EMPLOYMENT TRIBUNALS

Claimant: Mr B Suwanmongkol

Respondent: Knotts End Pub Company

Heard at: London South via CVP **On: 26, 27, 28 and 29 April 2021 & in chambers on 30 April 2021**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: In person, supported by Ms A Daymond, HR Consultant
For the respondent: Ms Nicholls, Counsel

JUDGMENT WITH REASONS

Decision:

The claim for constructive unfair dismissal contrary to S. 94/95/98 Employment Rights Act 1996 is not well founded and is dismissed.

Reasons

Claim, appearances and documents

1. This was a claim for constructive unfair dismissal under section 94, 95 and section 98 of the Employment Rights Act 1996 ('ERA').

2. The claimant was represented by Ms Haymond, an independent HR consultant, on a pro bono basis. The respondent was represented by Ms Nicholls, Counsel.

3. There was an agreed bundle of documents running to 295 pages. The Tribunal heard evidence from the claimant and from five witnesses for the respondent: Mr Lloyd Willis, former Operations Manager, Ms Hayley Connor, Head of People and Learning for Brewhouse and Kitchen Ltd (owners of the respondent), Simon Bunn, Managing Director of the respondent, Andy Spencer, former Operations Director of Brewhouse and Kitchen Ltd and Ms Giordana Annabel, Recruitment Manager for the respondent. The Tribunal did not hear

from Ms Christine Pugh, former Accounts Manager for East Street limited (transferor – see below). The respondent elected not to call her.

4. There had been a Case Management Hearing on 10th of July 2019 at which the case had been listed for a full merits hearing. At that Hearing, the breach of contract claim for notice pay was withdrawn as was the claimant's personal injury claim because the Tribunal had no jurisdiction to hear it. The Full Merits Hearing was relisted to be heard in November 2020 when the hearing did not go ahead due to a lack of judicial resource. Witness statements had been exchanged before the Hearing in July 2019.

5. There was discussion on day one about whether the claim included a claim under the TUPE Regulations, more specifically under regulation 4 (9), or whether this was only a claim under S.95/98 ERA 1996 i.e. ordinary constructive unfair dismissal. The list of issues, which were agreed, made no express reference to a claim under TUPE and the Case Management Order expressly said the claim was under section 98 ERA only. This was noted as being agreed and was a Hearing at which the claimant's representative was present. Following further enquiry of the claimant's representative by the Tribunal, she agreed that this was the case. The relevance of TUPE was context and background only. There was no claim under the TUPE Regulations. The list of issues are appended to this Judgment.

6. There was also discussion about additional disclosure mainly by the respondent which had been served a few days before the hearing was to commence. The claimant's representative did not did not object to the additional disclosure or its relevance but said that the claimant would need some time before being questioned on any of the documentation. Indeed the claimant's representative said the claimant had spent some time over the weekend looking at the additional disclosure.

7. There was also a live issue of jurisdiction before the Tribunal in relation to the effective date of termination. The claimant asserted this was 26th of August 2018 i.e. that he had resigned on 28th of July with notice. The respondent was asserting that this was 30 July 2018 when the claimant's employment was ended summarily with a payment in lieu of notice to follow. If it was the latter, the Tribunal claim presented on 27th of November 2018 was out of time by one day. It was agreed that early conciliation had commenced on 8 August 2018 until 5 September 2018 i.e. 28 days.

8. The claimant was also applying to adduce additional witness evidence. This was a health and safety report from an expert. The claimant had written to the Tribunal in March 2021 about this but there had been no adjudication. Following a brief adjournment to allow the respondent to take instructions, the application was strongly opposed. The respondent denied the evidence was of an expert witness or that it was relevant. The respondent said it was essentially a commentary on the respondent's evidence. The Tribunal had not seen this report and thus asked the respondent's counsel to provide the Tribunal a copy. At the same time it appeared that the Tribunal had an out of date bundle and thus an up-to-date bundle needed to be provided too.

9. The Tribunal decided that the best use of its time having regard to the overriding objective, was to spend the rest of the day reading the witness statements and the documents referred to. The case was to resume at 10.00am on day 2 when the Tribunal would first deal with the jurisdiction argument as the effect of this was that if the Tribunal had no jurisdiction, there would be no other claim before the Tribunal and that would be the end of the case. If the Tribunal decided that it had jurisdiction, it would then announce its decision on the additional witness evidence and then proceed to hear the case. The claimant was asked if he wished to give evidence in relation to the jurisdiction argument but it was confirmed that this would be dealt with via submissions only.

Jurisdiction

10. The claim form was presented on 27 November 2018. Early Conciliation took place between 8 August and 5 September 2018.

11. The Tribunal noted the claimant resigned on 28 July 2018. It was not altogether clear if he was doing so with notice or instantly/with immediate effect. However, the claimant did state at the end of this email that he was unable to work his notice due to his doctor's instructions (this was in relation to his asserted back injury) and would be submitting further sick notes to this effect. It is unlikely he would think he needed to do this if it was a resignation with immediate effect.

12. On 30 July 2018, the respondent acknowledged the claimant's resignation. The respondent said it was accepting the claimant's resignation and then said:

"*Should you choose to proceed via ACAS (the Tribunal's emphasis) we will pay your notice and outstanding holiday to you on 10th of August*"

13. On 1 of August 2018 the claimant stated in his email to the respondent that he would await his contractual notice and holiday pay and that he would be instructing ACAS and pursuing his claim.

