**Case No:** 3322769/2021

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Adam Burton

**Respondent:** Aldenham Social Club Ltd

**Heard at:** Watford (over Cloud Video Platform)
**On:** 1st and 2nd September 2022

**Before:** Employment Judge Dick

**Representation**
Claimant: Ms Julie Duane (Counsel)
Respondent: Mrs Rosslyn Hopwood (a Director of the Respondent)

# JUDGMENT

1. The Claimant was employed by the Respondent from August 2016.

2. Before the Claimant was placed on furlough in April 2020, it was a term of the contract that the Respondent would provide the Claimant with, and the Claimant would work, a shift every Saturday from 11:30 a.m. to 6 p.m.

# RESERVED JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent.

2. The Respondent was in breach of contract by dismissing the Claimant without notice.

3. The Claimant's claim for pay in lieu of holiday is well founded.

4. The question of remedy is adjourned to a hearing on a date to be determined, reserved to Employment Judge Dick.

# REASONS

Key to references: [x] = page in agreed bundle.

## INTRODUCTION

1. On 1st September 2022, having decided to treat the issue of whether the Claimant was an employee of the Respondent as a preliminary issue within the meaning of rule 53 of the Employment Tribunal Rules of Procedure, I heard evidence and gave an oral judgment with reasons on the point. That judgment is recorded above. Since I have already given reasons for that judgment, I will not restate them here (though of course any party who may wish for written reasons may make a written request for them within 14 days of the sending of this written record of the decision).

2. Having ruled that the Claimant was an employee of the Respondent, on 2nd September 2022 I heard the Claimant's claims for unfair dismissal, wrongful dismissal and holiday pay. I was able to hear the evidence and submissions in the morning but the parties were not available in the afternoon as the hearing for the full claim (i.e. including determination of the preliminary point) had originally been listed only for one day, on the 1st. I therefore reserved judgment on liability.

3. The Claimant claims that he was constructively dismissed by the Respondent, where he worked as a member of bar staff. He says he resigned in response to the Respondent's actions in: unilaterally removing the minimum 6 ½ hours' work per week to which he was entitled from August 2020 (i.e. after he was taken off furlough); failing to contact him when work became available again as the restrictions as a result of the COVID-19 pandemic began to be lifted; failing to make him redundant yet refusing to provide him with work; and various other actions. The Respondent denies that the Claimant was entitled to 6 ½ hours' work and in any event denies that the Claimant resigned. The Claimant also claims for notice pay and accrued holiday pay.

## CLAIMS AND ISSUES

4. Following discussions with the parties before the evidence began, I identified the following substantive issues:

    a. Was the Claimant unfairly dismissed? The Claimant claims constructive dismissal, so the issues were:
        i. Was the Claimant dismissed:
            1. Did the Respondent do the following things:

a. Unilaterally remove/reduce the Claimant's minimum of 6.5 hours of work each week from August 2020 until the Claimant's resignation in July 2021;
b. Fail to fulfil the promise of contacting the Claimant when work became available despite employing the services of another;
c. Tell the Claimant he was not being made redundant or had not been dismissed yet continuing to fail to provide work; and
d. Fail to respond to the Claimant's email dated 7th June 2021.

2. Did those things amount to:
    a. A breach of the implied term of trust and confidence
        i. Did the Respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
        ii. If so, did it have reasonable and proper cause for doing so.
        iii. "Last straw" – if any one act did not amount to such a breach, did the Respondent's actions taken together amount to such a breach.
    b. A breach of the term to offer the Claimant work and to pay him for it
        i. Was the breach a fundamental one? Was the breach so serious that the Claimant was entitled to treat the contract as being at an end.
3. Did the claimant resign in response to the breach?
    a. Did the Claimant resign?
    b. Was the breach a reason for the resignation?
4. Did the Claimant affirm the contract before resigning? Did the Claimant's words or actions show that he chose to keep the contract alive even after the breach.

ii. If yes, what was the reason for the dismissal (i.e. the reason for the breach of contract).
iii. Was it a potentially fair reason?
iv. Did the Respondent act reasonably in all the circumstances as treating it as a sufficient reason to dismiss the Claimant.

b. Was the Claimant wrongfully (constructively) dismissed
    i. Was the Claimant constructively dismissed (see above).
    ii. Without the proper notice.
c. Holiday pay

i. The Claimant asserts that he is entitled to 47.5 hours' unused accrued holiday pay (29.3 hours from 1st April 2020 to 31st December 2020 and 18.2 hours from 1st January 2021 to 1st July 2021).

5. During the course of proceedings, after hearing submissions from the parties, I decided that any aspects of remedy (i.e. relating to any award ultimately made by the Tribunal) would be dealt with at a later remedy hearing, should one be required, save for consideration of *Polkey* (see below).

**PROCEDURE, EVIDENCE etc.**

6. The case was heard on the Cloud Video Platform, all the participants (bar me) attending remotely. I am pleased to record that there were no significant technological problems and that all those appearing over CVP were able to participate fully.

7. Before the evidence was heard I explained the procedure to the parties and told them that I would read the witness statements but they should not assume that I had read any of the documents in the joint bundle unless I was specifically referred to them in the course of evidence or submissions. I also explained the law that I would be applying (as set out below) and explained that, as the burden would be on the Claimant to establish that there was a dismissal, I would hear the Claimant's case first.

8. I heard evidence from the Claimant and, on behalf of the Respondent, from Mrs Hopwood. The usual procedure was adopted, i.e. written statements stood as evidence-in-chief and the witness was then cross-examined. There was evidence from other witnesses, but that was relevant only to the preliminary issue of whether the Claimant was an employee.

9. After hearing the evidence I heard submissions from the parties and reserved judgment on liability. Although both parties were given time to make oral submissions, given that the timetable for the morning had been rather tight, I thought it best to give the parties the opportunity to address any points which they might have missed in further written submissions. The written submissions were provided to me on 14th October 2022 and I have of course taken account of them. Whilst making clear that I had not yet come to decision, having reserved judgment, I also thought it best to set a date for a remedy hearing in case one should be required, in order to avoid unnecessary delay. (Unfortunately that date will now have to be moved – see the separate Case Management Order which will accompany this document.)

**FACT FINDINGS**

10. It may assist if I set out those of the facts which I found on 1st September 2022 which are relevant to this decision on liability. They are:
    a. Around August 2016, the Claimant began working for the Respondent as a member of bar staff. A director, Gail Thomas, engaged him. There was no written contract.
    b. Between 2016 and 2018, the Claimant worked every Saturday, from 11:30 a.m. to 6 p.m. After that time, until the Respondent shut down the bar as a result of the COVID-19 pandemic, he continued to work Saturdays, with relatively few exceptions. (The Claimant also worked other shifts; although he worked more than 6.5 hours some weeks, there was never a week when he worked fewer hours.)
    c. The Claimant, like all other bar staff, had a set of keys which he would use to open up.
    d. The Claimant did not take any sick days while working for the Respondent. Nor did he formally take any holidays – if he needed time off, he would swap shifts with another member of staff. The practice during the course of his employment was that at the end of the holiday year the Claimant was made a payment in lieu of accrued holiday.
    e. While the Claimant was employed, there was also a full-time member of bar staff; there was no dispute that she was an employee. There were also other part-time members of staff, whose employment status it was not necessary for me to determine.
    f. In April 2020, the Claimant and the other bar staff were placed on furlough, i.e. paid with the help of the government, as a result of the "lockdown" imposed during the COVID-19 pandemic.

11. Following the hearing of 2nd September, I find the following further facts on the balance of probabilities. I have indicated where there were material disputes as to the facts between the parties; where I have not done so, the material facts were not in dispute.

12. The Claimant was put on furlough after contacting the Respondent and enquiring about it; this was despite the Respondent's belief that he was a worker rather than an employee, i.e that they had no obligation to offer him work. The way Mrs Hopwood put it was that the directors of the Respondent (who were of course not HR experts) were doing their best and that treating all staff the same had just seemed the fair thing to do. The Claimant was sent paperwork about the furlough scheme, which he was placed on from April 2020. This was sent to him from the email address ASC-sec@outlook.com.

13. It was the Claimant's understanding that he would remain on the furlough scheme for as long as it ran. However, in July 2020 the Claimant was taken off the scheme. The Claimant's recollection was that he received no warning or explanation. Mrs Hopwood's evidence was that, though it was the

Respondent's decision (whilst advice on health and safety was sought), the staff were contacted to say that furlough would be stopping from 31st July 2020 with a view to the bar re-opening (though re-opening was in fact delayed several times). Upon application by the Respondent, I admitted into evidence two documents (a letter, and the email which was sent to the Claimant attaching the letter, dated 13th July 2020) which had been omitted from the bundle, apparently in error, but which the Claimant was able to confirm he had seen as part of disclosure in preparation for the case. These documents supported Mrs Hopwood's recollection. The Claimant's recollection in evidence was in my view vague as to whether he received the letter at the time, but I note that in an email of 14th July 2020, addressed to the Claimant and the other staff, the Respondent says: "thank you all very much for responding so quickly" [58]. I therefore find that the Claimant did read and respond to the letter of 13th July. The letter of the 13th from the Respondent asked the recipients to provide their availability for work and said that the Respondent would be in contact closer to the re-opening date. The email of the 14th explained that shifts would be planned following advice from a Health and Safety advisor (this being a time of course when social distancing measures were paramount). Mrs Hopwood accepted in evidence that no shifts were in fact allocated to the Claimant.

14. There was also in evidence a WhatsApp message from "Gail Asc" (i.e. Gail Thomas) [59, 83] dated 3rd August. The message said that staff were being taken off furlough as the Respondent did not know when they would re-open or what hours would be available for the foreseeable future; the Respondent would be in touch once a re-opening date had been set.

15. On 4th August 2020, the Claimant emailed the Respondent complaining that "employment matters [were] being dealt with in public view" on Facebook and asking for an explanation of the decision to take him off furlough [56]. In correspondence which extended into the next day, 5th August 2020, the Claimant was told that nobody was being sacked or made redundant, but at present there were no shifts available and he would be contacted when that situation changed [57].

16. The bar re-opened from 11th September 2020 (see [62]) for three days (Friday to Sunday) with much reduced hours, with the full-time employee working all of those hours. Shifts were offered to other (part-time) staff, Mrs Hopwood told me, but not to the Claimant as he had said that he would be on holiday for two of the relevant weeks and the Respondent felt that it was important that staff who had received health and safety training were working. This training was not, it appears, given to the Claimant.

17. The Claimant emailed the Respondent to enquire as to the position on 16th October 2020. The Respondent's reply, on 19th October, was: "Unfortunately we do not have any news for you. We are working very reduced hours at the moment." [63].

18. The Respondent then had to close again as result of the next lockdown which, I take judicial notice of, began on 5th November 2020.

19. The Claimant emailed the Respondent again on 11th January 2021, seeking reassurance that his "employment conditions remain[ed] the same as they were pre-COVID". The response, on 14th January, was that the hospitality industry remained effectively closed due to COVID and that the Respondent would be back in touch once they knew what was happening. The response included, presumably in error, an email from Gail Thomas to Mrs Hopwood, approving the terms of Mrs Hopwood's response to the Claimant and opining that "by now he should have other things more important than this to keep him occupied" [64,65]. The Claimant emailed back the same day, pointing out that Mrs Hopwood's response had not addressed his question about employment conditions and noting that he had not received payslips for the furlough period or a P60 for 2019/2020 [64].

20. All the Respondent's correspondence I have so far mentioned was from the same email address, ASC-sec@outlook.com.

21. On 21st May 2021 (see [48]) the Respondent partially reopened, opening only at weekends. The Saturday opening hours were to be 2 p.m. to 11 p.m. The Claimant learnt of this on Facebook. In the bundle was a letter, dated 7th June 2021 from the Claimant to the Respondent. The email by which it was sent was not produced in evidence, but I accept the Claimant's evidence that it was sent. The letter said that the Claimant had seen on Facebook that the Respondent had reopened and expressed a concern that the Respondent had not been in touch to arrange the Claimant's return to work or alternatively to begin a redundancy process. The Claimant also noted that other members of staff had been allocated shifts. The Claimant asked for his latest P60, which he said he had already requested by email in January, and requested clarification of his "employment status" (which he said he had not been chasing vigorously given the pandemic and the closure) and his "holiday entitlement" (i.e. pay in lieu) for January to December 2020. The letter concluded by authorising Stephen Burton (who is the Claimant's partner) to now act on his behalf in matters relating to his employment with the Respondent. Mrs Hopwood's evidence was that the Respondent had not received this letter. I accept that during what was a difficult time for the Respondent, it may well be the case that the letter wasn't seen, but as I have said above, I find it was sent.

