Case No: No 2300169/2022

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
Remotely via CVP

BEFORE: **EMPLOYMENT JUDGE N COX**
sitting alone

BETWEEN:

Mr R Humble

Claimant

and

East Sussex National Limited

Respondent

ON: **6 October 2022**

Appearances:

For the Claimant: **Mr Greenhalgh : CAB**

For the Respondent: **Mr Williams : Counsel**

RESERVED JUDGMENT

1. The claimant the claimant was constructively wrongfully dismissed by the respondent without notice and the respondent is ordered to pay damages to the claimant of £690.10 net.

2. The claimant was constructively dismissed by the respondent and his dismissal was unfair.

3. The claimant is awarded compensation for constructive unfair dismissal of £2,156.65 to be paid by the respondent to the claimant.

4. This award consists of

   Basic award: £732.40 gross

   Compensatory award: £1,424.25 net

5. When these proceedings were begun, the respondent in breach of its duty to give the claimant a written statement of a change to his particulars of employment. The respondent is ordered to pay to the claimant the sum of £1464.80 gross

REASONS

Claims and Issues

1. The claimant was employed by the respondent from 8 March 2019 until 25 August 2021.

2. He worked under a zero hours contract of employment as a kitchen porter. He claims that he was also employed by the respondent with effect from 1 July 2021 under a separate employment agreement as a maintenance assistant.

3. The claimant complains that he was not provided with written particulars of his terms and conditions of employment as a maintenance assistant and that he was unfairly wrongfully dismissed. At the same time he was constructively dismissed from his employment as a kitchen porter.

4. In respect of the termination of his employment as a maintenance assistant he seeks basic and compensatory awards for unfair dismissal, adjusted to reflect a failure to follow ACAS procedures and failure to provide written particulars of employment and notice pay.

5. A claim for 'other payments' which related to unpaid wages in connection with the operation of a furlough scheme was abandoned by the claimant at the start of the hearing. A complaint that he was not permitted to be accompanied to a meeting on 25 August 2021 was not actively pursued during the hearing.

6. The respondent denies the claims in their entirety. The respondent's case is that the claimant was and remained employed under the terms of the March 2019 Contract as kitchen porter. The respondent agreed to give him a short term opportunity to try out for the role of maintenance assistant but did not enter into any separate contract of employment with him for that role. The trial was ended on 25 August 2021 because the claimant was found to be unsuitable as a maintenance assistant. The claimant then decided to resign from his March 2019 Contract. The Respondent did not argue for the existence of a potentially fair reason for the purposes of unfair dismissal.

7. The parties had not agreed a list of issues in advance but after discussion it was agreed that I needed to determine the following issues:

Factual Issues: Contract of Employment

8. Did the claimant enter into a separate contract of employment as a maintenance assistant 1 July 2021? If so

8.1. What were the terms of that agreement ?

9. Did the claimant and respondent agree that:-

9.1. the respondent was entitled to terminate the contract after or within a trial period ? If so, what was that trial period ?

9.2. the claimant would work 40 hours per week?

9.3. the claimant would be paid a salary of £21,000 pa ?

9.4. the claimant would work partly on maintenance and partly in the kitchen ? if so;

9.4.1. that the claimant would be paid for kitchen work at the rates set out in the March 2019 Contract and a pro-rata hourly equivalent rate for maintenance work|?

10. Did the respondent stop the claimant from carrying out any maintenance work on 25 August 2021?

Unfair dismissal

11. In relation to any separate contract of employment as a maintenance assistant:

11.1. Was the claimant dismissed?

11.2. What was the reason or principal reason for dismissal ? Was it a potentially fair reason?

11.3. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant? In particular:

11.4. Did the respondent adequately warn the claimant and give him a chance to improve;

12. Was dismissal within the range of reasonable responses?

Constructive dismissal

13. In respect of the contract as a kitchen porter, did the respondent do the following things:

13.1. Fail to provide written particulars of the contract of employment as a maintenance assistant;

13.2. Fail to pay the agreed hourly rate;

13.3. Fail to give the claimant work as a maintenance assistant and instead require him to do kitchen work?

13.4. Remove the claimant from his functions and position as maintenance assistant;

13.5. Fail to give required notice before removing the claimant from his employment as a maintenance assistant.

14. Did that conduct breach the implied term of trust and confidence in the claimant's contract of employment as a kitchen assistant?: In particular

14.1. 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

14.2. Did it have reasonable and proper cause for doing so;

14.3. was the breach so serious that the claimant was entitled to treat the contract as being at an end.

15. Did the claimant resign in response to the breach? Was the breach of contract a reason for the claimant's resignation.

16. Did the claimant affirm the contract before resigning?

<u>Remedy for unfair dismissal</u>

17. Whether any and if so what amount should be paid as a compensatory award?

18. What financial losses has the dismissal caused the claimant?

19. Has the claimant taken reasonable steps to replace his lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

20. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

21. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so did the respondent unreasonably fail to comply with it by:

21.1. Failing to provide details of claims that he was unable to perform tasks or that his work was not up to standard

21.2. Giving no opportunity to the claimant to respond to such claims;

22. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

23. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

24. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

25. Whether any and if so what amount should be paid as a basic award ?

26. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Breach of Contract/Notice

27. Was the claimant entitled to notice under the terms of a contract of employment as a maintenance assistant? If so how much contractual notice was the claimant entitled to?