14. In response, on 1 August 2018 the respondent said it would process the claimant's notice and holiday pay to be paid on 10 August via payroll.

15. From the above sequence of events, the Tribunal concluded that the claimant did resign with notice in accordance with his contract of employment. This required a months' notice albeit ambiguously worded in relation to an employee's notice to the employer. Strictly this would not expire on 26 August but on 28 August 2018.

16. However, the Tribunal considered whether the effect of the respondent's email of 30 July 2018 was to propose an agreed variation to the claimant's notice period/ termination date with a payment in lieu of notice to follow on 10 August 2018. However, the respondent's email was qualified and conditional on if the claimant chose to proceed via ACAS. To the extent there was any ambiguity about this, it was construed against the respondent.

17. That was not confirmed until 1 August 2018 when the claimant said (without objection) he would await his contractual notice and holiday pay and that he would be instructing ACAS and pursuing his claim. It was in response to that communication, also on 1 August 2018, that the respondent said that the notice pay would be processed and which the Tribunal concluded was the point at which the claimant's employment was terminated.

18. The claim was thus in time and the Tribunal had jurisdiction.

Report of Mr Sewell

19. This report was sent to the Tribunal on 8 March 2021. The case had been originally set down for 10 July 2019 by which date witness statements had been exchanged. The case was then re-listed for five days in November 2020.

20. The application to adduce this evidence was thus made considerably late within the timeline of these proceedings.

21. It was opposed by the respondent for reasons set out in the respondent's email dated 18 March 2021, essentially because the report which was about the health and safety aspects of the claimant's role and the injuries he says he sustained was not considered to have relevance to a constructive unfair dismissal. Further, the respondent raised issues of timing and the evidential impact as witness statements had been exchanged.

22. Whilst there had been no adjudication on the application before the commencement of the Hearing taking place now, it was still prejudicial at the point at which it was made as it would have required a review of the respondent's witness statements exchanged to date and further questioning of the claimant and an additional witness. In the light of the claimant's predicted cross examination of the respondent's witnesses being at least 2 days on a current estimate, without factoring in CVP, there was a risk of the Hearing not completing within the allocated time on the third listing of this case.

23. Moreover, in the Tribunal's view, the nature of the 'report' read as a series of questions being asked of the respondent's witnesses about their evidence – like a written cross examination. The claimant was not prejudiced by putting relevant questions to a witness if required. It was also the case that the report was written with the claimant's alleged injuries caused by the alleged health and safety shortcomings in mind – that was express from the opening paragraph, which was potentially relevant to a personal injury claim not within the Tribunal's constructive unfair dismissal forum. The context of the on-going injury was also said in the claimant's submissions to the Tribunal.

24. In pursuance of the foregoing analysis, it was not in the overriding interest in dealing with cases fairly and justly (to avoid delay and expense and to maintain proportionality) to admit this evidence.

Relevant Findings of fact

25. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

26. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

27. The claimant was employed by East Street (Horsham) Ltd ('ESH') which operated a bar and restaurant known as 'Wabi'. The claimant's employment commenced on 8 May 2015. The claimant was a Bar Manager. He had previously worked at TGIs.

28. The claimant's employment transferred to the respondent pursuant to the TUPE regulations 2006 on 29 May 2018. The claimant received a measures letter dated 25 May 2018, following a pre-transfer meeting on 22nd of May 2018.

29. At the pre-transfer meeting, the claimant was informed that in the respondent's business, cocktails were not part of its core offer (paragraph 8 of Ms Connor's witness statement). Under cross examination, the claimant agreed this was said, but also stated that he realised that brewing beer was not the direction of his career, it was not similar to mixology (cocktails). The claimant was also taken to a face book post (page 46 (i) outside of the main bundle) in which he appeared to be intimating a desire to leave upon the transfer. He said about the last night at Wabi:

"…*this last weekend is a special one as it marks the end of possibly my bar managing career as I will pursue to find another passion, hopefully will do something with cats as cats are nice…"*

30. The claimant's contract of employment was at pages 42 to 46 of the bundle. In addition to the claimant's salary, ESH had a Tronc system whereby service charges, tips and gratuities were paid separate from the claimant's salary for tax efficiency reasons. No fixed amount was stated in the contract, neither was any amount guaranteed although in clause 6 it was stated:

"*The company will not underwrite [Tronc] however a gross annual amount of £4000 per annum is expected*"

31. The claimant was informed that the respondent did not have a Tronc system. The claimant raised a grievance in relation to this as he felt that he would be financially worse off as a result of the transfer which he did not think was acceptable. He estimated that the effect on his pay will be approximately £7000 per annum (gross). This was at page 49 of the bundle.

32. A grievance hearing was arranged which took place on 4 June 2018. This was chaired by Mr Willis with Ms Connor present too. The minutes of the meeting were pages 57 to 58 of the bundle. There was no dispute about the accuracy of the minutes.

33. The claimant was accompanied at the meeting by Mr Gillesson. During the hearing, the claimant was asked to put a value on the Tronc payments. He said this would be between £300 and & £600. He said his P60 showed gross earnings in total of £31,000. It was not disputed that the sums were variable, or that when there was no custom, nothing would be paid. The example of a fire outbreak (actual) at the premises was used at the hearing. Ms Connor requested to see 12 months payslips. The claimant was asked/expected to work whilst his grievance was being resolved.