22. On 1st July 2021, Stephen Burton sent the Respondent an email. I again accept Mrs Hopwood's evidence to the effect that, for some reason, the Respondent did not pick up that email. It is however clear to me from the documentary evidence [67] and from the Claimant's oral evidence, that it was sent, to the same address as above, i.e. the address which the Respondent had been using to correspond with the Claimant about his employment. The email referred to the letter of 7th June, which it said had

gone unanswered, and then re-stated the Claimant's requests for the P60 and the pay in lieu of holiday. I quote the rest of the email in full:

> Since you have also failed to address [the Claimant's] concerns about his ongoing employment, and the fact that you have employed the services of another, it can only be assumed that you no longer consider Adam to be a member of your staff.
>
> I can find no formal letter notifying him that his employment has been terminated and, there is no evidence of the issue of a P45.
>
> As such, this will now become the subject of a claim for unfair/constructive dismissal at the Employment Tribunal.

23. It was the Claimant's case that this email amounted to a resignation; see below for my decision on that point. There was no dispute that he received no response to it. After sending the email, the Claimant made no further attempts to request shifts with the Respondent nor to clarify his employment status. The Claimant's claim to this Tribunal was submitted on 9th November 2021.

24. It was the Respondent's case that the Claimant was never told he would never be offered any more shifts; and that the Claimant was not told he had been dismissed and had not been asked to return his keys. This much was correct. It was not in dispute, however, that despite the Respondent reopening from May 2021 (albeit partially for some of that time) the Claimant was never in fact offered any more shifts. Essentially, Mrs Hopwood's evidence was that their treatment of the Claimant was based on their belief that the Claimant was a worker, unlike the full-time employee, and so there was no obligation to offer him work. Mrs Hopwood accepted that around June/July 2021, other part-time staff were doing shifts. When asked in general terms about why other part-time staff had been offered shifts when the Claimant had not, Mrs Hopwood said that this was due to their availability, but also pointed out that the other part-time workers did not also have a full-time job. (The Claimant also had a full-time job with another employer during the week, as a bus driver). However, aside from the holiday he was to take (see para 16 above), there was no suggestion that the Claimant was not in fact available on Saturdays. The Respondent was influenced, in my judgment, by the feeling that it was fairer to give what work there was available to the other staff as they may have needed the work more than the Claimant because the Claimant also had his full-time job.

25. So far as holiday pay and notice pay are concerned, the Claimant's evidence accorded with the issues as set out in the opening paragraphs above. In evidence, Mrs Hopwood did not dispute that the Claimant was probably owed some pay in lieu of holiday, though she said she would have to check the amount. I find that upon his dismissal the Claimant was not made any payment in lieu of accrued holiday. The Respondent made no suggestion that the Claimant did receive notice or notice pay; I find that he did not.

## LAW

### Constructive Unfair Dismissal

26. S 94 Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s 111. There is no issue with time limits in this case.

27. The first issue in a case such as this, said to involve constructive dismissal, is whether there was a dismissal, which will be for the Claimant to prove. S 95(1) ERA applies:

> 95.— Circumstances in which an employee is dismissed.
>
> (1) …[An] employee is dismissed by his employer if (and, …only if)—
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

28. In order for there to be a constructive dismissal, three things must be established.

29. First, there must be repudiatory or fundamental breach of the employment contract on the part of the employer. In order to decide whether there has been such a breach, it is necessary to consider what term has been breached. In this case the Claimant relies (though not exclusively) on a breach of the implied term as to trust and confidence, formulated by the House of Lords in *Malik and Mahmud* v *BCCI* [1997] ICR 606 as being an obligation that the employer shall not: "Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." Any breach of this term will necessarily be a repudiatory breach. *Malik* also makes clear that the test for whether there was a breach is an objective one, i.e. the term can be breached by an employer acting in good faith. On the other hand, it has been noted (see *Frenkel Topping Limited* v *King* UKEAT/0106/15/LA) that the employer merely acting in an unreasonable manner is not sufficient to establish a breach.

30. In this case the Claimant also relies on the "last-straw" doctrine, considered, for example, in *Kaur* v *Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978. It may be said that a whole sequence of events meets the test even if none of its individual components does. If the last straw is entirely innocuous or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim of constructive dismissal will fail.