28. Did the respondent summarily move the claimant from the position of maintenance assistant with no notice period? If so was that a breach of contract?

29. Did this claim arise or was it outstanding when the claimant's employment ended?

30. How much should the claimant be awarded as damages?

31. Was the claimant entitled to Statutory Notice pay under section 86 of the Employment Rights Act 1996? If so, how much ?

Written Particulars of Employment

32. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

33. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, should two or four weeks pay be awarded ?

Procedure Documents and Witnesses

34. The hearing was conducted remotely via CVP. All parties and witnesses were able to participate fully in the hearing.

35. The claimant provided a witness statement and gave oral evidence in support of his claims. He was represented by Mr Greehalgh from the Citizens Advice Bureau.

36. The respondent was represented by Mr Williams of counsel. A witness statement and oral evidence was provided by Mr Enriquez the respondent's maintenance manager.

37. I was provided with an agreed bundle of documents to which was added, by agreement, a copy of the internal advertisement for the position of maintenance assistant.

38. I heard opening and closing submissions from both parties on the evidence. I was not referred to any relevant law.

39. After considering the evidence and submissions I decided to reserve my judgment and provide written reasons.

Findings of fact

40. Having assessed all of the evidence, both oral and written, and taken into account the submissions of the parties I find on the balance of probabilities the following to be the relevant facts. Where there was a dispute I explain why I have made the relevant finding.

41. The respondent is a hotel golf resort and spa operator employing approximately 250 people.

42. The claimant was employed by the respondent as a kitchen porter continuously from 8 March 2019.

43. The terms of his employment as a kitchen porter were contained in a written Contract of Employment dated 8 March 2019 ("the March 2019 Contract") which referred to an Employee Handbook. I was not provided with a copy of the Employee Handbook.

44. The March 2019 Contract provided:

44.1. the claimant was *"employed as a kitchen porter and your duties will be as advised by your Head of Department. Your duties may be modified from time to time to suit the needs of the business".*

44.2. He was entitled to be paid the National Minimum Wage rate of £8.21 per hour.

44.3. The claimant worked a 3 month probationary period. During that period, if the claimant's work was not up to the required standard or the claimant was unsuitable the respondent could take remedial action or terminate the employment at any time, and reserved the right not to

apply the full contractual capability procedures contained in the Employee Handbook.

45. The March 2019 Contract was a 'zero hours' contract. The respondent did not agree to provide guaranteed hours of work, and the claimant was not bound to accept any work offered. In practice the claimant undertook weekly work in accordance with a published rota. The claimant's payslips indicated that his 'Pay Basis' was 'Monthly – Casuals'.

46. The March 2019 Contract provided for each party to give 1 week's notice up to the end of the probationary period and 1 month's notice thereafter.

47. The claimant had qualifications in carpentry. Some time before 16 June 2021 the respondent posted an (undated) internal advertisement for the job of maintenance assistant.

48. The advertisement stated, amongst other things that:-

48.1. The responsibilities of the role included (not a complete list):

48.1.1. to perform maintenance work 'around the whole complex' and 'for the whole hotel';

48.1.2. carrying out day to day maintenance tasks and involved handiwork, painting, electrical and plumbing works and carpentry.

49. The requirements of the job included (not a complete list):

49.1. being available as part of a 24 hour on-call programme;

49.2. a full driving licence.

50. At the time the respondent was in need of staff for both maintenance and kitchen porter roles and both functions were under operational pressures.

51. The claimant knew Mr Enriquez and raised with him the possibility of using his carpentry skills in a maintenance role. Mr Enriquez was attracted by the prospect of carpentry skills being available to him within his small maintenance team.

52. On 16 June the claimant asked to be considered for the role of maintenance assistant in response to the advertisement.

53. On 17 June the claimant attended a meeting with Mr Enriquez and Mr Thorne-Farrer – the respondent's then General Manager – to discuss the maintenance assistant job.

<u>The interview on 17 June 2021</u>

54. No written record was made, and no particulars of any discussion or agreement reached were produced. My findings about what was said at

the meeting have been made on the balance of probabilities by drawing inferences from the parties' evidence, from those matters which the parties agreed were discussed, from an internal email exchange on 1 July 2021 between Mr Enriquez and the respondent's HR manager, and from aspects of the parties' subsequent conduct.

55. The only evidence from participants present at that meeting are the differing recollections of Mr Enriquez and the claimant. The other participant, Mr Thorne–Farrer, did not give evidence.

56. Both the claimant and Mr Enriquez gave evidence honestly and to the best of their recollections, but those recollections were, I find, somewhat unreliable and internally inconsistent, or inconsistent with near contemporaneous statements. For example, Mr Enriquez' evidence was that at the meeting there was an agreement only to a trial period, but he had failed to make any reference to a trial period in his sworn witness statement. His evidence in relation to the claimant's performance (which I refer to below) also manifested internal inconsistencies. On the same issue – whether the agreement was for a trial period - the claimant was firm in his evidence that there was no 'trial' period discussed at the meeting. But this account was at odds with statements made in his grievance hearing on 7 September 2021 that he "*was told he would be temporary until November (2021) and this then would be reviewed*" adding that there were discussions about Christmas holiday "*so [he] assumed he would be staying".* I have therefore given appropriate weight to the witness evidence taking account of near contemporaneous documents, subsequent conduct and inherent probabilities.