34. On 5 June 2018, the claimant emailed Ms Connor saying he would send on his P60 and payslips in due course. He also objected to travelling to London and Portsmouth to undertake training because of the travel required (page 59). In response, Ms Connor said the claimant was expected to do the travel but she agreed to consider 2 hours of travel time within his contracted hours.

35. Also on 5 June 2018, Mr Willis asked the claimant to report for work at 10.00 am at the Horsham site to clear and clean the site and prepare useable items for storage and to remove unwanted and defunct items for which a skip would be arriving on site. This needed to happen before the fit team could commence the renovation/refurbishment (page 61).

36. On 4 June 2018, Ms Connor had emailed Wabi accounts to seek a payroll schedule of what had been paid out to the Wabi team in the last 6 months. This was provided on 6 June 2018; in the response, it was stated that the claimant had sought his payslips too.

37. The claimant responded to Mr Willis's email of 6 June 2018 about reporting for work saying he had been in hospital (reasons were not given) and would be back around 5.00pm/6.00pm and he would be available to work from 10.00am the following day (7 June 2018). He also said he was willing to travel to London for training provided the travelling time and work were within his 48 hours (page 67). The Tribunal noted that 2 hours of travel (going towards his contracted hours) had already been confirmed by Ms Connor.

38. Mr Willis responded to the claimant's email and said he could meet him at the site around 5.00pm/6.00pm and brief him on requirements for the site. He said the site needed to be cleared by Monday and he was looking to see if 'Matt' and/or 'Magda' could assist him too. In relation to the site clearance requirements, a detailed summary of requirements had been set out by Mr Bunn on 3 June 2018 with a budgeted allowance of 30 hours. This email was subsequently forwarded to the claimant by Mr Willis on 8 June 2018 (pages 71 (iv) to 71 (vi)). In summary the tasks were:

    - Drink stock was to be removed from the cellar/bar to the barn

- Perishable/freezer food stock was to be disposed of, dry food to be stored
- Glassware was to be packed and stored in the barn
- Small machinery ice crushers/blenders were to be packed up
- Office papers and equipment including filing cabinets was to be moved to the barn
- Large items were to be left in the kitchen
- Clean down the pub
- Sweep the garden
- Place the rubbish in the skip

39. Mr Bunn explained in oral testimony that the premises had been left in a very unclean state following the party on the last night of Wabi's trading. In his witness statement, Mr Bunn said there was no requirement for heavy listing. Further, in response to Tribunal questions, he confirmed that the maximum weight of any pack of drinks or a box would have been about 5 kg. This evidence was accepted.

40. The claimant did not provide any evidence of the weight of any item he actually lifted. The photographs the Tribunal was taken to, did not give any insight in to the specific weight of any item.

41. The claimant was unable to meet Mr Willis on 6 June 2018 as he had left the hospital late – he disclosed that he had been with his grandfather who had late stage cancer, but he confirmed he would be on site the following morning to help clear the site.

42. The claimant was then instructed to attend the Highbury site of the respondent on 7 June 2018 at 12.00pm, to collect the keys to the Horsham site and to receive detailed instructions with regard to the site tasks. (Mr Bunn explained under cross-examination that at that time there were only one set of keys). He also was to collect boxes which Mr Bunn had ordered, which ultimately he had to collect from Mr Bunn's car which was parked 2 miles away. The claimant contended that this was an unreasonable request. The Tribunal found it was, as a one off request, a reasonable management instruction. The claimant was being paid and not otherwise expected to work and it was necessary to get access to the site.

43. The claimant also contended that Mr Bunn had confirmed that the claimant would be paid his mileage for this trip. There was an expenses policy in the bundle but the Tribunal found the claimant was not directed to it. The Tribunal found however, a simple enquiry of HR would have revealed the claimant needed to submit a claim, there was nothing unusual or irregular about that. It was difficult to envisage how Mr Bunn, the Managing Director would do this on the claimant's behalf as it was not an expense of his for which he would be making a declaration.

44. The claimant emailed Mr Willis on 8 June 2018 stating that he planned to have all the cleaning/clearing done by Monday or Tuesday, he had not been able to get hold of Magda yet (to assist him) but he would try her later. He also

said he had pulled his back but that it "*should not be a problem by tomorrow*". He said he was going to pack up the stuff and label it.

45. On the following day, 9 June 2018, the claimant sent 3 images of the site (pages 71 (viii) to (x). He said all the alcohol from the bar and the restaurant and the glassware was in the shed, labelled and boxed. The second cellar had been cleared and the office too. He said he would need assistance on the following day and he had reached his "*limit with his back*".

46. The claimant enquired about his grievance outcome on 9 June 2018.

47. On 10 June 2018, Mr Willis emailed the claimant enquiring if he had been able to get hold of 'Matt' to help him to clean/tidy up the site before the builders were due to go in. He acknowledged he had seen the images and that there was 'a lot' more to do. He asked the claimant to get hold of Magda to assist him (that day) as she was unable to assist him on the following day. He also enquired of 'Tim' to assist by copy on his email.

48. On 11 June 2018 Ms Connor emailed the claimant explaining that an outcome to the claimant's grievance had not yet been reached as further detail was required around the claimant's P60 and Tronc payments.

