entitled to manage his or her employee. Clearly there is a line to be drawn where unreasonable expectations, imposition of unreasonable tasks or the manner, nature and tone of any instruction might be such as to cross that line. That was not the case here.

237. For the reasons detailed above I regarded grievances as having been addressed by the respondents, albeit not in a formal fashion.

238. I understood the claimant's perception and it may be that this is always the perception that he will have of what has happened. Nevertheless, on the evidence I heard, and the facts I found, I did not regard there as having been bullying and harassment. I did not regard there as having been fundamental breach of contract by the respondents entitling the claimant to resign whether on the basis of one repudiatory act or an accumulation of actings concluded by a last straw. Had Mr Keir punched the claimant, that might have been an act relied upon by him in resigning. Firstly, however, I did not believe that that had happened. Secondly, even if it had, the claimant had accepted the apology from Mr Keir and then worked for some time with the respondents. That would not prevent him looking back to that incident if later incidents occurred which of themselves were not fundamental breaches of contract although straws. I did not however find that any such acts occurred.

239. There was no breach of the implied term of trust and confidence or fundamental breach of any term of contract entitling the claimant to resign, in my view, for the reasons given above, whether looking to individual elements or cumulative behaviour or events. I do not therefore have to consider the question of whether by delaying in resigning for a period of almost three months without any medical evidence explaining what was said to be an inability to make decisions or by accepting sick pay for a period of almost 3

months the claimant has affirmed the contract. Equally, the claim having been unsuccessful, I do not require to consider the level of compensation which might be payable to the claimant and whether any deductions from that would appropriately be made.

240. For all the reasons set out, the claim is unsuccessful.

**Employment Judge: Robert Gall**
**Date of Judgment: 21 August 2019**
**Date sent to parties: 21 August 2019**