57. Having regard to the totality of the evidence, including drawing inferences from the correspondence and conduct of the parties following the meeting, I find on the balance of probabilities that the following took place at the interview on 17 June 2021:

58. The respondent made the following offer to the claimant:-

58.1. to begin work and training as a maintenance assistant from 1 July 2021;

58.2. the requirements and responsibilities of the maintenance work were to be those contained in the advertisement;

58.3. the offer of work as maintenance assistant work would be on a trial basis which would extend until November 2021;

58.4. the claimant would continue to work as a kitchen porter until a replacement for him in the kitchen could be found;

58.5. the claimant's total hours of work would be 40 hours per week and would incorporate both types of work;

58.6. The expectation was that he would work 10am to 6pm Wednesday to Sunday, but the claimant was required to be flexible and to accommodate the needs of the business (including the need to have 24/7 on call maintenance cover) and his rota-ed hours and the split of work were not fixed;

58.7. the salary for maintenance work would be £21,000 per annum payable monthly in arrears;

58.8. during the trial period the claimant's work performance and suitability for the role of maintenance assistant would be kept under review;

58.9. In particular the advertised requirement to hold a full driving licence would not be insisted upon during the trial period. The claimant would be permitted to use buggies to move around the estate. That concession would be subject to on-going review in light of the needs of the business during the trial period;

59. The claimant verbally accepted the respondent's offer in those terms.

60. I find that there was no discussion at the meeting about:

60.1. notice periods or performance assessment during the trial period; or

60.2. separate rates of pay attributable to the different roles.

61. The parties each made unspoken assumptions about these matters.

62. Resuming the factual chronology, the claimant began maintenance work on 1 July 2021.

63. On the same day the respondent's HR manager emailed Mr Enriquez at 13:50. I infer that the context of this email was a prior communication from Mr Enriquez concerning the claimant moving to a maintenance role. She asked: "*So Ricky is, I am assuming Ricky Humble, who is on Fourth, but currently assigned to the kitchen. If he is moving can you please confirm salary, hours and job title and I can update Fourth accordingly*". Fourth is the name of the respondent's payroll/HR management software.

64. Mr Enriquez replied at 14.06. He said: *"Ricky is starting today for a few hours until the kitchen finds another KP to replace him. His job title is Maintenance Assistant, his salary is 21k P.A. The hours working with us will be Wednesday to Sunday 10:00 h to 18:00 hr every day"*.

65. The HR manager then emailed a colleague on payroll administration with a practical question. She said: *"You may already be aware that Ricky is moving to Maintenance, but is (from today) diving* [sic] *his time between the two roles, which of course have different salaries! I am not 100% sure*

how to process this on Fourth…I can create multiple jobs, but not sure about different rates of pay?'.

66. Having apparently received a reply, the HR manager emailed Mr Enriquez back at 15:04: *"I have checked with Anna re payroll. Can I assume that Ricky has not yet signed a contract for his maintenance role ? If not, then I can keep him on a casual contract, but set up two different rates of pay for his time in kitchen and maintenance. Once he moves over full time, we can ensure that he is issued with a correct contract from then on*. *Can you confirm if this is all agreeable and Anna and I will action tomorrow".*

67. I infer from the respondent's manner of paying the claimant subsequently (see below) that Mr Enriquez confirmed the suggested course of action.

68. This exchange was not known to or discussed with the claimant.

69. Between 1 July and 25 August 2021:-

69.1. The claimant worked a rota-ed 40 hour week, Wednesday to Sunday 10 am to 6pm.;

69.2. approximately 50% of his time – the mornings – he worked as a kitchen porter;

69.3. for the remaining 50% of his time – the afternoons - he undertook the duties of maintenance assistant;

70. The respondent calculated and paid the claimant at two different rates for the different work he did:

70.1. In respect of his work as a kitchen porter he was paid the National Minimum Wage rate of £8.21 per hour;

70.2. In respect of his hours worked as a maintenance assistant he was paid a rate of £10.10 per hour calculated as a pro-rated hourly rate based on an annual salary of £21,000 and a 40 hour working week.

71. On 30 July 2021 the claimant messaged the HR manager, Mr Enriquez, and the respondent's deputy manager asking for an update as he was not happy that he was still working as a kitchen porter a month after starting maintenance work. The HR Manager replied explaining difficulties in finding staff to replace the claimant in the kitchen porter role.

72. The respondent was unable to recruit a replacement kitchen porter and so the claimant continued to fulfil both roles.

73. The claimant continued to seek updates on the need to do kitchen porter work. I find that he was unhappy with doing kitchen work by this stage and wanted to do exclusively maintenance work.

74. At the same time he requested a copy of his contract of employment. On 23 August the HR Manager gave the claimant a copy of his original unamended March 2019 Contract.