49. On 11 June 2018, the claimant emailed Mr Willis explaining that he had dropped a box and hurt his back and was going to the doctors and he was struggling to walk. He further explained that most of the clearing/tidying up had been done apart from some stuff that needed to go in the shed, one box in the restaurant and some pots and pans. He explained that he had told Magda to also leave the site as he did wish her to work alone. The Tribunal inferred from this that on that day Magda had been assisting him. The claimant was also assisted by Mr Willis in loading the skip (which was only on site for 30 minutes). The claimant also accepted that Mr Willis had assisted him for about 3 hours on site on the third day, which the Tribunal found meant 10 June 2018.

50. On 12th of June 2018 the claimant emailed Ms Connor, expressing his disappointment that there had not yet been an outcome to his grievance and that it was not his responsibility to provide further evidence in relation to his earnings. He said he was intending to approach ACAS in the next 24 hours. Ms Connor acknowledged this email and said that Mr Willis was still investigating the grievance and hoped to respond in the next 48 hours (page 76).

51. Also on 12th June 2018, the claimant emailed Mr Willis explaining that following his visit to the doctor he had been given pain medication, further that he would be in bed for a while. He offered her for his partner to drive to the site to provide the keys. Mr Willis asked for the claimant to return the keys (as offered).

52. On 12 June 2018, the claimant was signed off work for two weeks for low back pain. The fit note said this was due to heavy lifting at work (page 79).

53. On 14 June 2018, Ms Connor emailed the claimant saying that she hoped that there could be a resolution to the claimant's grievance by the end of the day but stated that a summary of the claimant's earnings were still needed from the previous year and asked if he had his P 60 (which she had previously mentioned). Ms Connor said that she would try to get this from the seller as it did not form part of the due diligence. Rightly or wrongly, the Tribunal found that this was because there was a separate P60 in relation to the Tronc master as distinct from Wabi (East Street (Horsham) Ltd).

54. Following an exchange of emails with Wabi accounts, Ms Connor was sent a copy of the claimant's P60 on 14 June. It was stated in the email that this had already been sent to the claimant (page 81). The P60s were at page 82 & 83. It was not clear if both P60s were sent by Wabi. The P60 from Wabi show earnings of £24,588 and earnings from 'CP Tronc services' as £7730.

55. The Tribunal was not specifically taken to the breakdown of sums earned between 2016 and 2018 on pages 84 and 85 but these did show that the claimant had earned on average £576 per month in the year 2018 and £676 per month in 2017, and £774 per month in 2016 in service charge/tips/gratuities.

56. Ms Connor sent a text message to the claimant on 15 June 2018 upon being informed that he was off sick with a back injury. Ms Connor was offering to meet with the claimant over a coffee. Although the text message in the bundle was a poor copy, the Tribunal accepted Ms Connor's evidence in paragraph 18 of her witness statement in this regard and this was not disputed. In response, the claimant enquired about what the meeting was about as if this was to be a grievance meeting, he would wish to be accompanied and he hadn't yet obtained all the payroll information. In response to that email, Ms Connor said she only wished to meet with the claimant informally to discuss his return to work and it was not a grievance meeting and went on to say " if you are still poorly of course I do not expect you to meet me" (pages 86-87).

57. Subsequently on 19 June 2018 the claimant was provided with an outcome to his grievance which was at pages 89 to 91.

58. The grievance outcome found that the amount of the Tronc varied each month depending on how much money was collected in service charge; where there was no service charge for example if there was a closure, no Tronc was paid as no service charge would have been received; the Tronc was paid separately to payroll and distributed by a Tronc-master separate to the company; the claimant had been receiving these payments since starting at Wabi; the Tronc system would be used to cover till shortages affecting the amount paid to the team; Tronc was referred to in the claimant's contract of employment but stated to be not underwritten meaning not guaranteed.

59. With the above findings in mind whilst the respondent accepted that there had been a custom and practice of paying Tronc, the amount varied depending on trading levels and guests and whilst there was an expected amount there was no guarantee about any sum being payable.

60. In relation to the claimant's earnings of approximately £31,000 in the previous year this was made up of salary, Tronc and bonus. The claimant's contract stated his eligibility to receive payments from Tronc, but these were not underwritten and an expectation amount of £4000 was referred to. The amounts payable monthly varied.

61. The respondent confirmed that it did not have a Tronc system, but it did offer service charge and tips. The outcome letter went on to state that managers could not be awarded service charge and tips or a higher amount of service charge and tips than team members. Whilst this was ambiguous in the Tribunal's view, the proposed resolution to the claimant was not ambiguous. The respondent presented two options.

62. Option one what claimant to retain his salary of £22,500 and have the right to receive cash tips and service charge, distributed fairly with the other team members of the shift. In addition the claimant would be entitled to a bonus of £2040 per year. This was an exception for the claimant, as the respondent's managers were not ordinarily entitled to receive tips/service charge.

63. Option two was that the claimant's salary would be increased by £4,000 to £26,500 per annum together with a bonus of £2040 per year. There would be no tips and service charge with this option but there may be an opportunity to earn additional money through additional incentives throughout the year.

64. The claimant was also told that there would be fantastic development opportunities which would allow the claimant to progress to the next stage of his career and thus increase his remuneration, potentially, substantially. The Tribunal found that the inclusion of this paragraph was evidence of an intention to try and retain the claimant in employment.

