



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss E Fox

**Respondent:** The Vintage Sports-Car Club Limited

**Heard at:** Watford, by CVP

**On:** 23 June 2022  
25 & 26 July 2022

**Before:** Employment Judge Maxwell

## Appearances

For the claimant: in person

For the respondent: Mr Butler, Counsel

Oral judgment and reasons having been given to the parties, the Claimant requested written reasons by an email of 27 July 2022.

## REASONS

### Preliminary

#### Amendment

1. By consent the name of the Respondent is amended to The Vintage Sports-Car Club Limited.

#### Documents & Evidence

2. I was provided with:
  - 2.1 an agreed bundle of documents;
  - 2.2 witness statements for:
    - 2.2.1 the Claimant;
    - 2.2.2 Dr Alisdair Lockhart, a member of the Respondent club;
    - 2.2.3 Mr Tunnicliffe, the President;
    - 2.2.4 Ms Brown, the Club Secretary;

2.2.5 Mr Kneller, a member of the Board and past President.

3. Following an adjournment and on the beginning of day two, I was provided with:
  - 3.1 an additional tranche of documents from the Claimant;
  - 3.2 one further page from the Respondent.
4. At the Claimant's prompting, I also obtained from the Tribunal file a copy of a letter written on the instruction of EJ Anstis, in response to party correspondence.

#### Issues

5. The Claimant brings a constructive unfair dismissal claim. The issues arising are whether:
  - 5.1 the Claimant has shown a repudiatory breach of contract;
  - 5.2 she resigned in response to the breach;
  - 5.3 she did not waive the breach or affirm the contract;
  - 5.4 any resulting dismissal was unfair.
6. In a lengthy witness statement the Claimant sets out a detailed history of dissatisfaction with the Respondent and its "culture", from the very start of her employment. She also describes the mistreatment of other staff members and their personal circumstances. At the beginning of the first day of this hearing, there was a discussion with the Claimant about her claim and she clarified that for the purposes of showing a repudiatory breach of contract she relied upon the following as causing or contributing to a breach of the implied term of trust and confidence:
  - 6.1 having someone else's job imposed upon her without consultation;
  - 6.2 being required to undertake overnight stays for work;
  - 6.3 a lack of health and safety training;
  - 6.4 the lack of a pay rise.
7. The above matters are those the Claimant says she resigned in response to. This is consistent with the particulars in her claim form.

#### Procedural Matters

8. Unfortunately, whilst the case had been listed for a two-day hearing, as a result of a lack of judicial resources, this listing was reduced to one day. Unsurprisingly perhaps, this proved to be insufficient. The matter was adjourned part-heard. Whilst one further day seemed likely to be sufficient, in order to avoid any risk in this regard, I listed it for a further two days.

9. At the beginning of the second day there were a number of preliminary issues. There had been a flurry of late disclosure, including one email which had only just been sent by the Respondent to the Claimant. This proved possible to deal with by consent and both parties' documents were added to the bundle. The Claimant then referred me to correspondence she had sent to the Tribunal earlier this year and a reply written at the direction of EJ Anstis. Closer scrutiny reveals the letter had in fact been written in response to letters from the Respondent. The Claimant's email had not been answered. Reading through the text of this document, the impression was given of the Claimant merely updating the Tribunal with her view about the Respondent's lack of cooperation in complying with the case management orders. Buried away in one of the attachments, however, were her comments on an amended bundle index, which included a request for disclosure. I explained that in a constructive dismissal claim it was necessary for the Claimant to show a repudiatory breach in matters they were aware of at the time and responded to by resigning. It would, therefore, be difficult to find the grounds for a constructive dismissal claim in correspondence or other documents the Claimant was not privy to at the time of her resignation. In light of this explanation, the Claimant did not pursue any further disclosure application.
10. There was, however, another difficulty. One of the Respondent's witnesses, Mr Tunncliffe, was in France. He wished to give evidence by video. Unfortunately, he had not told the Respondent's solicitor about his intentions. At the end of the previous week the Respondent notified the Employment Tribunal pursuant to the Presidential Guidance on witnesses giving evidence from abroad. The lateness of the application meant it had not yet been responded to. Further enquiries I made revealed that France had yet to respond to a request from the Foreign, Commonwealth and Development Office in this regard. As such, it seemed most unlikely permission would be obtained before the end of the current listing. The Respondent elected not to apply for a postponement but instead to rely upon the written statement from Mr Tunncliffe. Whilst I admitted his witness statement, the weight I attached to this was reduced because he was not available for cross-examination or to answer any questions I had.