75. On 24 August 2021 Mr Enriquez told the HR manager that the claimant was '*not suitable for the role'* and would not be moving over to maintenance. The HR manager re-advertised the job on the same day.

76. On 25 August the HR Manager met with the claimant and informed him that he would not be moved permanently to the maintenance team.

77. The reason given by the HR manager at that meeting was that the claimant's performance was unsatisfactory, that Mr Enriquez had found his not having a driving licence too difficult to accommodate, and that his maintenance work could be ended without notice because he was still in a probation period. These reasons were set out in a letter sent to the claimant on the afternoon of the same date. The letter stated "*We are happy to welcome you back into the KP role as per your contract"*.

78. The claimant responded immediately after the meeting by email. He said: "*Just wanted to let you know I won't be coming back because of how I have been treated….Unless I get a contract for maintenance and a form of apology I will not be returning.*". He complained that he had not been provided with a contract, and that there had been no mention of any probation period, and that it had been agreed that no driving licence was necessary so long as he could get to work to do his shifts.

79. He followed up on 26 August 2021 with a fuller email response to the respondent's letter. In that email he said that the maintenance role was '*for 40 hours a week, permanent or not'* . He had not agreed to do 50/50 but had said he would '*help for a couple of weeks, which turned into months, on the agreement I would get my new salary straight away as an incentive which didn't happen'*. He recorded that he had "*said on multiple occasions that he no longer wanted to kp but was ignored, it was due to last until November then reviewed if we still needed the staff*". He repeated his complaint that he had not been provided with a contract of employment, and that there had been no discussion of a 'probation' period or review. He said that the reasons for his dismissal were unfair because it had been agreed in the interview that a driving licence was 'not *a game changer'*, that buggies could be used on the estate and that that had not caused any problems in practice. He had not been given any timescale to address the lack of a licence. In regard to his 'skills not being to standard' he recorded that he had been praised for his work, had completed all tasks given to him and asked for examples of sub-standard performance. He had *"no desire to come back for how I have been treated".*

80. I find on the balance of probabilities that by this stage the claimant no longer wished to do kitchen work at all.

81. On 30 August 2021, following, I infer, an indication from the HR manager that he could raise a grievance if he wished to, the claimant raised a grievance setting out his complaints in a letter. In summary his complaints were i) he had not received a copy of a written contract for the maintenance role ii) he did not receive his maintenance salary for all hours worked iii) he had not had a performance review iv) he had received no notice of dismissal and there had been no agreement to a 'probation' period v) he had been given no details of sub-standard work.

82. The HR Manager conducted a grievance interview with the claimant (attended by a third person) on 7 September 2021. She met with Mr Enriquez on 14 September 2021. Mr Enriquez provided her with his account of the interview on 17 June in relation to pay levels and the need to continue with kitchen work because of staffing needs. He said that the appointment was a temporary one for a 'trial/probationary' period only, not until November. He explained that he had experienced practical difficulties because of the claimant's lack of a driving licence. He stated that the claimant had a '*poor attitude to work*'.

83. On 15 September 2021 the HR manager wrote to the claimant rejecting his grievances on the grounds that :-

83.1. The claimant had been provided with his written contract – namely the March 2019 contract;

83.2. She preferred Mr Enriquez's account of the interview, that there was a clear agreement that the claimant would receive the March 2019 Contract pay rate for kitchen work;

83.3. There was no legal requirement to provide written terms of the maintenance role because there had only been a verbal agreement to a temporary variation of the March 2019 Contract;

83.4. There is no requirement to carry out a performance review on a temporary contract;

83.5. There was no obligation to give notice because there was none required under the March 2019 Contract – which was casual - and that was the contract which covered his employment. There was no obligation to give any reason or evidence for the dismissal;

83.6. The 'probation period' issue was irrelevant. The maintenance role was for a trial period to see if he fitted the team, including if the team could support someone without a driving licence. He was dismissed from the maintenance role because he did not fit the role.

84. The respondent advised the claimant of a right to appeal by writing within 5 days with reasons. The claimant wrote to appeal on 30 September 2021. The respondent did not conduct an appeal because this was outside of the time period notified to him to lodge an appeal.

85. On 14/15 October 2021 the claimant reiterated his position in an email, and the HR Manager declined to consider the matter further. The HR manager's response included the following points:-

85.1. The March 2019 Contract allowed for alterations to the job role. It was *"not necessary to give notice where one role finishes or you are no longer required within that department'*

85.2. The claimant was not in a probationary period. He was not dismissed from his March 2019 Contract, he resigned.

Performance

86. I find that in the period to 24 August 2021 no complaints were made to the claimant about the quality or standard of his work. No evidence of any complaints or records of sub-standard work was provided in response to the claimant's requests or at his grievance hearing.

87. Mr Enriquez' witness statement asserted that the claimant was not able to complete tasks, especially in a carpentry capacity. However, in his oral evidence he changed his position. He was not able to identify any instances when the claimant had not completed a task and accepted that the respondent did not have many carpentry tasks for the claimant to do. I find that he did not have a genuine belief that the claimant's work was sub-standard.