An employee can rely on earlier conduct by the employer even if he affirmed (see below) the contract after those earlier matters, as long as the last straw adds something new and effectively revives those earlier concerns

31. Second, there must be a termination of the contract by the employee (i.e. a resignation) because of that breach. The fundamental breach of contract by the employer need only be a reason for the resignation of the claimant. It does not matter if there are other reasons: *Wright* v *North Ayrshire Council* [2014] IRLR 4.

32. Third, the employee must not have lost the right to resign by affirming the employer's breach of contract, e.g. by delaying resignation. The contract is affirmed if after the breach the claimant behaves in a way which shows that he or she intends the contract to continue. Delay in resignation which occurs whilst an employee is not otherwise performing the contract (typically, when on sick leave) is less likely to amount to affirmation than if the employee carries on turning up for work (see *Chindove* v *William Morrisons Supermarkets PLC* UKEAT/0201/13/BA).

33. If the Claimant establishes that there was a constructive dismissal, the Tribunal must then turn to the issue of fairness, which is dealt with by s 98 ERA in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within s 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

34. Regarding the first stage of fairness, S 98 ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

35. Reasons falling within sub-section 2 include conduct, capability and redundancy. Redundancy is defined by s 139 ERA, which provides, again so far as is relevant:

> (1) … an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—…
>
> (b) the fact that the requirements of that business—

for employees to carry out work of a particular kind…
have ceased or diminished or are expected to cease or diminish.
…

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

36. The second stage of fairness is governed by s 98 (4) ERA:

(4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

37. In deciding fairness, I therefore must have regard to the reason shown by the Respondent and to the resources etc. of the Respondent. In general, my assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for me to substitute my judgment for that of the employer and to say what I would have done. Rather, I must determine whether in the particular circumstances of this case the decision to dismiss the Claimant fell within the band of reasonable responses open to a reasonable employer.

38. In the specific case of redundancy, in *Williams and ors* v *Compair Maxam Ltd* 1982 ICR 156, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These are summarised at Vol 9 8.81 of the IDS Employment Law Handbooks:
    a. whether the selection criteria were objectively chosen and fairly applied
    b. whether employees were warned and consulted about the redundancy
    c. whether, if there was a union, the union's view was sought, [not an issue in this case] and
    d. whether any alternative work was available.

39. In the event that the dismissal was unfair, I would go on to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the Respondent in dealing with the Claimant's case, the Claimant might still have been fairly dismissed, in accordance with the principles in *Polkey* v *AE Dayton Services Ltd* 1988 ICR 142.

**Wrongful dismissal (notice pay)**

40. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, gives this Tribunal the power to award damages for claims for breach of contract outstanding on the termination of the Claimant's employment. The burden is on the Claimant to prove the breaches on the balance of probabilities.

41. So far as notice is concerned, an employee is entitled to notice of termination unless they have fundamentally breached the contract e.g. the contract is terminated because the employee is guilty of gross misconduct. S 86 ERA sets out the minimum notice period to which an employee is entitled. The provision has effect even where the contract provides a shorter period.

**Holiday Pay**

42. Under Regulation 14 of the Working Time Regulations 1998 ("WTR"), as amended by the Working Time (Coronavirus) (Amendment) Regulations 2020/365, a worker, on termination of their employment contract, is entitled to be paid in lieu for any leave to which they were entitled but had not yet taken, and any leave accrued in a previous year and carried forward under reg 13(10) and (11). Reg 13(10) states that where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in reg 13(11). Reg 13(11) provides that leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

43. In the absence of a relevant agreement, the entitlement is to be calculated in accordance with the formula in reg 14(3)(a). Remedy for a breach of the WTR is by way of a complaint to this Tribunal under reg 30.

**CONCLUSIONS**

**Constructive Unfair Dismissal**

44. I find that the Claimant being put onto furlough was an agreed variation to his contract of employment – it was after all something that the Claimant had requested the Respondent consider. I further find that in July 2020, taking into account the correspondence on 13th and 14th July 2020, there was a further agreed variation to the contract – although the variation was initially purportedly imposed unilaterally, it is clear from my findings at para 13 above that the Claimant did agree to the variation. In my judgment, taking into account the intentions of the parties, by 14th July 2020 it was agreed

there was no longer an obligation upon the Respondent to provide the Claimant with his regular Saturday shift (for the simple reason that at that time the bar was closed and there was therefore no work to offer anyone) and that he would not be paid "furlough" money from August onwards. It was, however in my judgment, now a term of the contract that the Respondent would contact the Claimant and offer him work when the work became available. I will refer to this below as the "work offer" term. This obligation would not necessarily extend to giving the Claimant his regular shift when the bar reopened, because it was clear to the parties that the bar would not necessarily reopen on full hours, and that therefore the work that was available may have to be shared out between the members of staff such that staff were offered fewer hours than pre-COVID. Rather, there was an obligation on the Respondent to offer the Claimant such work as was reasonably available. It follows that in my judgment, up until 14th July there was no breach of contract by the Respondent. (Nor indeed did the Claimant suggest there was a breach until August). That situation did not, in my judgment, change with the exchange of emails on 4th and 5th August in which the Claimant was in my view simply seeking clarity.

45. The situation did change, in my judgment, from 11th September 2020 when the bar reopened, for what was almost two months. There was work available, albeit limited hours that would need to be equitably shared amongst the staff. While it might have been reasonable not to offer the Claimant any shifts on the two weeks he was to be on holiday, that did not absolve the Respondent of their responsibility to offer the Claimant some work over that time, particularly given that the Claimant had "chased" them on 16th October. I therefore find that the Respondent did breach the work offer term at this point.

46. I also find that from 21st May 2021 the Respondent further breached the work offer term when the bar reopened and the Claimant was not contacted and offered work. The bar was only partially re-open, and there were other staff to accommodate, so it might not have been possible or reasonable to give the Claimant his former regular hours. However, the bar was open during the time that the Claimant had formerly worked (i.e. on Saturdays). It was not just a case of the Respondent prioritising the full-time employee (though I doubt whether even that alone would have justified offering the Claimant no work) because, as the Respondent accepts, other part-time staff were offered work. The Claimant only learned that the bar had re-opened having seen it on Facebook and raised his concern within about 2 weeks (i.e. in his letter of 7th June).

47. The breaches of the work offer term which I have described above were in my judgment repudiatory – they went to the very heart of the contract, the whole purpose of which was to provide the Claimant with work. Refusal to offer that work, when it was available, was a repudiatory breach.

48. Did the Claimant affirm the September 2020 breach by taking no action until his email of 11th January? In my judgment, he did not. He had made his position clear, and it is not as if he continued to work, under protest or otherwise – he was not offered any work, and of course by 5th November there was no more work for anybody as result of the second lockdown. I do not consider it unreasonable in those circumstances for the Claimant to have waited two months before taking further action in what was a very uncertain time for everyone. For the same reasons, the Claimant did not affirm the breach by waiting until 7th June 2021 (i.e. until the club had re-opened) before raising the issue again. I further find that the Claimant did not affirm the May 2021 breach by waiting three weeks before the letter of 1st July was sent – again, it was not the case that he kept working under protest, as he was not given any work, and in the circumstances it was reasonable in my view for him to have waited three weeks before taking further action. While I accept to some extent the Respondent's submission that it might have been better if the Claimant had picked up the telephone or gone into the club to speak to somebody, he was, as I have found, sending communications to the email address which he had used to correspond with the Respondent over the time of the pandemic.

49. Given my findings above, I am also satisfied, essentially for the same reasons, that by the cumulative effect of the failure to contact the Claimant about work and also to address his repeated enquiries about the terms of his employment (including on 7th June 2021), the Respondent also breached the implied term of trust and confidence from 11th September 2020. There was also of course the failure to pay the Claimant the holiday pay. The Respondent, in my judgment, without reasonable and proper cause, conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust. This remains the case, in my judgment, even though the Respondent (or at least, Mrs Hopwood) had, for whatever reason, not read the letter of 7th June. I should say that it was not suggested to me, nor do I find, that the Respondent's email of 14th January (in response to the Claimant's email of 11th January) on its own was a fundamental breach of the implied term of trust and confidence, unfortunate as it was to have included Gail Thomas's comments.