## **Facts**

11. Whilst there is much on which the parties have different views, the central facts are not in dispute. The issues which arose are reflected in a considerable volume of contemporaneous correspondence.
12. The Respondent is, as its name suggests, a club for vintage sports car enthusiasts. An important part of its activity and also income generation is provided for by the organisation of motor racing events.
13. The Claimant began her employment with the Respondent on 15 October 2018. Her position was, initially, Anniversary Administrator. That role was concerned with organising a week-long celebration of the Club's 85th Anniversary, including a race meeting at Brands Hatch.
14. A difficult AGM took place in April 2019.

15. Also in April 2019, the Claimant attended a race meeting at Brands Hatch. She found this a stressful and worrying experience. She had not received any race-specific training and did not feel safe.
16. During the course of the year, a number of employees left the Respondent, one way or another.
17. Having previously been on a fixed-term contract, from 1 September 2019, the Claimant became a permanent employee, in the position of Membership Secretary & Media Consultant. She signed terms and conditions of employment on 19 September 2019, including a salary of £27,500. In about November 2019, the Claimant's salary was increased to £30,000. This was intended to reflect additional duties she had taken on, assisting Rob Smee, Marketing Manager, with copywriting, events and some other activities.
18. At the beginning of 2020, a new President was appointed, Paul Tunncliffe.
19. In February 2020, Mr Smee was dismissed. Mr Tunncliffe asked the Claimant if she would take on some of Mr Smee's duties. He explained no increase in pay was offered at this time, given the financial circumstances the Respondent found itself in, but they could talk about money nearer the "middle of the year". The Claimant accepted this.
20. During this hearing, at times, the Claimant appeared to dispute the fact of her having agreed anything with Mr Tunncliffe. I am satisfied that her subsequent conduct could only be viewed as consistent with agreement. She took on and carried out many of the tasks previously carried out by Mr Smee.
21. Mr Tunncliffe wrote to his colleagues about this on 11 February 2020:

**Please note that I intend making Rob Smee redundant on Thursday as discussed at our last meeting. He has less than 2 years' service, and so has no legal rights, and no redundancy pay will be due. I intend promoting Liz to a new role of Marketing & Membership Manager as a consequence, news she says she would welcome with enthusiasm.**

22. Mr Tunncliffe's email fairly reflected his recent conversation with the Claimant. Given what he said he intended to do with respect to Mr Smee, his email is written in candid terms.
23. On 18 February 2020, the Claimant replied to an email from Mr Minnis, the MD of a printing business which, had been sent to Mr Smee:

**Liz here. Rob no longer works for the Club so I will be picking up the media and marketing side of things.**

Mr Minnis responded by explaining he had been in discussion with Mr Smee about making the Respondent's newsletter a "full colour" document.

24. On 19 February 2020, the Claimant wrote to Mr Tunncliffe:

**Gill has just flagged up that we need to be a little careful with whatever my new job title is going to be (she is working on the newsletter). Are you happy with Membership & Marketing Coordinator?**

25. Shortly thereafter, the Respondent was affected by the pandemic and lockdown. Race meetings were stopped, which put further pressure on the Respondent's finances.
26. In April 2020, Ms Brown was appointed Club Secretary.
27. There was no conversation about pay in the middle of 2020. The Claimant accepted this, given the unusual circumstances
28. One point the Claimant made repeatedly during this hearing was that the Respondent must have been able to afford to increase her pay, given the fact it took on new staff. She asked the Respondent's witnesses a number of questions about recruitment in 2020. Four members of staff were recruited. Both Ms Brown and Mr Kneller gave evidence to like effect on this point, which I accepted. Three of the new recruits (including Miss Brown) were direct replacements, at a lower cost, for recently departed employees. The fourth, was an accountant. The explanation for this last appointment was that management accountancy had proved a particular weakness for the Respondent in recent times and it was necessary to employ someone with the requisite skills to remedy this. The Claimant did not challenge Ms Brown or Mr Kneller on this explanation.
29. In October 2020, Ms Brown conducted the Claimant's appraisal. On this occasion, the Claimant did bring up the subject of her salary. Although Ms Brown had been in post for some months, this was the first time the Claimant had discussed pay with her. The Claimant said her pay should be similar to that received by the Competitions Secretary. Ms Brown said she would consider this request, although she thought it unlikely the Claimant's expectations would be met, as the Competitions Secretary was one of the more senior specialist positions within the Respondent. Ms Brown added that if the Claimant's salary was not increased at that time, it would be reviewed again in January 2021. Ms Brown asked if there was anything else she could help the Claimant with, aside from pay. The Claimant raised an issue around software. She did not bring up the question of health and safety training.
30. Ms Brown decided against any immediate pay rise. She believed this was not appropriate given the Respondent's financial position and the fact that the number of employees were on furlough. Ms Brown wrote to the Claimant on 18 November 2020:

**Salary wise, the discussion I noted was that I am unable to make any increase yet but I would review that when the budget is clearer by the end of the year. If we are unable to offer an increase then or only a partial increase it would be reviewed again around April. That too will need to go via the FSC, but that is likely to be approved as long as the President agrees with me and he is fully aware that you will need an increase in salary sooner rather than later.**
31. It is clear there was a common understanding: the Claimant would, at some point in the near future, be likely to receive a pay increase. The point at which this would occur and amount were yet to be settled.
32. In January 2021, Ms Brown sought permission from Mr Tunnicliffe for an increase to the Claimant's salary. He did not approve this.