88. However, I accept Mr Enriquez' evidence that his team was under pressure during that period, and that he perceived that he needed to make operational adjustments to accommodate the claimant's lack of a driving licence – for example having to send other team members to buy stores/equipment and to drive the van to the claimant's location where it was necessary to transport heavy tools to him. He said that he believed that that meant that the claimant overall took longer to complete tasks because of lack of mobility. He was concerned about the claimant's ability to get to the site if he was on call and had to attend at short notice. I find that he genuinely held these beliefs on reasonable grounds.

89. Mr Enriquez' evidence was that he felt that when he needed help the claimant was not available to him. This feeling was reinforced when the claimant was away on sick leave in the period immediately before 24 August. He said that he found the claimant unsuitable. I find that he genuinely held this belief on reasonable grounds.

90. He did not discuss any of these matters with the claimant before 24 August 2021, but that he informed HR on that date that the claimant was not suitable for working with the maintenance team.

Relevant Law

Unfair dismissal

91. If an employer simply relies on the argument that there was no dismissal, a tribunal is under no obligation to investigate the reason for dismissal (or its reasonableness) for itself — Derby City Council v Marshall 1979 ICR 731, EAT.

92. If there has been a dismissal the test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg capability and qualifications, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

93. It is sufficient that the employer believes on reasonable grounds that the employee is incapable. It is not necessary to prove actual incapacity: Alidair Limited v Taylor 1978 ICR 445, CA. The burden of proving that the employer held that belief at the time of dismissal and that it was held on reasonable grounds, including whether the employer conducted a reasonable investigation to verify its belief, is neutral.

94. Qualifications for the purposes of s98(2)(a) are defined as *'any degree, diploma or other academic, technical or professional qualification relevant to the position with the employee held"*. Holding a driving licence is a qualification because it relates to aptitude or ability to do a job which necessitates driving.

95. Capability under s98(3) is assessed by reference to skill, aptitude and other physical or mental quality. The alleged incapacity must relate to the performance of the employee's duties, though they do not need to affect all of them.

96. I must decide whether there was material in front of the employer that satisfied the employer of the employee's inadequacy or unsuitability and on which it was reasonable to dismiss. The employer can set its own standards which employees are required to achieve.

97. Under s98(4) 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

98. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own view: Iceland Frozen Foods v Jones 1983 ICR 17, EAT. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA).

99. In general an employer should be slow to dismiss an employee for incapacity without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on that ground and giving him an opportunity of improving his performance: James Walton v Holy Cross UDC 1973 ICR 398 NIRC.

100. In determining any question arising I must take into account the ACAS Code on Disciplinary and Grievance Procedures and where an employer or employee has unreasonably failed to comply with the ACAS Code of Practice I may, if I consider it just and equitable in all the circumstances to do so, increase or reduce any compensatory award by up to 25%: Trade Union and Labour Relations (Consolidation) Act 1992. Section 207and 207A.

101. An employee requires two years' continuous employment to bring a claim for unfair dismissal in respect of the contract that is terminated. The period of continuous employment is also used in the calculation of the basic award for that contract. There is a statutory presumption in favour of continuity unless the contrary is shown: section 210(5), ERA 1996.

102. Where there are two separate and distinct contracts running side-by side and concurrently, each concurrent contract is treated as separate employment for the purposes of determining continuity of employment. It is not possible to allow the service or hours under one to feed the other: Surrey County Council v. Lewis [1987] I.C.R. 982.

103. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. The Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

104. Where I find that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, I must reduce that amount accordingly Section 122(2) of the Employment Rights Act 1996.

105. Where I find that the dismissal was to any extent caused or contributed to by any action of the claimant, I must reduce the amount of any compensatory award by such proportion as I consider just and equitable: Section 123(6) of the Employment Rights Act 1996.

106. Section 1 of the Employment Rights Act 1996 requires that an employer provide an employee with a written statement of particulars of employment. Section 4 requires a written statement of any changes to those particulars to be provided. Section 38 of the Employment Act 2002

provides for a minimum award of two weeks' pay and a maximum of 4 weeks pay if a breach of s1 or s 4 is unremedied at the time of dismissal unless there are exceptional circumstances that would make it unjust or inequitable to so order.

Constructive dismissal

107. Constructive dismissal requires a repudiatory breach of contract by the employer which is accepted by the employee, bringing the contract to an end. The test for whether or not there has been a repudiatory breach is an objective one: Western Excavating v Sharp Western Excavating (ECC) Ltd v Sharp [1978] Q.B. 761; The Leeds Dental Team Ltd v Rose UKEAT/0016/13). Whether the breach is sufficiently serious to be classed as repudiatory is a question of fact and degree.

108. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:

108.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, their resignation?

108.2. Has the employee affirmed the contract since that act?

108.3. If not, was that act (or omission) by itself a repudiatory breach of contract?

108.4. If not, was it nevertheless a part of a course of conduct which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)

108.5. Did the employee resign in response (or partly in response) to that breach? But it does not have to be the effective cause of the resignation. Nottinghamshire County Council v Meikle [2004] IRLR 703.

109. The employee must make a choice to accept the repudiatory breach. He may be taken to have impliedly affirmed the contract if he continues to work and accept wages after the breach. Exercising a grievance procedure or a right of appeal against what is said to be a seriously unfair disciplinary decision may not amount to unequivocal affirmation of the contract, or of the contract as a whole: Kaur; Gordon v J & D Pierce (Contracts) Ltd UKEATS/0010/20 (obiter) cf Patel v Folkestone Nursing Home [2018] EWCA Civ 1689.

110. An employee who is constructively dismissed will be entitled to damages for breach of contract to put him in the position he would have been in had the contract been lawfully performed. He may also be entitled

to compensation for unfair dismissal, if the constructive dismissal was unfair.

Conclusions

Factual Issues: Contract of Employment

111. In my judgment the claimant and respondent entered into a binding oral agreement on 17 June 2021. The nature and effect of that agreement was, with effect from 1 July 2021, to vary the parties' existing contractual relationship found in the March 2019 Agreement and the Employee Handbook in the respects I set out below.

112. I reject Mr Greenhalgh's submission that the claimant entered into a new, wholly separate contract of employment as a maintenance assistant which subsisted concurrently with and separately from the March 2019 Contract. I take account of the fact that the requirements and responsibilities of the two functions the claimant was to carry out were very different from those provided for in the March 2019 Contract: the working hours arrangements (zero hours as against fixed hours) were different, and there was separate line management control. Also, I infer that the parties anticipated on 17 June that if his performance was satisfactory and a replacement in the kitchen could be found the claimant would transition to only doing one job – the maintenance function. However, I find as a fact that on 17 June 2021 the parties agreed that for a trial period the claimant would perform two functions on the same site, on the same day, by reference to a global work rota and subject to the terms of a common Employee Handbook, and that those functions would include that of a kitchen porter. It is ultimately a question of fact and degree but in my judgment, the intention of the parties, viewed objectively, on 17 June 2021 and the legal effect of their agreement was, for a temporary period, to vary the existing March 2019 Contract in the respects I set out below.

113. Because the claim for unfair dismissal arises in connection with, as I have concluded, a variation to the contract of employment entered into in March 2019, and not, as Mr Greenhalgh sought to persuade me, a new and entirely separate contract of employment as a maintenance assistant, no jurisdictional issue of the duration of prior continuous employment of the kind raised in Lewis v Surrey CC arises in connection with the claimant's unfair dismissal claim in respect of the claimant's maintenance work.

114. I find that the nature and effect of the agreed variation to the March 2019 Contract was:-

114.1. to provide for the claimant to work a 40 hour working week, in place of the existing zero hours arrangements;

114.2. for the claimant's time to be divided (in accordance with a rota provided by the respondent) between kitchen porter work and

maintenance work until a replacement kitchen porter could be found by the respondent;

114.3. to add to the claimant's existing responsibilities as a kitchen porter (found in the March 2019 Contract) the requirements and responsibilities set out in the maintenance assistant advertisement when the claimant was doing maintenance work, with the exception of the requirement initially for the claimant to have a driving licence;

114.4. that the agreement was for the claimant to carry out maintenance work on a trial basis until November 2021 (4 months) unless terminated early.

114.5. During that period the claimant's performance and suitability would be subject to review and assessment including the waiver of the requirement to have a driving licence and that the maintenance work might be terminated during the trial period.

115. The parties agreed that the claimant would receive payment for hours worked as a maintenance assistant at a rate equivalent to the annual salary of £21,000 for that job.

116. In the absence of any discussion on the issue of the payment rate for separate functions, considering the position objectively, I find that they agreed no variation to the pay rate for the ongoing kitchen work provided for in the March 2019 Contract. The claimant therefore remained entitled to be paid at the National Minimum Wage rate for kitchen work.

117. There having been no discussion about performance assessment procedures during the trial period, I conclude that the parties intended no change to the terms and procedures found in the March 2019 Contract and the Employee Handbook. I was not provided with any information about the Employee Handbook. In the absence of detail of the contractual position, I proceed on the basis that those provisions were consistent with the obligations which would be expected of a reasonable employer of the respondent's size and resources during a trial period.

118. Those obligations therefore included conducting a fair review of the claimant's performance, advising the claimant of the respects in which, following such review, his performance was unsatisfactory, warning him formally of the possibility or likelihood of dismissal (or removal from the maintenance trial) on that ground and giving him an opportunity of improving his performance.

119. I have found there was no discussion of any notice period during the meeting on 17 June 2021.

120. Both parties submitted that neither was required to give notice to terminate the March 2019 contract because it was a zero hours contract. They both had different reasons for adopting this position. The claimant's position was that there was a separate and distinct maintenance contract

which left the March 2019 agreement intact. The respondent's position was that the maintenance arrangements were merely a trial and that the March 2019 Contract remained unchanged. Both parties' conclusion that no notice was required to terminate the March 2019 Contract however proceeded from the premise that the March 2019 Contract was a 'zero hours' contract. However, as I have found that there was a variation to the March 2019 Contract to provide for specified hours the premise underlying their respective positions on no notice under the zero hours contract fell away.

121. I conclude therefore that, objectively viewed, the parties' agreement envisaged a trial period that could be terminated with some notice. The question of the period of notice cannot be found in the terms of the March 2019 Contract: there is no concept in the March 2019 contract of a trial period. The 1 week notice period which it is provided applied pending completion of an initial 'probationary period' in the March 2019 does not supply the answer because the concept of a 'probation period' in the March 2019 Contract encompasses both general suitability and work performance, and the claimant had already been found to be generally suitable for employment by the respondent and the probationary period under the Contract had been completed. The one month period of notice of termination to be given by employer and employee never applied at all to the kitchen porter work, and did not apply in terms to the claimant's employment as varied during a trial period. I find therefore that, objectively viewed, in the absence of express agreement it would be implied that the parties intended to provide the minimum period of notice provided by statute. Having regard to the claimant's length of continuous service, that is a period of two weeks.

Constructive dismissal

122. The respondent was entitled to vary the claimant's work rotas to accommodate the needs of the business. However, the respondent acted in breach of the contract of employment, as varied, by:-

122.1. ceasing to provide work for the claimant as a maintenance assistant on 25 August 2021 and stating that it would not provide such work in future;

122.2. unilaterally varying the working hours so as to revert to a zero hours basis

122.3. unilaterally varying the scope of employment so as to limit it solely to kitchen work;

122.4. in each case acting without notice of the change;

122.5. purporting to justify the above on the basis that:-

122.5.1. the claimant's performance was unsatisfactory but providing no details or disclosing no reasonable grounds for doing

so, and having conducted no performance review involving the claimant;

122.5.2. the claimant's lack of a driving licence was proving too difficult to accept but without providing any prior notice that the waiver of that requirement was to be withdrawn.

123. The respondent's conduct taken together was sufficiently serious to amount to a breach of the implied term of trust and confidence in the contract of employment, as varied, and was repudiatory entitling the claimant to treat himself as constructively dismissed.

124. The claimant accepted the breach by resigning by his email of 25 August 2021. He said "*Just wanted to let you know I won't be coming back because of how I have been treated"*.

125. The words of his email and letters of 25 and 26 August 2021 make clear that a reason for his resignation was the respondent's breach of contract: "*Almost 3 years at this company just to be treated unlawfully and unfairly its disgraceful": "As stated before I have no desire to come back for how I have been treated through the contuct [sic] of the hotel ...Like I have said before I will be taking this further".*

126. The claimant's use of the grievance procedure, and attempted use of the appeal procedure did not amount to subsequent affirmation of the contract because:-

126.1. the claimant provided no further work after 25 August 2021;

126.2. the respondent had not provided written particulars or details of the grounds upon which it had terminated the claimant's maintenance work, and it was reasonable for the claimant to engage in a process other than litigation provided for in the contract and envisaged by the ACAS guidelines which might be expected to yield such information;

126.3. The claimant did not seek reappointment in the course of the grievance or appeal procedures.

<u>Unfair dismissal</u>

127. I find that the claimant was unfairly constructively dismissed.

128. The respondent's case was simply that the claimant resigned and was not dismissed. It did not identify (in the alternative to its main case that the claimant resigned) a potentially fair reason for the constructive dismissal of the claimant. The claimant's constructive dismissal was therefore unfair.

129. I am not obliged to investigate the reason for dismissal (or its reasonableness).

130. However, for the assistance of the parties I make the following observations and findings:-

131. I have found that :-

131.1. the real reasons for the respondent's repudiatory conduct was Mr Enriquez's genuine beliefs that the claimant's lack of a driving licence required more complex and time-consuming arrangements to be made for the claimant to work, concern and that the claimant was actually or potentially unavailable when required and that generally the claimant was unsuitable as a member of Mr Enriquez' team. In addition, the respondent required but was unable to find substitutes for the claimant in the kitchen.

132. Mr Enriquez had no reasonable grounds for, or no genuine belief in the claimant's lack of capability for maintenance work;

133. The lack of a driving licence, being a qualification required by the maintenance job, was a potentially fair reason for dismissal within s 98 (2) (a) ERA 1996. However in its ET3 the respondent states that *"this was a small part of this decision [*to terminate the trial] *and not the main reason behind the decision".* In any event the respondent did not act reasonably in treating qualification (the lack of a driving licence) as a reason justifying its termination of the claimant's maintenance work. The respondent:-

133.1. did not tell the claimant that it was experiencing difficulties because of the lack of a driving licence;

133.2. did not give him any warning or notice of its decision to end the maintenance trial for that reason;

133.3. did not give the claimant any opportunity to make representations about those difficulties and how they might be addressed, including whether changed or alternative travel arrangements would be adequate;

133.4. did not give the claimant time to offer to acquire a licence.

134. The respondent's subsequent grievance procedure did not cure these deficiencies:

134.1. The HR manager conducting the investigation did not seek evidence or examples of alleged unsatisfactory performance, or operational difficulties. She merely accepted oral statements by Mr Enriquez;

134.2. She did not seek evidence of what happened at the meeting on 17 June from Mr Thorne-Farrer;

134.3. No consideration was given after the grievance investigation to deciding on a different course of action, a performance review or

representations by the claimant in response to specific concerns. The decision was treated as a foregone conclusion.

135. Even if the respondent were to have relied upon qualification as a potentially fair reason, if it were necessary as part of my decision I would have concluded that its conduct fell outside the band of reasonable responses for the procedural reasons above.

Remedy

Breach of Contract/Wrongful Dismissal

136. I find that the claimant's average gross weekly wage was:

(20h x (£8.21)) + (20h x (£10.10)) = £366.20 gross.

137. In the absence of documentary evidence of the claimant's actual net pay, I have applied the multiplier of 0.9286 to the gross pay figure to arrive at net pay. This multiplier was used by the claimant in his schedule of loss to determine his net pay in his new employment and the approach used in the schedule was unchallenged by the respondent.

£66.2 x0.9286 = £340.05 net

138. The claimant was entitled to 2 week's notice which has not been paid: **£690.10 net.**

Unfair Dismissal

Basic Award

139. Claimant's age at EDT was 25. He had two years continuous employment. Basic award is two weeks gross pay:

2 x £366.20 = **£732.40 gross**

Compensatory Award

140. The claimant obtained new employment as a warehouse assistant for 40 hours per week at a gross salary of £19,136 per annum on 27 September 2021. That employment is continuing. The claimant has therefore been continuously employed in the new job for approximately 56 weeks. In the circumstances I consider that the claimant's current employment can properly be regarded as permanent.

141. The claimant's weekly wage in that job exceeded by a small amount that to which I have found he was entitled to be paid by the respondent: £368 vs £366.20 gross. As regards pensions, the March 2019 Contract provided that: "*We operate a contributory pension scheme to which you will be auto-enrolled into [sic] (subject to the terms and conditions of the scheme. Further details are available from the HR Manager"*. The claimant's schedule of loss claimed an amount of £82.82

per week. There was no other documentary evidence before me to support this sum but it was not challenged by the respondent. However, no allowance is made in the claimant's schedule for employer pension contributions made by the claimant's new employer. The claimant's new employer's contract provided that "*the company operates an auto-enrolment pension scheme in line with government requirements".* There is insufficient evidence from the three payment slips in evidence to prove that there was any pensions contribution deficit during the relevant 5 week period to September 27 2021.

142. The claimant's compensatory award therefore falls to be assessed by reference to the sums due to him only during the period of unemployment until he obtained his new employment.

143. The claimant is entitled to the full amount of his wages during the period of unemployment : 25 August 2021 to 27 September 2021.

5 weeks x £340.05 gross (£!,700.25) LESS 2 week's payment in lieu of notice (£690.10 - see breach of contract award above) = **£1010.15 net**

144. In addition the claimant is entitled to a sum reflecting loss of pension contributions during this period. The claimant's schedule of loss claimed an amount of £82.82 per week. There was no other documentary evidence to support this sum, but the schedule was not challenged in terms by the respondent. The amount of pension loss is therefore:

5 weeks x £82.82 = £**414.10**

145. There is no claim for, or evidence before me of the loss of any other benefits.

146. In the absence of a potentially valid reason for dismissal relied upon the by respondent, and in light of the lack of evidence addressing the claimant's performance I conclude that I have an insufficient evidential basis to speculate on whether a fair procedure would nevertheless have resulted in the claimant's dismissal, or a fair variation of the terms of his employment to remove maintenance work. In case I am wrong, and I ought to have treated the claimant's lack of a driving licence as a potentially fair reason for the respondent's conduct, I find that:-

146.1. If the respondent had conducted a fair procedure, the claimant would be likely to have made representations and made use of the grievance and appeal procedures. That process would have taken until 27 September 2021 or later in any event;

146.2. The claimant would have resigned in any event if the respondent had terminated his trial as a maintenance assistant fairly, because I find that he no longer wished to continue work in the kitchen at national Minimum Wage rates or at all after August 2021.

147. The contributory conduct of the claimant which the respondent relied upon for the purpose of reducing any compensatory award was the claimant's resignation. Since I have found he was entitled to treat himself as constructively dismissed I make no reduction to the award on the basis of any contributory fault of the claimant.

148. I find there was no disciplinary or culpability element in the claimant's conduct relied upon by the respondent when it dismissed him. I find therefore that no ACAS code was applicable and make no uplift in to the award in respect of the respondent's unreasonable failure to follow the ACAS code: Holmes v Qinetiq Ltd 2016 ICR 1016, EAT.

149. In circumstances where, as I find, the respondent would have continued to require the claimant to do kitchen work, but the claimant would have resigned if he was required to do so at national minimum wage in the month following August 2021, I do not consider it just and equitable to make any award for loss of statutory rights.

150. The respondent failed to provide written particulars of the changes to the claimant's terms of employment. No exceptional circumstances justified the respondent's failure. In considering whether it is just and equitable to award more than the minimum amount 2 weeks pay, I take account of the fact that the respondent did provide a contract at the claimant's request. Whilst that copy of the contract did not reflect the terms as varied, the respondent did not consider there to have been a legal variation to amend the original contract. As against this I take account of the fact that the respondent was an employer of some size with an HR department, it failed to ask potential witnesses about the meeting of 17 June 2021 and if the respondent had kept a proper record of the meeting and produced details of the changed particulars it might well have led to different behaviours by itself or the claimant at an earlier stage and avoided the dispute escalating. I consider it just and equitable to award the higher amount of 4 weeks pay.

151. 4 weeks x £366.20 = **£1464.80 gross**

Employment Judge N Cox

Date:20 November 2022