65. In relation to the bonus element aspects of either options the Tribunal found that this was not in contention between the parties.

66. In oral testimony, the claimant indicated that he believed his ability to earn through the respondent's tips and service charge would be less than what he had been at Wabi. He said that Wabi was a high-end bar with table service and a service charge of 12.5%. The respondent's evidence about its offering was that a 10% service charge would be payable on tables of 6+ guests and distributed through the respondent's 'Polaris' system.

67. In addition, cash tips were pocketed by the individual serving a guest which may be shared with another at the discretion of the individual. The respondent also said that most of this additional income would be via cash tips.

68. The Tribunal did press the respondent's witnesses about how much could be earned through the respondent's scheme on a comparative assessment but the witnesses were unable to give any numeric value because of the variable nature.

69. The claimant was given a right of appeal against the grievance outcome.

70. On 22nd of June 2018, Ms Connor emailed the claimant asking if he was feeling better saying she was just touching base as he was due to return from his sickness absence on the following Tuesday. She enquired whether the claimant would be able to meet with her on Tuesday morning.

71. In response, on 25 June 2018, the claimant said he was still struggling to sit or walk and he intended to arrange a further doctor's appointment. He said he would email Ms Connor when he would be fit to return to work.

72. Separately and on the same day, the claimant emailed Mr Willis explaining that he was still unwell because of his back and that his grandfather had passed away. He also explained that he was unhappy with the grievance outcome and wished to appeal and he enquired about next steps in this regard.

73. Mr Willis responded to the claimants of the following day (26th of June), firstly expressing his condolences for the loss of the claimant's grandfather. He also asked for additional sick notes so that these could be put on the claimant's file. The claimant was also directed to Mr Andy Spencer, Operations Director, in relation to his desire to appeal with his reasons (page 95).

74. The claimant subsequently appealed the grievance outcome. This was on page 96 of the bundle. Essentially the claimant was maintaining that he had a right to paid what he had been over the past three years or that the offer should be closer to that.

75. A further fit note was received dated 27th of June 2018 signing the claimant off for 2 weeks because of his back.

76. An appeal hearing was set down for 11 July 2018, to be heard by Mr Spencer. Upon the claimant's request, the venue was changed to Horsham from London as the claimant did not wish to drive or sit on a train for a long journey because of his back. The emails were at pages 100 to 101.

77. The appeal hearing proceeded on 11 July 2018. The claimant was not accompanied . Ms Connor was in attendance to take notes. During the course of this hearing, Mr Spencer expressed his view that Tronc could never be a guaranteed income and in response to a question whether the claimant's contract stipulated how much, the claimant said that it was "expected to but not guarantee". In addition, at this hearing, the claimant also said that working solo at the site was a health and safety risk. This was in relation to the period he was clearing/cleaning the site.

78. The grievance outcome was conveyed to the claimant by letter dated 18th of July 2018. The appeal was rejected as Mr Spencer considered that the offers which had been made were fair and in line with TUPE regulations. Mr Spencer also commented that whilst there had been not much consultation by the seller, he felt that there had been a fair consultation since 22nd of May 2018 by the respondent. In relation to the issue about having to work on his own whilst clearing/cleaning the site, Mr Spencer said that this was outside of the terms of

this original grievance and he recommended that the claimant pursued a separate grievance in this regard. In relation to that aspect of his decision, the Tribunal found that that was a reasonable and proper way to respond. In oral testimony, Ms Connor commented that had this been raised during the original grievance hearing or if the issue had been linked to his "pay" grievance, it might have been reasonable to deal with both issues together but neither of these points applied. Her evidence in this regard was accepted.

79. The claimant subsequently resigned on 28 July 2018. His resignation letter was at page 107. Before resigning, the claimant had attempted to call Ms Connor and the Tribunal found, Mr Willis. There were screenshots of outgoing calls on 23rd and 24th of July 2018 in the bundle at pages 106 (i) and (ii). Whilst the Tribunal accepted that these calls were made, the Tribunal noted in relation to the call to Ms Connor that it was a call of two seconds duration. The Tribunal could not be satisfied that this would show as a missed call if for example it had directed to voicemail because of the duration.

80. In the claimant's resignation letter, he cited his reasons for leaving to be the ongoing dispute regarding his pay, the unresolved grievance and unacceptable appeal outcome, the unacceptable decision that he should submit a separate grievance in relation to his back, his loss of pay throughout this period and the failure to consult in relation to the TUPE transfer.

81. In relation to the claimant's loss of pay during this period, the Tribunal found that this was an assertion in relation to the claimant receiving SSP whilst he was off sick.

82. Following the claimant's resignation, at the end of August 2018, the claimant visited the respondent's premises and was asked to leave pursuant to a policy of the respondent to have a cooling off period in respect of leavers. It was not clear from the respondent's evidence whether there was a written or unwritten policy in this regard, but the Tribunal accepted that that was the reason the claimant was asked to leave.

Applicable Law

83. Under S. 95 Employment Rights Act 1996 ('ERA'), an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer's conduct.

84. The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606.*** This requires an objective assessment, having regard to all the circumstances.

85. The correct test for constructive dismissal was set out and established in ***Western Excavating v Sharp 1978 ICR 221*** as follows:

- Was the employer in fundamental breach of contract?
- Did the employee resign in response to the breach?
- Did the employee delay too long in resigning i.e. did he affirm the contract?