50. Did the Claimant terminate the contract because of the breaches? I accept the Claimant's evidence that the email of 1st July 2021 was sent because of the breaches – indeed no other possible explanation for his actions is apparent, and the reasons for it being sent are also clear from the way the email is worded. What the Respondent really took issue with was whether the email amounted to a resignation – it does not, for instance, contain the words "I resign" or any variation upon them. The email of 1st July contains technical language (i.e. "unfair/constructive dismissal") but must be viewed in the context that it is from one layperson to another. I therefore look to the substance, rather than embarking upon a purely technical analysis. Although the email asserts that *the Respondent* no longer appears to consider the Claimant a member of staff, it then goes on to point out that no

letter terminating his employment, and no P45 has been sent. In my judgment this is a statement, in summary form, of the Claimant's claim that the employer was failing to give the Claimant work but yet was also failing to clarify his status, i.e. to begin a redundancy process. When the email then refers to a claim for "unfair/constructive dismissal", it seems to me that it is being made clear on the Claimant's behalf that, as a result of the Respondent's actions, the Claimant no longer considers himself bound by the terms of the employment contract. In other words, it amounted to a resignation.

51. There are two further points about the 1st July email. First, did the fact that the Respondent (or at least Mrs Hopwood) did not see it mean there was no resignation? Counsel for the Claimant told me that, having researched the point, there did not seem to be any authorities directly on point. In my view, given that it was sent to the correct email address, it was an effective resignation, particularly given that there was no evidence of any "bounce-back" email. My conclusion on that point is strengthened by – though it does not depend upon – considering the email in the context of the Claimant's actions around the time. He stopped asking for shifts, which would have left the Respondent in no doubt (had they considered the point) that he had resigned. While the Respondent did not ask him for his keys back, nor did they ever go on to contact him and offer him any more work. Second, I do not consider in all the circumstances that the fact that the email was sent by the Claimant's partner, rather than him, materially affects the position, since the Claimant had authorised him to act on his behalf.

52. I therefore find that the Claimant was constructively dismissed, and I turn to the reason for the dismissal, keeping in mind the burden is on the Respondent to show there was a potentially fair reason for the dismissal. This is a somewhat difficult exercise when the Respondent is asserting there was no dismissal at all, but nevertheless I am satisfied on the evidence that the reason for the dismissal was redundancy. The Respondent's actions in not offering the Claimant shifts (and to a lesser extent not clarifying the terms of his employment) were mainly attributable to the fact that the requirements to carry out work of the kind that the Claimant was doing had diminished – there was less work available because of the COVID-19 pandemic.

53. I therefore go on to consider whether in my judgment the Respondent acted fairly or unfairly in dismissing the Claimant for that reason. I keep in mind that the Respondent was a social club, with limited resources, acting in a truly unprecedented situation, which was changing very quickly. Nevertheless, it is clear to me that the Respondent acted unfairly, in other words in a manner in which no reasonable employer would have acted. Work was available and others were offered shifts when the Claimant was not. The Claimant was not kept informed about the club reopening, he was not consulted in any meaningful way about the absence of offers of shifts and the Claimant's repeated attempts to clarify his employment status were

not answered. The Claimant was therefore unfairly dismissed in my judgment.

54. Turning now to *Polkey*, in my judgment there can be no argument that, had a fair process been followed, then the Claimant still would have been offered no shifts and therefore dismissed. Indeed, there was no reason why the Claimant could not at least have been offered some shifts. Had that been the case, there would have been no repudiatory breach and therefore no dismissal. Nor of course does the Respondent argue that there would have been a dismissal, since it says there was no dismissal.

55. That is not to say, however, that the Claimant will be entitled to damages assessed solely on the basis of the hours he was working before the pandemic. The award of damages will have to take into account the variation in the contract which I set out at para 43 above and will necessarily involve an assessment of what sort of hours the Claimant might reasonably have been given. To that end, I have made some directions in relation to the forthcoming remedy hearing, which I set out in a separate document.

**Wrongful dismissal (notice pay)**

56. Given my findings above to the effect that there was a dismissal, applying the common law principles applicable to constructive dismissal, it follows that the Claimant was dismissed without the notice on the Respondent's part to which he was entitled. He will therefore be entitled to damages to be assessed at the remedy hearing (though there will of course be no double-recovery in that he cannot be compensated twice for the lack of notice, once as part of the unfair dismissal claim and once again as part of the wrongful dismissal claim).

**Holiday Pay**

57. It is conceded on the Respondent's behalf that the Claimant is owed some holiday pay; in other words the Claimant's claim is well-founded. I will hear submissions at the remedy hearing about whether it was not reasonably practicable for him to have taken his 2020 leave as a result of the effects of coronavirus.

Employment Judge **Dick**

Date: 1st December 2022

SENT TO THE PARTIES ON

5 December 2022

FOR THE TRIBUNAL OFFICE