33. On 29 January 2021, the Claimant wrote to Mr Tunnicliffe about various issues. Her email included:

**We still don't have a staff handbook, we don't have job descriptions or proper contracts in some cases (my own included). I was quite forthright in my appraisal with the Club Secretary regarding a pay review given that I took on Rob's job at a moment's notice a year ago but have not received a penny in pay rise, nor any indication of what that pay rise/review may look like, despite the fact that I am using many more skills, qualifications and experience than I did in my previous role. We also took on Tania and Rupert since the day Rob departed, and had taken on Richard (who I know is paid almost 50% more than I am) and Carrie (who I know is paid only approximately £1k less than I am, but who, a year into her employment, has to ask Colette how to put an entry form onto the office system), so clearly there was space in the staff costs budget. We have not had any feedback at all from our appraisals so, although I thought they were a good thing at the time, I am not sure what the point was.**

34. The Claimant further chased her salary on 10 February 2021, in an email to Ms Brown, entitled Pay Review:

**It's February already! And a year this week since Rob left and I took on his job. I just wondered if there is any progress with this issue?**

35. Following this, an increase in the Claimant's salary was approved. By email of 11 February 2021, Ms Brown wrote:

**As discussed earlier, I can confirm that your salary will rise to £32,500 with effect from 1st March 2021.**

36. The Claimant was not satisfied by this increase. She did not feel it fairly reflected the significant increase in her duties. She raised a formal grievance on 23 February 2021. She set out the recruitment of other staff, her knowledge of a termination payment agreed with another employee, an issue around pensions and the lack of a staff handbook. The grievance also included much on the question of additional duties and pay:

**On 12 February 2020, Paul Tunnicliffe dismissed the then Media & Marketing Manager, Rob Smee, without notice. After Rob had left the building and the announcement had been made to staff, Paul Tunnicliffe asked if I was 'alright' to take over Rob's role and responsibilities and said that 'we would look at pay nearer the middle of the year', He then left abruptly. Paul Tunnicliffe had previously hinted that Rob would be let go and had asked if I was happy to take on some of his responsibilities; I had indicated that I was interested but there was no formal discussion and under no circumstances did I agree to do this on a voluntary basis; I already had my own full-time role and Rob's role was also a full-time role which required skills and qualifications that were not required in my job. I was shocked at the speed of Rob's departure, at the lack of preparation for his departure which could have led to significant loss to the Club, and at Paul Tunnicliffe's 'look at pay in the middle of year' comment [...]**

[...]

I was becoming increasingly concerned at the number of staff that had been recruited during the period since Rob Smee's departure with no sign of any pay review to reflect the significant added responsibilities and skill set and qualifications required. You asked me if I wanted to take over the News Sheet from you in August when I returned to work and I agreed as I wanted to support the Club, but at that point I did expect that the issue of my pay would have been, or would be, under discussion. I have produced the News Sheet every week since, as well as producing advertisements for external publications, the programme for the Mallory Park race meeting, posting on social media accounts. These are all duties over and above those of Membership Coordinator, which is the job title and role I am currently contracted to do, and require skills acquired during my time studying for an MA in Journalism and my time studying design,

During my appraisal with you, on October 28, I raised the issue of pay and that, in February 2020, Paul Tunnicliffe had advised 'something' would be discussed nearer the middle of the year. It was clear that this was the first you had heard of any issue regarding my pay. I said I didn't see any reason why I shouldn't be on a far higher salary, equivalent to that of Competitions Secretary, as between the two roles I had significantly more responsibility and the role was far more skilled than it had previously been. You agreed that the job title should change but that any pay review would have to be passed by the Finance Sub-Committee.

To date, I have not had sight of any notes from that appraisal but when I later raised the issue of pay with you, you advised that in your notes you had written the issue would be revisited in February once the 2021 budget was clearer.

On Friday 29 January I raised concerns with Paul Tunnicliffe, who left a voicemail on my mobile on the following Sunday morning advising me not to call him back as he was busy. At around 5pm I took another call from him, during which he categorically stated that I could not have any increase in pay and I needed 'to do what I needed to do'.

