EMPLOYMENT TRIBUNALS

Claimant: **Mr G Carter**

Respondent: **A B Hotels (Five Lakes) Limited**

Heard at: **East London Hearing Centre**

On: **21, 22 June 2021, 20 and 21 July 2021**

Before: **Employment Judge Lewis**

Representation

Claimant: In Person - with the assistance of Ms Walker
Respondent: Ms G Rezaie (Counsel)

JUDGMENT having been given orally and a written judgment sent to the parties on 26 July 2021, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following written reasons are provided:

REASONS

1. The procedural background and the summary of the case is set out helpfully in Ms Rezaie's written submissions in which she also largely sets out the relevant law. I also received helpful written submissions from Mr Carter. The issues I had to decide were identified at a Preliminary Hearing before Employment Judge Moor. This judgment deals only with those issues relevant to liability.

2. The Tribunal heard evidence from the Claimant and from Mr Andrew Gilbert and Will Boniface on his behalf; and from Mr Andrew Blyth and Ms Alice Humphris for the Respondent. I was provided with a joint bundle of documents. I have set out below my findings of fact in so far as they are relevant to the issues I had to decide.

Relevant findings of fact

Was the Claimant an employee of the Respondent within the meaning of Section 230 of the Employment Rights Act 1996.

3. The Claimant was paid on the provision of invoices which he provided at the beginning of every month, he was then paid at the end of the month. He was not ever paid as PAYE, he did not receive a P60 or a P45 and his terms of engagement described him as self-employed. The Claimant confirmed that he was responsible for paying his own Tax and National Insurance when asked to do so.

4. The Claimant was first engaged by the Respondent on 1 April 1995 for a fixed term of 12 months as Head Golf Professional. On 1 June 1995 he took over responsibilities for the day to day management of the sport shop at the golf resort. In the renewal of his contracts he was described as self-employed and required to invoice. He agreed an annual payment and invoiced in 12 equal monthly instalments. Within the terms of that agreement he was able to charge guests separately for golf tutoring and retain those fees, subject to providing an agreed number of hours of tuition each year to guests at the hotel at the direction of the General Manager. The Claimant was paid for 20 days holiday per year. He was provided with the Employee Handbook and had an Employee file.

5. His contract was renewed firstly for a further 12-month period in May 1996 then in May 1997 for two years, in May 1999 for a further two years, in July 2000 it was renewed for three years and then twice more for three years each. On 1 September 2009 the contract was renewed for four years. The contract from 1 September 2009 was at page 75 – 77 of the bundle. In 2004 the Claimant was provided with a job description for his role [105 – 106]. The documents contain various requirements of the Claimant including attendance at Heads of Department meetings, he was included in Heads of Department emails, he was responsible for staff training, ensuring compliance with health and safety, for keeping to budgets agreed with Accounts and the General Manager of the hotel. He ran the golf shop within the terms provided by the hotel, which set the budget. The purpose of the agreement was described as being to coordinate the golf operation at 5 Lakes Resort. The Claimant had responsibility for the shop and the golf operations, including the golf office. He was required to ensure that the shop and golf area were sufficiently staffed by either working himself or arranging for staff cover from hotel employees within the budget provided: this meant that the Claimant was required to work additional hours as and when the business dictated.

6. The agreement also provided that the Claimant was to represent 5 Lakes at external events [page 75] and that when he was doing so he was representing the hotel and should wear their logo on his clothing. He was required to be regularly present in the golf club and shop to welcome guests and members of the societies and to provide the complimentary golf lessons set at the required number of hours per year agreed in advance with the General Manager and as directed by him.

7. The Claimant's retainer was varied from year to year, he was also entitled to commission from the sales from the shop if that exceeded the set budgeted profit for the hotel.

8. From 14 March 2013 to June 2015, the Claimant was engaged as the Golf and Leisure Operation Manager. The Claimant says he reverted to the role of Golf Manager when he ceased to carry out this role in June 2015. The Respondent contends that he reverted to being a golf professional.