86. In ***Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*** it was confirmed that any breach of the implied term of trust and confidence is repudiatory.

87. ***In RDF Media Group PLC and another v Clements 2008 IRLR 207***, QB the High Court said as follows:

"*103. The burden lies on the employee to prove the breach on a balance of probabilities. This means, where the employer claims that he had reasonable and proper cause for his conduct, that the employee must prove the absence of reasonable and proper cause. Although the matter does not seem to have been decided expressly, I would hold on the basis of first principles that whether there is reasonable and proper cause must also be determined objectively; and the subjective intentions of the employer, though admissible in evidence, are not determinative of the issue.*

105. The test whether there is a breach or not is said to be a 'severe' one. In this regard it should be remembered that for an employee to become entitled to claim that he has been constructively dismissed on this ground, it is not enough to prove that the employer has done something which was in breach of contract or 'out of order' or that it has caused some damage to the relationship; there is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can fairly be regarded as repudiatory of the contract of employment, that is to say, so serious that the employee is entitled to regard himself as entitled to leave immediately without notice."

Conclusions and analysis

88. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and the applicable law to the issues including the burden of proof. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

89. The Tribunal has already found that the claimant resigned on 28th of July 2018 but his employment terminated on 1 August 2018.

90. 2.3.1 – "Pay issue" - the claimant relied solely on an alleged breach of the implied term of trust and confidence and in relation to the pay aspect of this claim, his allegation was that there was a failure to offer equivalence of pay following the transfer of his employment. The Tribunal did not consider that the second limb of this issue – that there had been a failure to compensate the claimant for his loss suffered in consequence could be made out as from the

claimant's transfer to his resignation, the site was not trading and thus in any event there would be no service charge/tips payable to him.

91. In relation to the core pay issue, the Tribunal noted that the claimant's assertions were rooted in his primary allegation that over a three-year period he had earned a certain amount through Tronc, that this had become a custom and practice and that he should receive an equivalent amount, presumably on a net average basis going forward. Whether or not this would have met the requisite certainty to constitute an implied term by custom and practice, the fundamental problem with this assertion in the Tribunal's conclusion, was that it would be inconsistent with the express term in the claimant's contract which provided a benefit which was not guaranteed and which at best provided an indication of what the claimant might expect to earn only. In ***Bluestones Medical Recruitment v Swinnerston UK EAT 0197 2018***, HHJ Eady referred to "*the well-established principle of contract law that no term should be implied whether by custom or otherwise, which is inconsistent with an express term of the contract unless an intention to vary the relevant contractual term is established."* [the latter was not part of the claimant's case].

92. Although this was not a case founded on an alleged breach of implied term through custom and practice it's analysis remained central to the Tribunal's objective assessment as to whether there had been a breach of the implied term of trust and confidence.

93. In addition and on a complete analysis, the Tribunal concluded that in relation to the two options presented, viewed holistically, there was no breach of the implied term of trust and confidence. Option one essentially was replicating the claimant's pre-transfer position. The suggestion that the claimant would earn less through tips and service charge going forward was speculation. There was no evidence before the Tribunal of actual or projected earnings for example from other sites. There was no appreciation of what impact there may be in having greater cash tips in comparison to service charge – the respondent's evidence was accepted in this regard and was not challenged. There was no evidence of what volume or footfall might be expected on a comparative basis.

94. In relation to option two, the Tribunal concluded that increasing the claimant salary by £4000 to provide a guaranteed income was potentially not detrimental to the claimant. In comparison, service charge and tips would not be received when the claimant was on holiday or when the claimant was sick or when the premises were not open. The likelihood of those occurrences were not remote or far-fetched. The claimant would be entitled to a minimum of 5.6 weeks holiday. The claimant had of course been sick for four weeks for example. The premises had also been shut down for refurbishment for 10 weeks and the Tribunal was also informed of an occasion when there had been a fire. These examples were used to illustrate the advantage of having a fixed amount of earnings in this regard regardless of whether service charge and tips are actually received. In addition, the Tribunal noted that the figure of £4000 was the same figure as what had been expected to be received as set out in the contract of employment. There was thus a reasonable and proper rationale for it.

95. The Tribunal concluded that the respondent's cash tips were in addition to service charge and the Tribunal was not satisfied that this was the case at Wabi. Just before submissions, the claimant's representative indicated that cash tips were not part of Tronc at Wabi, but the claimant had given no specific evidence in this regard and this was not consistent with paragraph 5 of his witness statement.

96. Thus, the Tribunal concluded the respondent's conduct was not calculated or likely to destroy or seriously damage trust and confidence, alternatively it had reasonable and proper cause to proceed in the way it did.

97. 2.3.2 to 2.3.5 (2.3.8.1 & 2.3.8.2), 2.3.8.18 – the pay grievance/additional grievance - the Tribunal concluded that the respondent followed a reasonable and proper process in relation to the claimant's grievance. There was no unreasonable delay. There were reasonable and proper enquiries in relation to the claimant's P60 from Tronc. Whilst the claimant criticised the insufficient due diligence in this regard, the Tribunal noted that the earnings from Tronc were not paid by East Street (Horsham) Ltd, but by a separate Tronc master and that there was a separate P60. In any event, the grievance was heard on 4 June 2018 and the outcome was sent on 19 June 2018. A period of two weeks was not unreasonable or improper particularly where enquiries were needed. The claimant was accompanied at the grievance hearing and was given the right to be accompanied at the grievance appeal hearing. The Tribunal did not follow the claimant's assertion, if any, in relation to impartiality. The claimant referred to Mr Bunn being acquainted with Mr Gillesson, but the Tribunal did not understand how this tainted the process. Although he was the Managing Director, he was not a decision-maker and based on the offers made to the claimant and the expressed intention to retain his employment, the Tribunal concluded that the respondent dealt with the grievance in a reasonable and proper way. The Tribunal has already found that it was reasonable and proper to separate the pay grievance from the working on site alone grievance. To the extent that the claimant's dissatisfaction was with the substance of the outcome, that was not an unresolved grievance. It had been resolved but the claimant did not accept the outcome.

98. Thus the Tribunal concluded the respondent's conduct was not calculated or likely to destroy or seriously damage trust and confidence, alternatively it had reasonable and proper cause to proceed in the way it did.

99. 2.3.6 & 2.3.8.14– loss of pay – the Tribunal has already concluded that there was no actual loss of pay consequent on non-receipt of Tronc payments from the date of the transfer to the date of the claimant's resignation because the site was closed for refurbishment. In relation to losses consequent on the claimant's alleged work-related injury, that was not a claim that could be made without establishing causation/negligence which could only form part of a personal injury claim which was not before the Tribunal. The respondent's payment of SSP whilst the claimant was sick, was not asserted to be a breach of any policy and thus it was paid based on reasonable and proper cause.

100. Thus the Tribunal concluded the respondent's conduct was not calculated or likely to destroy or seriously damage trust and confidence, alternatively it had reasonable and proper cause to proceed in the way it did.

101. 2.3.7, 2.3.8.5 & 2.3.8.6, 2.3.8.8 to 2.3.8.10, 2.3.8.12 & 2.3.8.13, 2.3.8.17 – accident/working alone/no risk assessment/pressure to return/no medical, welfare or OH support - the Tribunal noted that none of the respondent's witnesses were questioned specifically on the regulations cited by the claimant including RIDOR 2013, Management of Health and Safety at Work Regulations 1999 and the Manual Handling Operations Regulations 1992. The claimant had not made clear his injury had been work-related until his email of 11 June 2018 which was then noted/recorded on his sick certificate on 12 June 2018 and his email of the same date. Ms Connor, in HR, contacted the claimant on 15 June 2018. On 8 June 2018, the claimant had also referred to his back but he said he should be okay in the morning but there was no indication that this was a work-related injury. Whilst the Tribunal recognised that this was not recorded as an accident at work at the time, the Tribunal concluded that Ms Connor was intending to have a return to work meeting with the claimant before deciding next steps in relation to the processes including whether or not there was a requirement to refer to occupational health. On that basis, this was not conduct calculated or likely to destroy or seriously damage trust and confidence, alternatively, there was a reasonable and proper cause for her approach. The non-completion of an accident at work form/notification was not conduct likely to *seriously* (emphasis added) damage trust and confidence.

102. In relation to working on the site, the Tribunal was troubled by the claimant's case in relation to this. The respondents were cross-examined with casual and interchangeable references to the site being a building site or a site being refurbished or a site the claimant was asked to clear/clean. There was a material difference in between being asked to clear and clean a site of rubbish following a closing party on the last night of Wabi's trading and to pack up and label drinks and glassware in the main and being asked to work on a building or construction site. The respondent was criticised for assuming that the claimant had received manual handling training whilst at Wabi and in his previous employment at TGI but the claimant did not say in evidence that he had never received such training. He had been on the site for approximately 3 years, he was the bar manager. In addition, the claimant accepted he would need to deal with the delivery of stock once or twice a week thus it was not plausible that the claimant had been doing so without having had any training on manual handling. He would thus have lifted and moved several boxes/crates, several hundred times. It was open to the claimant to say he did not have any training to lift boxes but he did not do so. The Tribunal accepted Ms Connor's evidence that the claimant had told her he had completed a level 3 hospitality supervisor's certificate which would have included health and safety. This was not challenged by the claimant.

103. The Tribunal accepted that the claimant undertook most of the clearing/cleaning work. He was however assisted by Mr Willis when the skip was to be loaded. The claimant also accepted that Mr Willis had assisted him for around three hours (paragraph 24 of the claimant's WS). He was also

assisted by Magda. The respondent did attempt to get other people to assist and although the claimant was asked to engage others too, this did not materialise. The Tribunal concluded that it was reasonable for the claimant to be agitated that he had to do so much of the clearing and cleaning on his own but without more, this was not conduct on the part of the respondent calculated or likely to destroy or seriously damage trust and confidence. He worked alone for about 2 days. It would have been dull and monotonous but he was not otherwise being asked to work and it was clearly temporary in nature.

104. The site had been visited by management and considered to be a mess. The Tribunal did not consider that the respondent acted without reasonable and proper cause in not undertaking a risk assessment when all that was required was, primarily, for the site to be cleared up of its rubbish and drinks and glassware packed up. There was a lot of work to do, that was acknowledged by respondent but the management instruction to do so was reasonable and proper. The Tribunal was not deciding whether in fact there was an injury caused on site by reason of an asserted breach of duty of care.

105. There was no pressure put on the claimant to return to work. Ms Connor had reached out to the claimant when she had found out that he had had an injury and subsequently enquired of him to have a meeting before he was scheduled to return to work. The claimant was not asked to do any work on the site after his sick certificate of 12th of June 2018.

106. Thus the Tribunal concluded the respondent's conduct was not calculated or likely to destroy or seriously damage trust and confidence, alternatively it had reasonable and proper cause to proceed in the way it did.

107. 2.3.8.3 – failure to compensate for travel expenses - the Tribunal concluded that this was a very weak allegation. It would or should have been apparent to the claimant, that travel expenses are reclaimable by an employee who has incurred an expense. Even if the claimant was unaccustomed to doing so, he could and should have enquired of HR as to how he should go about doing so especially as Mr Bunn had already agreed that he was entitled to claim the travel in principle. There was little more to say on this assertion. There was no breach of the implied term of trust and confidence.

108. 2.3.8.4 & 2.3.8.11 – requiring the claimant to undertake unreasonable heavy tasks – the starting point of the Tribunal's analysis was that the claimant was not instructed to undertake any heavy lifting. Mr Bunn's email dated 3 June 2018 did not set out any requirement to lift heavy items. In fact he said that the large items were to be left in the kitchen. In evidence, in response to Tribunal questioning about the approximate weight of crates or packs of drinks, he estimated that these would be up to 5 kg. The claimant did not on any occasion at the time indicate that he was being asked to lift anything which was excessive and there was no reason why he could not have set said certain activities could not be undertaken because of the weight or left alone any items he thought required more than one person. There was some inherent responsibility on the claimant in this regard. The tone and language of his emails indicated that all the tasks that he was being asked to do were

reasonable and achievable. In his email of 9 June 2018, he had set out what he had done so far on that day and his complaint was about the volume of work not the weight of items. His resignation letter did not cite anything to do with heavy lifting.

109. There was also evidence from the pictures, that there was a trolley which could be used to transport boxes. There was no challenge to this evidence. There was also evidence of a lift in the premises which could be used to transport stock between the cellar and the ground floor and vice versa. The claimant did not give evidence about the existence of a lift or not, or, if there was one, why it was not used or could not be. Mr Willis was clear that there was a lift; Mr Spencer was not sure; Mr Bunn believed there was a lift. The Tribunal was satisfied there was a working lift which could have assisted moving some of the crates of drink - after all that must have been its purpose.

110. A number of items listed in paragraph 2.3.8.4 in the list of issues were not, on any reading, examples of items which were heavy - for example loose wood, telephone equipment, toilet rolls, floor polisher, wet vax, dust pans, mops, dustbins and food stock. There was no reference in the claimant's witness statement to what specific items of weight and as to how heavy they were, that he was being asked to move.

111. The Tribunal concluded that there were no heavy items the claimant was required or asked to lift or move. That is not the same thing as saying there were no heavy items, just that the claimant was not required to do this. The Tribunal did not consider it necessary to define what was meant by heavy as the claimant had not at the time or in evidence stated what this might entail. Instead, the Tribunal had regard to Mr Bunn's evidence about the boxes or packs of drink being up to/approximately 5 kg.

112. The Tribunal refers to its earlier conclusions regarding the claimant's limited assistance – it was not conduct calculated or likely to destroy or seriously damage trust and confidence.

113. The Tribunal refers to its earlier conclusions above in relation to the sitework generally in relation to the issue about lone working and or health and safety risks. This was not a building or construction site. The Lone working policy of Wabi was about end of day working and for 2 people to be on the premises to lock up together. This was not, in the Tribunal's conclusion, relevant to cleaning and clearing a non-operational site. The other lone working policy in the bundle was not that of Wabi or the respondent.

114. 2.3.8.7 – long hours – the Tribunal concluded the claimant worked long hours because of his desire to impress the respondent/create an impression. The claimant said in evidence he was motivated to do this – he wanted to perform/to do the tasks expected of him**.** It was not a requirement or instruction of the respondent. The date reference period in relation to this issue was an error. The Tribunal concluded that the claimant was referring to dates on or after 8 June 2018.

115. 2.3.8.15 & 2.3.8.16 – Ignoring telephone calls/emails and falsely accusing the claimant of not communicating with the respondent – there was no or an insufficient evidential basis upon which the Tribunal could conclude that the respondent behaved in a way calculated or likely to destroy or seriously damage trust and confidence. There was evidence of 2 telephone calls one of which the Tribunal was not satisfied would have appeared as a missed call. The claimant did not advance a case in this regard. Paragraph 45 of the claimant's witness statement which referred to page 108 of the bundle (Mr Willis's email of 28 July 2018, *post*- resignation of the claimant) was not challenged. The respondent's witnesses were not questioned about the assertion that any or all of them had falsely accused the claimant of not communicating with them.

116. In pursuance of the above conclusions, the Tribunal concluded that the alleged conduct on part of the respondent was not calculated or likely, individually or cumulatively, to destroy or seriously damage trust and confidence.

117. In the light of the above conclusions, the Tribunal did not need to decide whether the claimant's activities in August and beyond, having regard to his own evidence regarding not seeing his career in the beer/brewery sector or otherwise, cast any doubt on his reason for resigning or, whether his sickness absence related to his back was exaggerated or not bona fide.

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Employment Judge Khalil

17 May 2021

Sent to the parties on:

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For the Tribunal:

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