On the week of 12 February, exactly one year since Rob Smee departed, I raised the issue of my pay with you again and you advised that there was something in the budget but not as much as I had wanted. You advised that you needed to discuss this with Paul Tunnicliffe. Subsequently, you advised that Paul Tunnicliffe had reiterated his position, that I would not receive any increase in pay, but had eventually agreed to a pay increase of £2,500pa to commence 1 March 2021. You advised that you had wanted to review this after six months but that he was adamant no review would take place that year.

This equates to financial recompense of £1,250pa for the years 2020 and 2021, which is a derisory sum for such an increased degree of responsibility, workload and skill set, particularly set against the recruitment of four members of staff and a substantial reduction in a fifth member of staff's salary to reflect their reduced responsibilities. Prior to my appraisal, at no point was my opinion as to what I would be prepared to accept in recompense for having such significant workload imposed on me at a moment's notice a year before asked for. At that time Covid was not causing any restrictions on working patterns or events; the Club's financial difficulties were entirely self-inflicted. I do appreciate that you

explained that there were no issues regarding my performance at play in the decision to award such an inadequate sum

[...]

I note that you stated in your email in response to my request for the grievance procedure that it is sometimes better to resolve issues such as these informally and I do agree with that. However, given the sustained and continued resistance of Paul Tunnicliffe to any kind of financial recompense for the additional duties and responsibilities of a previously full time job in addition to my own, the recruitment of four staff during this period, the requirement of the Club for another member of staff to accept a substantial reduction in pay to reflect their reduced responsibilities but the refusal to recompense similarly in my own case and the amount of time that has passed with regards the employment law issues I regret I do not see any other means to proceed.

I stated in my appraisal on 28 October that I saw no reason why I shouldn't be on a salary equivalent to the Competitions Secretary, given the skill set required and the additional work load. Given that the previous Media & Marketing Manager role and the Membership Coordinator role both commanded salaries of £30,000pa I see no reason why a salary of £42,000pa, back-dated to 12 February 2020 (which includes a period of full and part furlough), should not be offered, thus contributing a salary cost reduction of £18,000 for the Club, in addition to my contribution made by volunteering to be furloughed.

37. The Claimant's grievance hearing took place on 4 March 2021, before Ms Brown. The discussion focused on her pay. The Claimant referred again to the recruitment, which had taken place. She felt the sum offered was "derisory" for "what is essentially two full-time jobs". There was also some discussion about the manner in which the new role was put to her at the time of Mr Smee's dismissal, and the Respondent's lax approach to HR matters generally. The resolution sought by the Claimant was pay as per her grievance letter, although there was some discussion of an alternative in the form of reduced hours.
38. The grievance decision was provided by Ms Brown's letter of 10 March 2021. Somewhat surprisingly, she took the opportunity to set out performance issues she had not first raised with the Claimant:

Since February 2020, the Club has not operated at full strength, the number of events has been vastly reduced and other members of staff you mention have not been receiving full pay. For this reason, any pay award will not be back dated. I recognise that at your last appraisal that no concerns with your work were raised and there is not an issue with your overall work, however it has been clear as more is required of you that there are areas for improvement. These have not been sufficiently serious to merit a formal performance management process. A small increase in pay would be fair but it cannot be to the levels you have indicated, a larger increase may be possible once you are able to show you are operating at and beyond the expectations of the Club in light of the skills you possess. Carrying out a salary comparison exercise is difficult as the role is not directly comparable to other Marketing Manager roles, however marketing roles that do not carry line manager responsibilities in the area are commensurate with your current pay.



39. Ms Brown's outcome was:

**You will receive a pay increase to £34,000 per annum, effective from 1st March 2021**

**•A comprehensive job description will be put in place which will be clear about the expectations for the role of Membership and Marketing Manager. Your input on this will be welcomed and we will aim to agree this by Wednesday 31st March 2021.**

**During the informal 1-2-1s and annual appraisal, there will be an ongoing review of your workload and your performance against the job description, clearly identifying both areas for improvement and areas where you exceed expectations. There will continue to be a dialogue about how your pay may be reviewed to recognise your performance.**

40. In an email seeking advice, the Claimant recorded her view of Ms Brown's decision. Not unreasonably, she was disappointed to find performance issues raised in this way:

**I have had Tania's response with regards the grievance procedure; in essence, an additional £1.5k per annum from 1 March this year, not backdated because there were no events last year (after furlough I produced the News Sheet every week plus the programme for Mallory). Also apparently there are issues with my performance - although not serious enough to warrant action - and knowledge of vintage cars is a thing - which I do agree with in a sense, but my predecessor did not have such knowledge and neither did I, which Paul knew when he put the job onto me.**

**I am intrigued to know how there can be issues with my performance when I don't know what the job entails.**

**As far as I am concerned, it is either take it to the next stage of the grievance procedure or revert back to my original contract of Membership Coordinator with a salary of £30k as opposed to £34k, which at the moment I think is my preferred option. This last three months has been horrendous and I think it is going to get far worse under the current leadership (or lack of) as things start to move again.**