9. In the contract for the Golf and Leisure Manager dated 20 March 2013, the Claimant's pay was increased to £20,000 per annum, invoiced monthly pro rata and the contract was open ended requiring four weeks' notice for termination. All other terms and conditions were described as being unchanged.

10. I accept the Claimant's evidence that further he had fixed hours of work, he worked 45 hours a week. In the winter he worked 2 or 3 shifts per week in the shop as the payroll budget set by the hotel did not allow for more staff. I find that the Claimant was required to provide and always provided a personal service. I could not provide a substitute and was not able to sub-contract the service he was engaged to carry out.

11. The Claimant's only place of work for 25 years was Five Lakes Hotel. He did not work anywhere else during this time. His only time at other locations during working hours was for training and development as directed by the various General Managers and Hotel Managers. All of the training he attended in his years at the hotel was paid for by the Respondent.

12. The Claimant was not required or invited to invest in the business. There was absolutely no chance of him making a loss or being responsible for or having to a bear any loss that would be associated with a supplier or contractor. He was able to profit from his own good performance and received commission from the golf shop's successful results by being paid commission on several occasions. I find that this mirrors the arrangement with the Spa Manager who the Respondent does not dispute was an employee.

13. After the first national lockdown a decision as to when to reopen was made by the General Manager not by the Claimant and he was not provided with staff to work in the shop. As a result he worked 9 hour days for 13 days straight until the General Manager agreed to help him out.

14. The Claimant was paid the same monthly amount regardless of the number of hours he worked, he was paid holiday pay and was provided with a period of paid compassionate leave when his wife died in 2015. In August 2020 he was paid even though he was off work with ill health. The Claimant was included in a bonus scheme which was described in 2001 as payable at the Respondent's Director's discretion. He was subject to appraisal, his training needs were identified in the appraisal process and training was provided by the Respondent and paid for by the Respondent. He received a copy of the Employee Handbook in 2002. Throughout his time with the Respondent he received free staff meals and when the hotel was part of a larger chain, he received staff discounts throughout that chain. He was included in all staff events including Christmas holidays. He was also included in the organisational charts when he was the Golf and Leisure Manager (page 109 and 270). The Respondent provided the Claimant's business cards and name badge with the 5 Lakes logo, an office, telephone, all stationary including headed company paper, computer, printer and equipment to carry out his role as Golf Manager. He received the same office equipment as every other manager employed by the Respondent. He had employed staff reporting directly to him. He had a number of appraisals which were recorded on the Management/Supervisory Appraisal form which was the form used for employed supervisors and managers.

15. The Claimant was eligible for IHG staff hotel rates together with food and beverage discount whilst the Respondent's hotel was a Crowne Plaza and a member of IHG. The use of this employee benefit had to be authorised by the General Manager. He was also eligible and enjoyed staff discounted rates when staying at Sopwell House, which is also owned by the Respondent and again had to be authorised by the General Manager.

16. Throughout his 25 years with the Respondent he was entitled to free meals in the staff canteen whenever on shift; he was always invited to staff parties, received staff Christmas gifts from the Respondent each year and attended the staff Christmas lunch most years. On the rare occasions that bonus payments were made to the management team he also received these.

17. The Respondent pointed to the fact that the Claimant provided his own liability insurance as indicating that he was self employed. I accept the Claimant's evidence that this came as part of his PGA Membership and was not something he had ever applied for separately it provided cover for his time on the golf course when he was training and playing golf. The Respondent also pointed to the fact that in his mortgage application the Claimant declared that he was paying his own Tax and National Insurance, and that he had claimed the Self-employment Furlough Grant for the period of furlough. I accept that the Claimant considered that he had no other choice as he was still being treated by the Respondent as self-employed at that time. I do not find his application for this grant to be conclusive. I accept that the Claimant had little option in the circumstances other than to apply for the furlough grant and to describe himself as self employed. I also find however, that by this time, he had already very clearly set out in September 2018 his assertion to the Respondent that he considered himself to be an employee.