41. The Claimant appealed the grievance decision by her own letter 16 March 2021. The grounds set out included a number of matters not in her original grievance, which appear to be a response to Ms Brown's decision. The substantive challenge was set out in the last two paragraphs:

**All of the above, however, is irrelevant given that, in any contractual agreement, terms must first be offered and agreed before a contract can be deemed to have been entered into. The addition of the marketing role was not discussed, terms were not agreed - in contrast to all of the individuals you mention in your response. To expect me to do the job and then decide what terms you are going to impose on me a year later is not acceptable, for the simple reason that I would not have accepted the terms had I been given the opportunity to do so in February 2020.**

**In light of the fact that the offer of £34kpa dated from 1 March 2021 will not be backdated and therefore equates to a salary increase of £2kpa**

**across two years I consider that this imposition of a material change to my existing contract In February 2020 is unfair and unreasonable in the light of the work I have undertaken between 12 February 2020 and 28 February 2021, which it appears the Club has arbitrarily, retrospectively and unilaterally decided not to pay me for. Therefore, I wish to escalate this grievance to the next stage at the earliest opportunity.**

42. The Claimant's appeal meeting took place on 13 March 2021. The decision-maker was Tim Kneller. He was a member of the Respondent's board and past president of the club. The main issue ventilated on this occasion was, as before, pay. Some other matters were touched upon, however, including that the Claimant felt there was not enough support. She also complained about Ms Brown and communication. This reflected her concern about performance issues having been raised for the first time in a grievance outcome letter. When considering his decision, Mr Kneller met with Mr Tunnicliffe. Whilst Mr Kneller was the appeal decision-maker, to the extent this involved any change in the Claimant's pay then Mr Tunnicliffe had to approve this. Mr Kneller wished to offer something more in terms of pay and after some initial reluctance, Mr Tunnicliffe agreed.
43. Before putting anything in writing, Mr Kneller wished to ensure this outcome would satisfy the Claimant. His intention was to bring her grievance to a satisfactory resolution. He telephoned the Claimant and spoke with her about it. She said this was acceptable.
44. Mr Kneller wrote the Claimant on 1 April 2021:

**Further to our meeting on 30th March I can confirm that it has been agreed for the increase in your salary to £34.000 to be backdated to 1st June 2020. It has also been agreed that this will be paid in full for the period that you were furloughed.**

**I have been given assurances that a draft Job Description will be presented to you for discussion, at the earliest opportunity.**

45. Having indicated her agreement to Mr Kneller, the Claimant changed her mind about the adequacy of the pay rise. She gave 12 weeks' notice of resignation by letter of 12 April 2021, sent to Ms Brown:

**In light of the fact that there has been no attempt to address the issue of my job description (reference your letter to me dated 11 March 2021 in which you stated this issue would 'aim to be completed' by 31 March, also your assurances to Tim Kneller subsequent to the second grievance hearing and mentioned in his letter to me dated 1 April 2021 that this issue would be resolved 'at the earliest opportunity' - no progress has been made at all) I am writing to advise you that I will be terminating my employment with the Vintage Sports-Car Club in accordance with my terms and conditions of employment.**

**I note that the terms and conditions state:- "A detailed job description is issued separately upon appointment and is to be signed with a copy held on your personal file. In the event of a major change to your role a revised job specification will be issued."**

I consider that, at the very least, significant progress could and should have been made towards establishing a job description acceptable to both parties within a period of a month and in fact I see no reason why the process could not have been completed in full within that time. I find the complete silence on the issue even more astounding given the fact that we have just been through the entire internal grievance procedure; I am not sure what else can be done to impress upon you that this issue needed to be dealt with immediately.

The above statement does not, of course, take into account the fact that there was a whole 13 month period (progress could have been made during my time on furlough) in which to deal with the issue previously.

I note that we still have not been provided with an updated Staff Handbook and that the current Handbook is some 20 years out of date. The statement that the Handbook was 'with Mike Holt's wife' is not a defence for failure to comply with employment law, besides which you stated that it was returned to you two weeks ago and you just needed to read through it.

Despite finally obtaining some kind of backdated pay rise I remain deeply unhappy at the adding of an entire role onto my workload with no notice or consultation, which I did not want or apply for, particularly as the extent of the additional role is only now becoming clear. I am obviously even more unhappy that I am discovering the full extent of the additional role third hand via other members of staff and incidental emails from yourself. The terms and conditions that I agreed and signed up to specified 'limited working weekend days'.

I can categorically state that, had the matter been handled properly in February 2020 and a reasoned consultation entered into with regards my taking on the full-time role of Rob Smee in addition to my existing full-time role, I would have refused, particularly, but not only, because the only salary increase finally offered some fourteen months later equated to approximately only £200 net per month. This is particularly derisory given that, in addition to the role that Rob Smee fulfilled, I am also required to produce a weekly News Sheet. Rob Smee also did not design the graphics and layout, or write the copy, for literature such as event programmes. I consider that the requirements of my dual 'role' absolutely ludicrous with no administrative assistance and no effective management support; no debrief after returning from furlough, no pre-planning meeting for a major event such as renewals when we had a new member of staff in the Finance department, no marketing strategy meeting in which to allocate the £13k marketing budget and only four staff meetings in the period since I returned from furlough in August to date is not remotely adequate to run a team of eight and certainly does not fulfil the clause which states "the Club Secretary [who] will also provide you with such support as may be necessary for you to fulfil your primary duties". In my grievance I stated that I had received no training for either the Membership or Marketing roles and this remains the case today. I did not make the statement merely to fill up blank space on the page, I made the statement because there was a need that needed to be addressed.

I am, of course, aware that you have previously attempted to justify the merging of the roles as my predecessor in Membership worked only part-time; however, in September 2019 it was mutually agreed between myself

and the Club to employ me full-time in Membership. There was no substantive altering of either role in the subsequent five months that would justify fully merging the two jobs.

I further note that, despite the agreement on 1 April 2021 that my increased rate of pay would be backdated at the full, not furlough, rate to 1 June 2020, you have not indicated when this money owing will be paid, or made any reference to it whatsoever. This issue needs to be addressed as a matter of urgency.

I am contractually required to work a notice period of 12 weeks, therefore my final day of employment will be 2 July 2021. My holiday entitlement is 23 days per annum, of which I have taken five days. I calculate that the allowance pro rata is 11.5 days and therefore I am entitled to 6.5 days leave.

46. The Claimant and Ms Brown met on 14 April 2021. Ms Brown provided the Claimant with a draft job description. She asked if there was anything she could do to persuade the Claimant change her mind. The Claimant said there was not.
47. Shortly thereafter, on 14 April 2021, the Claimant wrote to a member of the club setting out her thoughts:

**You are correct, by the time you invited me to Scotland and suggested I share a lift in Paul's Bentley I was already very sure I would not be doing that! The issue of pay has been through the formal grievance procedure now, and I had a partial victory in that I secured a payrise of £4k but it went to the second grievance hearing (before Tim Kneller) because of Paul's refusal to backdate it to last year, which I considered wholly unreasonable. I certainly would not have agreed to those terms had they been presented to me in February 2020 in the proper manner.**

**Tim confirmed that he had secured 'some' movement from Paul, who had finally agreed to backdate the payrise to June 2020.**

**I am attaching my resignation letter which I sent to Tania on Monday morning. She requested a meeting to discuss, which happened this morning. She initially asked if there was anything she could say to make me change my mind, I indicated that there wasn't. During the meeting she stated that she accepted that some of the issues I raised in my resignation were her fault but not all had originated with her. She stated that she had not known the outcome of the second grievance hearing (Tim wrote to me on 1 April and his letter indicated that she had been copied in for the Personnel file) and had been waiting until she had heard something she had before she discussed the job description with me. In Tim's letter he stated that he had been 'assured' that the job description issue would be dealt with 'at the earliest opportunity'. She then produced a job description for me to consider. I asked what was happening about my back pay and she said she would need to see the agreement in writing but if that could happen before next Monday it could be included in my next pay packet.**

**I find it remarkable that, had she not heard anything, she didn't enquire as to why not. I also find it remarkable that she did nothing between Monday morning and Wednesday morning to clear up any possible issue with**

regards the agreement that Tim and Paul came to in preparation for today's meeting with me.

Since the meeting I have attempted to contact Tim to ask his side of her claim that he had made no attempt to contact her but have had to leave a voicemail. I have also emailed Tania with a synopsis of the salient points of the meeting today, which she has not yet come back to me on to confirm or disagree with.

Yesterday, in response to Mike Holt's kind email and statement that he felt that, as a Director, he had been left in the dark I stated that I couldn't see how that could be healthy for the Club and that I had no objection to any Director having sight of the paperwork in relation to the grievance procedure or my resignation.

48. On or about 7 May 2021, the Claimant was placed on garden leave. Her employment terminated on 2 July 2021.

## Law

49. So far as material, section 95 of the **Employment Rights Act 1996** ("ERA") provides:

### **95 Circumstances in which an employee is dismissed**

**(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) 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.**

50. Where, as here, the respondent denies dismissal, the claimant has the burden of proving dismissal within section 95(1)(c).
51. In accordance with **Western Excavating v Sharpe [1978] IRLR 27 CA**, it is not enough for the claimant to leave merely because the employer has acted unreasonably, rather a breach of contract must be established.
52. In order to prove constructive dismissal four elements must be established:
- 52.1 there must be an actual or anticipatory breach by the respondent;
- 52.2 the breach must be fundamental, which is to say serious and going to the root of the contract;
- 52.3 the claimant must resign in response to the breach and not for another reasons;
- 52.4 the claimant must not affirm the contract of employment by delay or otherwise.
53. Implied into all contracts of employment is the term identified in **Malik v BCCI [1997] IRLR 462 HL**:

**The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.**

54. In **Baldwin v Brighton and Hove City Council [2007] IRLR 232** the EAT held that a breach of trust and confidence may be caused by conduct calculated or likely to have the proscribed effect.