18. In September 2018 the Claimant was asked to sign a new consultancy agreement and he declined to do so, at page 111 – 113 he sets out why the terms he was being offered were less favourable than those he had enjoyed up to that date. He specifically informs the Respondent that he considers he has for all intents and purposes been an employee for 23 years and disputes that he was a contractor setting out very clearly the reasons why he asserted that.

19. The Claimant received nothing in writing in response from the Respondent. The Respondent suggest that it responded to that detailed letter by holding a meeting. It is accepted the Claimant had a meeting with Ms Humphris, however I am satisfied that the Claimant was expecting Ms Humphris to respond to him after that meeting and she did not do so. There was a dispute as to whether she said that she would respond to him within a week: whether she said that or not Ms Humphris accepted that there was no response from her directly to the Claimant, she had assumed that Mr Morgan, the General Manager at the time, had responded to the Claimant. This was even though she accepted she was aware that the Claimant was still chasing for a response at some point in January 2019 because Ruby Knight informed her of this.

20. Much reliance was also placed by the Respondent on a document produced by the PGA and Mr Blyth's evidence of what he would expect a golf professional to do as a self-employed professional. Mr Blyth joined the Respondent hotel in November 2019. He had previous experience of working at golf resorts, including the hotel where the PGA was based, and he explained that in his experience most golf professionals are self-employed. The document from the PGA was disclosed for the purposes of the proceedings and

included in the bundle. It was not suggested that it was provided to the Claimant at any point during his employment or engagement by the Respondent and indeed was not something that Ms Humphris had seen before these proceedings. The document's copyright is dated 2013 and its title is "PGA Role Descriptors, First Edition" it contains suggested role descriptors for *employing* a golf professional. At page 270 in the introduction Colin Mayes, then Chair of UKGCOA (UK Golf Course Owners Association) describes its purpose in the following terms

> "PGA Professionals fulfil a very important role at all golf clubs in the UK, and the UKGCOA has been pleased to be able to assist The PGA in the development of these role descriptors, which we believe can help golf course owners (***as employers of PGA Professionals***) best use the skills and talents of their PGA Professional to the benefit of the golf club as a business and to golfers who visit the club, either as members or visitors." [my emphasis]

Andy Salmon, Scottish Golf development manager was quoted in similar terms as saying,

> "…The role of the professional can go way beyond coaching and we welcome the development of role descriptors which will support ***employers*** in future in the effort to recruit the right professional for their business objectives." [my emphasis]

Richard Dixon, chief executive of the Golf Union of Wales was quoted as follows:

> "The Golf Union of Wales firmly believes that a PGA Professional is an essential element of any successful club and that the introduction of Role descriptors by The PGA will benefit employers enormously in helping them identify the right Professional for their specific needs."

21. The Introduction at p 270c states that the Roel descriptors as being

> "designed to highlight some of the typical responsibilities expected of a PGA professional in their employment. They can be used by an employer to help shape a job description for a post they wish to fill or a position they wanted to develop. Please note the various roles and responsibilities that accompany them are not meant to be in any way exhaustive and therefore do not constitute a full description of a particular role."
>
> The document acknowledges that each employer or hotel or resort will need to adapt the descriptors and job roles and job description to their own set of circumstances.

22. I do not find that the document assists either way as to whether the Claimant was or was not self-employed or an employee. The document specifically describes itself as role descriptors for someone who is being *employed* and to assist *employers*, I do not find it supports Mr Blyth contention that PGA Golf Professionals were usually self-employed. Ms Humphris suggested that in her opinion when the PGA used the word employed, they meant self-employed; when asked why she thought that was, she explained that she got that understanding from speaking to Mr Blyth. There is no basis in the document for that; it simply seems to be something that Mr Blyth has assumed. The PGA document is not a contractual document between the Respondent and the Claimant and does not assist the

Respondent as they seem to suggest that it does.

23. Mr Blyth accepted that he had no knowledge of the Claimant's past experience other than what he had been told by others, he accepted that he had only worked with the Respondent from November 2019 whereas the Claimant had been the golf professional at the hotel for some 25 years. I find that in large part Mr Blyth based his understanding of the Claimant's role and employment status on assumptions he made about what other golf professionals did and their status.

24. I accept the Claimant's (largely undisputed) evidence as to his working arrangements. I find that he always reported directly and was answerable to the various General Managers. He undertook regular shifts including regular Duty Manager shifts dealing with customer complaints across the hotel and not just relating to the golf area. In the past he had been rostered on evening Duty Manager shifts when the golf operation was closed. He was expected to attend regular Head of Department meetings. He received regular emails from the General Manager and a few WhatsApp messages directing him how to work. He required approval from the General Manager for the stock he ordered in the golf shop via the Purchase Order system and could not order anything without the General Manager's authorisation.

25. Mr Blyth confirmed that it was his decision when to reopen the golf courses after the first lockdown; he also confirmed that the Claimant was required to work as dictated by the respondent/himself and confirmed could not have any staff to support him. All of the revenue generated by the Claimant went to the Respondent. During this time the Claimant was also required to serve beverages in the Sports Bar and on occasion clean the toilet that was being used by the members. He was specifically directed to do this in order to save on staff costs whilst increasing the potential revenue for the Respondent.

Relevant law

Employment status

26. Ms Rezaie summarised the relevant law in her written submission. The starting point for determining whether someone is (or was) an employee was set out by McKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, [1968] 1 All ER 433* where he said as follows:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …'.'

Other relevant factors

27. Ms Rezaie acknowledged in her submissions that payment of income tax and National Insurance contributions on a self-employed basis and registration for VAT are not conclusive evidence of a contract for services (as opposed to a contract of employment), although she submitted that they can be highly determinative.

28. The degree of integration of a worker into the employer's organisation remains a material factor under the multiple test approach and will be a question of fact for determination by the Tribunal.

29. The stated intentions of the parties (whether or not reduced to writing) are also a relevant factor but the Tribunal should always look to the substance of the matter, even if the parties have expressly agreed on a label. A contractual description of the relationship ought to carry significant weight where all other factors are evenly balanced. In *Massey -v- Crown Life Insurance Co* [1978] ICR 590, CA, Lord Denning MR stated: "when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal

Conclusions on employment status

30. I am satisfied that by at least 20 March 2013, and indeed as early as 1995, the working arrangement between the Respondent and the Claimant indicates that he was fully integrated into the business and that there was substantial control and direction from the General Manager. He was not in business on his own account during the time covered by the contract, that is the majority of his working week, albeit the agreement allowed for him to provide golf lessons in addition to the services covered by that contract and to set his own rates and retain the fees from those lessons.

31. Save for the arrangements of payment by invoice and paying his own Tax and National Insurance I find that all other indications were those of an employee and not self-employed.

32. The conclusion I come to on the evidence before me was that the Claimant was employed under a contract of service. I am satisfied that save for when exercising his professional skill as a golf coach when he was on the golf course, at all other times he was under the direction and control of the Respondent's Directors and the General Manager.

33. I find there was mutuality of obligation, there was an ongoing agreement that there should be work provided and that he was obliged to carry out that work personally, that had been the consistent position since 1995. The Claimant was not entitled to send a substitute to carry out the work in his place. I am satisfied that he was fully integrated into the business and indistinguishable from employee of the Respondent and treated in the same way as other Heads of Departments who were employees, for example, the Leisure Manager. For the reasons set out by the Claimant in his letter in 2018 and repeated in September 2020 and before the Tribunal, I am satisfied that he was an employee of the Respondent.

34. The Respondent placed much weight on descriptors set out in the PGA Role Descriptors document [270a-270t] submitting that nothing that the Claimant did for the Respondent was inconsistent with those role descriptors. However, the document itself describes the relationship in terms of employee and employer. Whilst this does not mean that a golf professional will always be an employee. I find that the fact that the Claimant's role is consistent with many of the descriptors in that document does not point towards self employment a rather than employment.

Constructive dismissal

35. The claim for constructive dismissal was based on three contended for breaches of contract by the Respondent, the first (in date order) being (i) the failure to respond to the Claimant about his employment status after his letter in about August 2018 and subsequent meeting with Alice Humphris about the matter; (ii) the denial that the Claimant managed the golf department; and (iii) the failure to consult the Claimant about a risk of redundancy.

36. My findings of fact in respect of the position in August 2018 are as follows:

37. On 16 August 2018, the Respondent sent the Claimant a new consultancy agreement (pages 81 – 89). The Claimant objected to the contents and Ruby Knight, the HR Manager at the hotel asked him to put his objections in writing. On 3 September 2018, the Claimant set out his objections (page 111 – 113) which included that he was refusing to sign the document as it did not acknowledge his 23 years of service; he set out why he considered that he was in fact an employee. The Claimant also sought an increase to his retainer of 10%. On 26 November 2018, the Claimant met with Ms Humphris to discuss his letter. Ms Humphris set out at paragraph 17 of her witness statement her understanding of the Claimant's position; her evidence, she said, was based on what she was told by the hotel. The Claimant was able to point out numerous inaccuracies in her understanding of his position. I have accepted the Claimant's evidence as to what the true position was. Ms Humphris was not able to gainsay the Claimant's account because she did not have direct knowledge of his position. She accepted in her evidence that she had not seen the document setting out his job description and the requirements of his role which was set out in the contractual renewals. It is somewhat surprising that she had not seen those before these proceedings even though she was tasked with addressing his concerns in 2018.

38. As earlier indicated (see paragraph 19 above), there was a dispute as to whether Ms Humphris said she would get back to the Claimant within a week. She vehemently denies saying this but she does accept that she did not personally get back to him and accepts that she was aware the Claimant was chasing up the response. It was not disputed by the Respondent that no written response was given to the Claimant in response to his detailed letter of 3 September 2018. The only evidence before the Tribunal was that Ms Humphris assumed that Mr Morgan had responded. Again, this was despite knowing that Ms Knight had informed her that the Claimant was still chasing for a response in January 2019.

39. I am satisfied that in September 2018 the Claimant disputed the description of him as being self-employed, clearly asserting he was an employee and that he did not receive a substantive response. The only response that he did receive was in respect of the pay increase that he had requested, he was asked by Mr Morgan and Ruby Knight to resubmit his invoice for December to reflect the 10% increase and he did so. The Respondent suggests that this is evidence of a response to his letter of September or to his contention that he was self-employed: if it is to be taken as a response then in the absence of any indication from the Respondent to the contrary I find that it is as consistent with indicating it accepts the Claimant's position as it is with refuting it; at the very least it indicates an acceptance of his request for an increase in pay.

40. As a result of the payment increase and in the absence of any clear indication to the contrary the Claimant considered that from September 2018 onwards he continued to carry on working on his previous terms and conditions which meant that he was an employee with 23 years' service. There was nothing formally from the Respondent to suggest otherwise. He was not asked to sign a new or different agreement. He considered the ball was in the Respondent's court.

41. Things only then came to ahead in July 2020 following the Covid 19 Pandemic and period of lockdown. It was not disputed that the Respondent experienced substantial financial difficulty in early June 2020 as a result of the pandemic. Mr Blyth was called to a meeting with the Managing Director of the Respondent, the continued financial uncertainty caused by the pandemic meant that there was a need to reduce head count and Mr Blyth was asked to produce a restructure plan. He told the Tribunal that in doing what he was asked, he decided on the pools for employees and he proposed that there would be 23 redundancies. Within the golf compartment those at risk were only the four golf shop assistants. He did not consider there was a reduction in the need for a PGA Golf Professional at the resort which had two golf courses. He did consider that there was a redundancy within the country club or leisure club side of the business and his plan involved the creation of a golf and leisure manager instead of a leisure club manager role. He decided that the leisure club manager role would be redundant and the golf and leisure department would be joined, reporting to a single manager. His plan was reviewed by the Managing Director and HR and signed off on 17 June 2020. He did not include the Claimant in the consultation process because he did not consider him to be an employee and because he did not consider there to be an impact on the services that the Claimant provided.

42. Mr Blyth, perhaps somewhat confusingly as acknowledged by Counsel in her closing submissions, described that there was no job description for the Golf Manager as the Claimant had been the golf pro for a number of years; he therefore drew up the job description from the Leisure Manager's job description whilst at the same time he sought to maintain that there was no impact on the Claimant's role. When Mr Carter put to him the numerous duties and responsibilities that would be affected by the introduction of the new Golf and Leisure Manager Mr Blyth accepted there would be an overlap. Mr Carter took Mr Blyth to the job description for the new role in cross-examination and pointed to a number of descriptions that had previously been under his remit. Mr Blyth was not able to dispute that they had been and accepted that there would be an impact on the Claimant. Mr Blyth's evidence was that if the Claimant had been an employee he would have been consulted in the reorganisation because of the likely impact on his role.

43. Mr Blyth's told me that he considered that the fundamental requirement of the Claimant's role was to teach golf and then perform ancillary duties around that (paragraph 74 of his statement). I find that this fundamentally misunderstood the Claimant's position: I find that the contract the Claimant had with the Respondent was to the opposite effect. The majority of his role was to manage their golf department and golf operation and his golf teaching was ancillary to that. The contract provided for 50 hours of golf tutoring a year out of his full-time contract. Any additional golf tutoring or coaching he did was in the Claimant's his own time and he was entitled to charge and keep the fees for that (as acknowledged within the written agreement between him and the Respondent).

44. On 7 July 2020 the Claimant was sent a copy of the Organisational Chart by a colleague, not by Mr Blyth, the Chart is found at page 185. He was not on the Chart and he

went to see Mr Blyth to discuss his exclusion from the Organisational Chart. When he said to Mr Blyth that he should be on there as the golf manager, Mr Blyth's response was that he was a self- employed golf professional, and Mr Blyth asked him if he would like to apply for the role of Golf and Leisure Manager. I accept the Claimant's evidence and find that he was asked if he would like to apply for the role, Mr Blyth did not offer him that role directly.

45. The Claimant sent an email to Mr Blyth on 9 July (page 191) informing him that he would not apply for the role and that he wished to continue in his existing role which he had been undertaking since 1995. Mr Blyth had reassured him that his role would not be affected by the restructure and the Claimant felt that he had to take this assurance at face value until he saw a copy of the job description for the Golf and Leisure Manager role (page 186 – 190) and saw that it included a significant number of his responsibilities that he had fulfilled for a significant time and had been included within his previous contracts. The Claimant identified a number of those responsibilities at paragraph 66 of his witness statement. The Claimant met with Mr Blyth in his office, Mr Blyth did not directly address his concerns but simply told him they would discuss it after the reorganisation had been completed. The Claimant considered this was a less than satisfactory position given that by then it would be too late to address the matters that he was in fact trying to raise.

46. The Leisure Manager was duly made redundant and a new Golf and Leisure Manager was appointed in August 2020. I accept that the Claimant found himself training the new manager in the responsibilities that had previously been his own. He was left in the position of having other people, staff, members of the golf club and others asking him if the new Golf and Leisure Manager was his new boss. The situation overall had a negative impact on his mental health; he had previously suffered from depression and anxiety and has had a recurrence of his symptoms during this period. There was an incident on the golf course on 15 August 2020 which led to the Claimant taking time off. He met with Mr Blyth on 19 August to explain that his mental health was suffering as a result of the circumstances. He returned to work briefly on 29 August 2020 and worked for the bank holiday weekend. During that period, he was faced with being asked again by the Golf and Leisure Manager to continue explaining to him his job and showing him what to do. The Claimant found that he was unable to continue and spoke to Mr Blyth on 1 September informing him he could not continue as things were; he gave him a letter dated 1 September (page 240 in the bundle). In that letter he set out in detail that he had raised his employment status in 2018, that he had not had a response and the lack of clarity in his employment status had resulted in the failure to properly consult him in relation to the restructure and the denial of his position as Golf Manager.

47. On 1 September 2020 the Claimant wrote to Mr Blyth [240-241] informing him that he considered he had been constructively dismissed as a result of the Respondent's actions in not treating him as an employee, not consulting him about the restructure and that the new Golf and Leisure Manager had significantly impacted his role as PGA Professional and Golf Manager. There was some further correspondence and on 30 September the Claimant's solicitors wrote to the Respondent repeating his complaints and asking that their letter be treated as a formal grievance. The Respondent disputed that the Claimant was entitled to raise a grievance – the Respondent's position being that he was not entitled to as he was not an employee

48. A meeting was held on 23 October 2020 between the Claimant and Mr Blyth with Ms Humphris present as note-taker. The minutes were at pages 251-252 of the bundle. I do

not accept Mr Blyth's description of the respective approaches to the meeting by the Claimant and Respondent which to a substantial extent fails to acknowledge the genuine distress caused to the Claimant by the Respondent's actions and its stance on his contested employment status.

Conclusions in respect of Constructive dismissal

49. Again Ms Rezaie helpfully summarized the relevant law in her written submissions.

50. The Respondent suggested that it did not deny that the Claimant was a Golf Manager or that Mr Blyth did not deny that he was the Golf Manager. Mr Blyth's explanation for not including the Claimant in the consultation was that he was not an employee which was the same reason for not including him in the Organisational Chart. When Mr Carter put to him the numerous duties and responsibilities that would be affected by the introduction of the new Golf and Leisure Manager Mr Blyth accepted there would be an overlap. Mr Blyth accepted that there would be an impact on the Claimant and his evidence was that if the Claimant had been an employee he would have been consulted in the reorganisation because of the likely impact on his role.

51. The Respondent contended that the Claimant's role as PGA Golf Professional had not changed and that there was still a requirement for a Golf Professional. I find that this ignores the reality and substance of the Claimant's role, the substantial part of his role was as the Golf Manager as set out above.

52. I am satisfied that it must have been clear to anyone who addressed their mind to it that by combining the golf and leisure departments there would necessarily have been an impact on the Claimant's role. The Claimant's asserts that if he had been treated as an employee as he ought to have been then he would also had been consulted.

53. I find that the refusal to recognise the Claimant as an employee was fundamental to the relationship of trust and confidence between the employer and employee and was likely to seriously damage that trust and confidence. I am satisfied that the unilateral removal of significant duties from the Claimant's role was also conduct which was likely to destroy or seriously damage the trust and confidence between the Claimant and Respondent and was a fundamental breach of the contract between them.

54. I am also satisfied that there was a failure to substantively respond to the Claimant in respect of his assertion in 2018 that he was an employee; this continued until the end of his employment and its impact crystallised in July 2020 when the consequences of that failure had a direct impact on Mr Carter in a way that had not previously impacted on him, in that the result of that failure was to leave the Claimant in the position he found himself in in July 2020 of not being considered in the redundancy consultation exercise and not being treated as an employee. I find that the failure was a breach of the implied term of trust and confidence akin to a failure to provide the Claimant with a response to a grievance,

55. I was addressed on the question of delay, or more properly affirmation. It was submitted that there was affirmation of the contract between 2018 and 2020. I do not find that the conduct of the Claimant amounts to an affirmation, he had reasonable grounds for believing his position as an employee had been accepted and was not affected to his

detriment in the interim period so as to put him on notice that the Respondent was considering him otherwise than as an employee. As soon as he was treated inconsistently with being an employee he immediately brought to Mr Blyth's attention his previous contention in respect of his position in his letter on 1 September 2020. He did not attend work between 1 September and 16 October 2020, he explained to the Respondent the reason for his absence and sent in sick certificates notifying Mr Blyth that he was not well enough to attend work. The Claimant did not invoice for September and October although he had submitted an invoice at the beginning of August and was paid for the entirety of August.