55. Either as an incident of of trust and confidence, or as a separate implied term, employers are under a duty to afford their employees a means of prompt redress with respect to their grievances; see **W A Goold (Pearmark) Limited v McConnell [1995] IRLR 516 EAT**, per Morrison J:

**11. [...] It is clear therefore, that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course, with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the industrial tribunal that such could be a breach of contract.**

56. At least insofar as the question of breach of the implied term of trust and confidence is concerned, the band of reasonable responses test does not apply; see **Buckland v Bournemouth University [2010] IRLR 445 CA**.

57. Furthermore, the decision in **Buckland** confirms that a repudiatory breach cannot be remedied; per Sedley LJ:

**40. This account of the alternative courses which may be taken in response to a repudiatory breach leave no space for repentance by a party which has not simply threatened a fundamental breach or forewarned the other party of it but has crossed the Rubicon by committing it. From that point all the cards are in the hand of the wronged party: the defaulting party cannot choose to retreat. What it can do is invite affirmation by making amends.**

58. In a last straw case, the final act relied upon need not in isolation constitute a breach of contract, nor even amount to unreasonable or blameworthy conduct, although an entirely innocuous act will not suffice; see **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**.

59. Whilst mere delay will not amount to affirmation, where the employee continues to perform their contract a point may be reached when that becomes persuasive evidence they have indeed affirmed the contract; see **W E Cox Toner (International) Limited v Crook [1981] ICR 823 EAT**.

60. Where the claimant resigns in part because of a repudiatory breach of contract, that will suffice, the breach need not be the only or the main cause for that decision; see **Nottinghamshire County Council v Meikle [2004] IRLR 703**.

61. If a constructive dismissal is established the employment tribunal must still consider whether the respondent has shown a potentially fair reason for dismissal within ERA section 98(1) and whether or not dismissal was reasonable in all the circumstances under section 98(4).

## Conclusion

### Repudiatory Breach

62. As set out above, in February 2020 the Claimant agreed to take on additional duties, previously carried out by Mr Smee, as a result of his dismissal. This occurred with very little consultation. Nothing was put in writing by the Respondent. Nonetheless, it is clear the Claimant agreed.
63. Agreement can be provided in a number of ways. A person might sign a written agreement to confirm this. A person might receive an oral proposal and then say to the proposer "I agree". Alternatively, agreement can be implied from conduct. When a party conducts itself in a manner only properly consistent with having agreed, then agreement can be found without any express consent, whether written or oral. At the very least, by her actions, the Claimant impliedly agreed to take on these additional duties. She did in fact, over many months, carry out these additional duties with no complaint. She wrote emails consistent with having accepted the duties and then undertaking a new role. A repudiatory breach cannot be found within an agreement.
64. Alternatively, if I were wrong and the manner in which the Claimant was given new duties amounted to a repudiatory breach, then she waived the same and / or affirmed the contract by carrying out those duties for many months without any objection. This was not a case of working under protest.
65. As far as pay is concerned, it is common ground that no immediate pay rise was offered in February 2020.
66. The Claimant's evidence is that Mr Tunnicliffe said they would talk about money near the middle of the year. In the absence of any live witness evidence to the contrary, I accept her account. Importantly, no specific sum was proposed. This was, therefore, nothing more than an offer to revisit the question of pay.
67. In the event, neither party raised the matter again until October 2020, when the Claimant asked Ms Brown about it. No immediate increase was then forthcoming. This does not amount to a breach of contract. The Claimant benefited from no term requiring a specific pay increase, or any increase, at a particular point. The Claimant could have a reasonable expectation of a conversation but no specific outcome. 2020 was a somewhat unusual year for the Respondent as for most others. In addition to the general financial difficulties the Respondent had experienced, lockdown prevented much of its usual income-generating race programme.
68. In February 2021, a pay increase was offered to the Claimant. Whilst she may consider this derisory, it was a substantive increase. No parameters had been agreed within which any pay rise had to fall. In those circumstances, the proposal cannot amount to a breach of contract.