56. The Claimant's solicitors wrote to the Respondent on 30 September 2020 setting out clearly the Claimant's position, they confirmed that he would attend a grievance meeting with the Respondent and was willing to engage in the grievance procedure but that should in no way be treated by the Respondent as waiving the fundamental and repudiatory breaches. The Claimant was clear in reserving his right to rely on the breaches and I find that conduct plainly cannot be taken as an affirmation or a waiver. This was followed up on 9 October 2020 (page 247). The Claimant's stated the sick leave was due to stress and anxiety. I do not find that the Claimant affirmed the contract by his actions in the interim. He continued to assert his position that he was an employee and simply gave the Respondent an opportunity to address and deal with his concerns.

57. I was also addressed in respect of the offer (as it was described) of the Golf and Leisure Manager position. I have not found that an offer of the golf and leisure position was made in July. I have found that the Claimant was invited to apply for the position. In any event, I am satisfied that this was not something that was capable of curing the breach which had arisen by then. The golf and leisure position was a role that the Claimant had carried out previously and he was aware that it was not suitable. I accept his evidence in respect of the difficulty he had in completing both roles, particularly during the busy summer period when the golf department was exceptionally busy and that he did not consider it to be a suitable position. I also find that the offer that was made to him on terms which did not acknowledge his 25 years' service and that this was his principal objection to the subsequent offer made to him. The same applies to the offer of an employment contract as the golf professional, this similarly did not acknowledge his 25 years' service and was not sufficient to allay his concerns in that regard.

58. Having been taken to and considered the minutes of the meeting on 23 October between the Claimant, Mr Blyth and Ms Humphris I am satisfied that nothing about the conduct of the meeting on 23 October can have reassured the Claimant that there was an acceptance on the part of the Respondent of his status as an employee or recognition of his 25 years' service.

59. In conclusion, I am satisfied that there were fundamental breaches by the Respondent of the contract, there was a failure to consult the Claimant about the risk of redundancy and in substance a denial that he managed the golf department. That was plain by the Respondent's actions in defining the roles in the restructuring and taking roles that had previously been the responsibilities of Mr Carter and allocating them to the newly created Golf and Leisure Manager, substantially ignoring his role as manager of the golf department.

60. I am satisfied that the Claimant resigned in response to each of the was the breaches that he relied upon and that he had not affirmed the contract before leaving. I have found those were each breaches of the implied term of trust and confidence and that taken separately or together were fundamental breaches of his employment contract. I also find that the refusal to acknowledge him as an employee and the removal of the responsibilities of his role themselves were fundamental breaches of contract and it is not necessary to rely on the implied term of trust and confidence in respect of those. However those matters were also capable of amounting to breaches of the implied term of trust and confidence and I find did breach that term. I have considered in that context whether the Respondent had reasonable or proper cause for its actions; the reason put forward was that it did not accept the Claimant was an employee, or that it believed he was self-employed. I do not find that they had reasonable proper basis for that belief or assertion. The Claimant had set out as plainly as he possibly could in 2018 the basis for his assertion that he was an employee. Although Ms Humphris said she took legal advice, she relied on vague information provided to her in seeking that advice; she could not identify the detail and source of the information relied on, she accepted that she had not taken the basic step of looking at his contracts or job descriptions, both of which clearly set out the responsibilities that he was contracted to cover, and which were entirely consistent with the Claimant's assertions as to the degree of control and integration and limits of the Claimant's autonomy. In the circumstances I do not find that the Respondent had a reasonable or proper basis for the belief that the Claimant was truly self-employed.

61. I find that the reason for the dismissal was the Respondent's denial of the Claimant's employee status. The reason the Claimant was not included in the redundancy exercise was because he was not accepted as being an employee.

62. The Claimant contends that there was a redundancy situation and he ought to have been treated as redundant. The question is something that has a bearing on compensation but I found that the reason he resigned was for the fundamental breaches of his contract and I will hear further from both parties before reaching a conclusion as to the implications of that in respect of any remedy that should follow.

Employment Judge C Lewis
Dated: 28 February 2022