69. Similarly, over the next two months, by way of exercising her rights under the grievance procedure, firstly a greater increment was proposed and secondly, this was to be backdated. Once again, whilst the Claimant may think this was wholly insufficient, it was a meaningful increase. Her pay was to go up by £4,000 per annum and this would be backdated to June of the previous year. Again, there is no contractual term the Claimant can point to requiring that a greater sum be paid. It is simply the Claimant's opinion that the salary was not enough to justify the additional duties expected of her.
70. There was no breach, repudiatory or otherwise in the Claimant's pay. Mr Butler says that because the Claimant in these proceedings relied upon "no pay rise" and there was a pay rise, that is an answer. Even if the complaint were construed more broadly as no or no sufficient pay rise, still there is no breach. As above, the Claimant had no contractual entitlement to a particular increase. Sometimes parties purport to enter into an "agreement to agree". Such an arrangements are frequently unenforceable. In this case, the Claimant does not even get that far. On her case she was offered a discussion or review. That is not the same as a guaranteed pay rise. There was no breach of contract with respect to pay.
71. The Claimant refers to a race meeting in 2019 when she felt stressed and unsafe because of a lack of training. Notably, she did not complain about this at the time. Her role was not on the racing side. I am not satisfied, that any failure to provide the Claimant with health and safety training amounted to a breach of the implied term of trust and confidence. In any event, given the absence of complaint and passage of time, a breach had been waived in the contract affirmed. Furthermore, she entered into a new employment contract with the Respondent in September 2019.
72. Overnight stays were not made a requirement of the Claimant's job. The Claimant explains her understanding in this regard as having arisen from a conversation when Ms Brown said that a Bonhams auction clashed with Oulton Park. The Claimant did not tell Ms Brown that she had construed the remark as imposing on her an obligation to stay overnight at either event. Furthermore, the Claimant did not say at the time that she had any difficulty with overnight stays. This point appears to be ventilated for the first time in her claim at the Tribunal, when she says could not stay overnight because of the need to care for her dogs. Ms Brown said that if the Claimant had raised any difficulty with overnight stays, she would have been excused. The Claimant was not actually required to undertake any overnight stay in the period after she took on duties from Mr Smeed. No breach of contract can be found in Ms Brown's remark about the clash with Oulton Park.
73. The Claimant referred to many other matters in her evidence and submissions. Ranging from a gate that fell over an nearly hit the Respondent's tenant, through to the lack of a job description. Given she does not rely upon any of these matters as founding a repudiatory breach, it is unnecessary for me to make determinations on them. I will, however, address the job description briefly, since the Claimant emphasised that in her closing submissions and notwithstanding it was not one of the matters she identified at the beginning of the hearing as amounting or contributing to a breach of the implied term. The Claimant points to her contract from September 2019 for the Membership Secretary and Media



Consultant position, which included a provision that a job description would be issued separately. This did not happen in September 2019. To the extent there was any breach, this predated her agreeing to take over any of Mr Smee's duties. Thereafter, the Claimant did not say that she was unable to carry out her role because of uncertainty as to its scope. If there was any breach of an express term, this occurred in September 2019, it was a minor, not repudiatory and had been waived or the contract affirmed by the time she agreed to take on Mr Smee's duties. I am certainly not satisfied this is something which would, objectively, seriously damage or destroy trust and confidence in the employment relationship. This point was a, belated, makeweight for the Claimant. It was part of the general picture she sought to paint of the Respondent not handling HR matters well. Her real concern was about pay.

74. Having found no breach of contract, the Claimant's claim must fail. Nonetheless, for the sake of completeness, I will make findings about the reason for resignation.

#### Reason for Resignation

75. I am satisfied the Claimant resigned because:

75.1 additional duties had been given to her, with little discussion and no immediate pay rise;

75.2 when the pay came, in her view it was insufficient to reflect the additional duties she had taken on.

76. Whilst there were some other matters which made a small contribution to her decision, it was mainly down to additional duties and pay. She felt the two were out of kilter to such an extent as to amount, in her words, to "exploitation".
77. The other two factors relied upon by the Claimant at the Tribunal, namely being required to undertake overnight stays for work and a lack of health and safety training, played no part whatsoever in her decision to resign. Whilst they may appear important to the Claimant now, this is not what she had in mind when she tendered her resignation. A lack of health and safety training featured little in the Claimant's correspondence and not at all in her detailed letter of resignation, which I am satisfied is a good guide to what the Claimant was thinking about. The Claimant said nothing at all about overnight stays until the Tribunal proceedings.

#### Resignation

78. Given the matters the Claimant relied upon did not amount to a repudiatory breach of contract, it follows she was not entitled to resign and treat herself as having been dismissed.

#### Outcome

79. Accordingly, the Claimant's claim must fail.
80. Given my findings, I do not need to address the question of affirmation.

**Case Number: 3311743/2021**

EJ Maxwell

Date: 8 August 2022

Sent to the parties on:

19 January 2023

For the Tribunal Office: