Case No: **2306149/2020**

EMPLOYMENT TRIBUNALS

Claimant: **Mr Lee Tandy**

Respondent: **East Sussex National Ltd**

Heard at: **ET London South** **On:** **9 and 10 January 2023**

Before: Employment Judge Swaffer

Representation
Claimant: In person
Respondent: Mr Kuldeep Chehal, Consultant, Peninsula

JUDGMENT having been sent to the parties on ***11 January 2023*** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim for unfair dismissal, specifically automatically unfair dismissal under Section 100(d) Employment Rights Act 1996 (ERA) arising from what the claimant claims is his constructive dismissal. During a preliminary hearing on 16 September 2021 the claimant accepted that he does not have the necessary 2 years' service to bring a claim of "ordinary" unfair dismissal.

2. The claimant was employed by the respondent, a hotel, as a painter and decorator on 29 October 2018. He was place on furlough on 25 March 2020. On 16 September 2020 he was instructed to return to work as a night porter on 17 September 2020. He refused to return to work, and on 17 September 2020 the claimant was removed from furlough, his pay was stopped, and he was invited to a disciplinary hearing to be held on 24 September 2020. On 23 September 2020 the claimant resigned with immediate effect. In his resignation letter, the claimant said *My position has become untenable due to the serious 'Health & Safety' failings of the hotel management, coupled with the unreasonable return to work, subsequent detrimental loss of wages, and disciplinary action to be taken against me. I do not feel I have been treated fairly in relation to being told I was to be moved from 'Furlough' to 'Flexible Furlough'.* In his resignation

letter, the claimant said he would be claiming constructive dismissal *due to the fact I do not believe it to be a safe place to return to work, as the number of 'Covid 19' cases spike again.*

3. I heard sworn evidence from the claimant, and from the respondent’s two witnesses, Ms Beth Baldwin and Mr Vivek Singh.

4. The issues to be considered in this case were agreed at the preliminary hearing on 16 September 2021 as follows:

<u>Unfair dismissal</u>

a. Was the claimant dismissed?

    i. Was the respondent in fundamental breach of contract? The claimant relies upon the implied term of trust and confidence and/or the implied term that the respondent would provide a safe place of work.

    ii. The details of the alleged breach are:

        1. The manner in which the claimant was asked to move from furlough to flexible furlough and return to work on a day’s notice. On 16 September 2020 he was told to report to work the following day, giving just one day of notice of returning to work having been on furlough for an extended period of time;
        2. The requirement to return to a workplace in which, the claimant says, social distancing was not being observed. He relies on a photograph of managers uploaded to Facebook which showed them not socially distancing.

    iii. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant’s resignation.

    iv. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant’s words or actions showed that he chose to keep the contract alive even after the breach.

b. If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

c. Was it a potentially fair reason?

d. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

e. Was the reason or principal reason for dismissal? In particular was it a reason prohibited by Section 100(d) ERA. In other words, was the claimant dismissed because:

   i. in circumstances of danger (i.e., a workplace in which there was a failure to observe social distancing during the pandemic);
   ii. which the claimant reasonably believed to be serious and imminent;
   iii. and which he could not reasonably have been expected to avert,
   iv. while the danger persisted he refused to return to his place of work or any danger part of his place of work.

   If so, the claimant will be regarded as unfairly dismissed contrary to Section 100 ERA.

Preliminary matter

5. The claimant sought to adduce additional evidence by email after the hearing concluded and whilst I was deliberating. The respondent objected. As the claimant is in person, I assumed that he was not aware that it is not possible to adduce additional evidence once the evidence has concluded. I have not taken the additional evidence which the claimant sought to adduce into account in reaching this decision

Findings of fact

6. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the bundle of documents provided by the respondent. Details of some undisputed facts are included here as relevant background to my decision.

Golf

7. In May 2020 the claimant visited the hotel to play golf. The general manager, Mr Thorne-Farrar, told the claimant by email on 29 May 2020 that staff could not play golf because the respondent was keeping the course for members and guests. The claimant questioned this by email to Ms Sarah Terry dated 2 June 2020 (pages 109-110). Ms Terry investigated, and replied that Mr Thorne-Farrar did not manage the respondent's golf courses. By implication, he therefore did not have the authority to stop staff using the courses. However, Ms Terry's email communicating this information (pages 105-106) also states that following a relaxation of government rules, on 1 June 2020 the golf manager issued new guidelines for staff golf. Ms Terry states in her email "*You will see very clearly from these guidelines that you as an employee can now play golf – subject to the terms and conditions laid out on the [guidelines]".*

8. It is important to note the details of Ms Terry's email, as the claimant relies on Mr Thorne-Farrar having a particular dislike for him after he questioned his decision. I find that a full reading of Ms Terry's email at pages 105-106

indicates that there was a rule change very soon after Mr Thorne-Farrar told the claimant that staff could not play golf, and that under new guidelines issued on 1 June 2020 staff could now play golf, subject to certain terms and conditions. I find that Ms Terry's email amounted not just to a finding that Mr Thorne-Farrar had no authority to stop staff playing golf, but also included information about a change in the rules both nationally and within the respondent. The respondent's new guidance was issued on 1 June 2020, after the claimant was told staff could not play golf.

9. I find no evidence that Mr Thorne-Farrar had any particular dislike for or bias against the claimant as a result of the claimant's questioning of being told that he could not play golf. There is no evidence of any subsequent interaction between the claimant and Mr Thorne-Farrar. My finding is supported by the claimant's own evidence that he had no further contact with Mr Thorne-Farrar between the email on 29 May 2020 and 16 September 2020.

Night porter

10. On 13 August 2020 the respondent asked for volunteers to return to work as a night porter. On 15 August 2020 the claimant replied (page 114). In his email, the claimant asked about pay, hours and duties, and immediately after that said he would be *"happy to look at helping out where possible on a few midweek evenings. Unfortunately I wouldn't be able to cover weekends, due to family commitments with my children" (*page 114).

11. His response was interpreted by the respondent as an offer to work, and Mr Ben Edwards of the respondent's HR team replied on 16 August 2020 (page 113) stating "*we have actually managed to cover the night porter hours now so do not have any hours available".*

12. The claimant suggested in evidence that he did not agree to be a night porter. I found this somewhat disingenuous. On a straightforward reading of his email, he states that he is happy to look at helping out where possible midweek. He suggested in evidence that his intention was to make a *"risk assessment"* once he received further information about the role. He said in evidence that if the night porter role involved lone working as his work as a painter and decorator did, that would have been acceptable to him. That may have been the case, but I find that he took not steps to find out whether the night porter role involved lone working. I find that the contents of his reply to Mr Edwards do not indicate the caution the claimant suggests that he had about the role. I do not find that the meaning of the claimant's email to Mr Edwards was that he would be carrying out a risk assessment before agreeing to work as a night porter. I find that the claimant's email of 15 August 2020 was him responding directly to a request for volunteers, and showing a clear willingness to work as a night porter on a few mid-week evenings, provided it fitted in with his child care obligations. This finding is supported by his subsequent statement in his email that *"Unfortunately I wouldn't be able to cover weekends, due to my family commitments with my children"* which I find indicates a clear willingness to work. I find that the recipient of the email, Mr Edwards, would have reasonably interpreted it as an offer to help on mid-week evenings, subject to childcare obligations, with a request for details of pay, hours, and duties which does not detract from

the overall message that the claimant was willing and available to work in the role of night porter.

The photograph

13. In terms of the claimant's submission that he had concerns about health and safety at the hotel related to its Covid19 measures and compliance with those measures, I find that the only evidence provided by the claimant on which he based any such concerns was a photograph taken of four members of the respondent's management team, including Mr Thorne-Farrar. The photograph was taken on 3 July 2020. No one was wearing a mask in the photograph.

14. The claimant's evidence was that he only became aware of the photograph via discussions in a group chat between colleagues in early September 2020. I find, and this is not disputed, that he knew the photograph was taken on 3 July 2020. The respondent disputes that the claimant first knew about the photograph in early September 2020, submitting that he knew of the photograph in July 2020. I find that the claimant knew about the photograph in early September 2020, having no reason not to accept his evidence on this point. The respondent provided no evidence to support its submission. I find that the claimant took no action to raise any concerns with the respondent between the time he became aware of the photograph and his resignation on 23 September 2020.

15. The claimant's position is that on a group chat, colleagues were discussing failures to follow social distancing measures at the respondent's hotel, and mentioning reviews on TripAdvisor stating that the respondent did not follow social distancing measures. In evidence he referred to *"talk amongst staff"* that the respondent was not following Covid19 guidelines or its own policies, describing this as *"common knowledge".* He said he became aware of these concerns before his resignation. However, the claimant did not provide any evidence of those reported concerns by others or to support his claim that the respondent was not following Covid19 measures and guidance. The focus of his case in terms of his health and safety concerns was the photograph.

16. I find, and it is not disputed, that the photograph was taken to use to promote the hotel on social media. I find that it only took a very short time to take the photograph. In the absence of any evidence to the contrary, I find that those in the photograph were part of a "bubble" which included everyone who had returned to work at the hotel following furlough. In the absence of any evidence to the contrary, I find that the photograph was removed from all social media within a week of it being taken and posted, as the respondent was concerned that the photograph might create a negative impression about the respondent's approach to the pandemic. I find that the photograph was removed from all social media by mid July 2020.

17. I find that the photograph amounted to one isolated incident on 3 July 2020, which the claimant knew took place in early July 2020. I find that there is no other evidence that the respondent took anything other than a stringent approach to Covid19 related health and safety guidance and measures.

This is supported by the evidence of the polices and guidance which the respondent developed and disseminated to staff, in particular via the Learning and Development platform (pages 129-132) (Mr Singh's witness statement paragraphs 10-11). It is also supported by the evidence of the respondent's witnesses, who were both working certainly by 3 July 2020. Both were clear that they felt safe at work, everyone wore masks, staff were testing regularly for Covid19, stringent measures were in place, and they believed the respondent was taking all necessary precautions. The claimant accepted that the respondent had put Covid19 measures in place as set out in its polices and guidance and as per government guidance, that he had access to the Learning and Development platform, and that risk assessments were issued to all staff. The claimant knew that there was a relaxation of some national Covid19 measures and guidance in early July 2020. I find that it was this relaxation that prompted the decision to take the photograph to promote the hotel.

Instruction to work as night porter

18. On 16 September 2020 the claimant received a voicemail from Mr Thorne-Farrar instructing him to return to work at 11pm the next day as a night porter for two weeks. This was followed by an email (page 115) of the same date. The claimant was told he would be paid his normal salary for hours worked and recorded as being furloughed for the remainder of his contractual hours *"flexible furlough*". In the absence of any evidence to the contrary, I find that the respondent had a legitimate business need at that time for staff to work as night porters. The claimant then rang Ms Baldwin as requested, and when during that conversation he said he would not return to work, he was put through to speak to Mr Thorne-Farrar.

19. I find that when the claimant spoke to Ms Baldwin, he said that he would not return to work due to family commitments, specifically child care needs, and the short notice given. This is supported by his witness statement (paragraph 2), which states that he told Ms Baldwin he would not be able to return to work *"at such short notice to undertake a night-working position due to family commitments*". I find that the combination of night work and child care responsibilities, and the short notice during which to make alternative arrangements for child care, were the reasons the claimant gave for not returning to work as instructed. I find that the claimant's concerns about the short notice were related to his child care commitments. I find, and the claimant accepts, that he did not raise any health and safety concerns during that short phone call. As noted above, I find that the claimant was aware of the photograph on 16 September 2020. I also find that there was an opportunity during that phone call for the claimant to have raised any such health and safety concerns. Although it was a short conversation, I find that Ms Baldwin did not seek to curtail the claimant or cut him off. I find that he had the opportunity to say everything he wished to her. Ms Baldwin put him through to Mr Thorne-Farrar as he was not willing to return to work, and this was a matter that needed to be escalated to a line manager.

20. I only have the claimant's account of his conversation with Mr Thorne-Farrar on 16 September 2020. The claimant accepts that he did not raise

any health and safety concerns during that conversation. The claimant suggests this was because Mr Thorne-Farrar was short with him, and also that as Mr Thorne-Farrar was *"at the forefront"* of the health and safety matter he believed he would not be taken seriously. The claimant also suggests that Mr Thorne-Farrar was somehow prejudiced against him as a result of the golf matter.

21. I find that this is not the case. I find that the only evidence for any such health and safety concerns the claimant had was a photograph which he knew had been taken over two months before he was asked to return to work. I find that there was no reasonable basis for the claimant having any such beliefs about Mr Thorne-Farrar or his likely attitude to the claimant's health and safety concerns, should he have raised them. Indeed, I note that the decision to remove the photograph was taken due to concerns about how the respondent might be perceived. I also note that Mr Singh believed that Mr Thorne-Farrar decided to take down the photograph. I find no evidence that Mr Thorne-Farrar would not have taken any health and safety concerns raised by the claimant seriously. I find no evidence that Mr Thorne-Farrar was biased or prejudiced against the claimant. I find that if the claimant had had concerns about health and safety issues at work during his conversations with Ms Baldwin and Mr Thorne-Farrar on 16 September 2020, he would have raised them.

22. The claimant objects to the requirement to work as a night porter. However, he accepts that he responded to a request for volunteers to work as night porters a month prior to being instructed to work as a night porter himself.

<u>Furlough</u>

23. On 17 September 2020 the claimant was removed from furlough and placed on unpaid unauthorized absence. He was also invited to a disciplinary hearing to be held on 24 September 2020 to investigate the allegation that he had failed to follow reasonable management instructions when required to return to work on 17 September 2020 (page 117). The letter and email (page 118) were sent by Mr Edwards. The claimant did not reply either to the email on 17 September 2020 or the invitation to the disciplinary hearing.

24. The respondent submits that the instruction to return to work on 16 September 2020 was made in accordance with the letter setting out the terms of the claimant's furlough. The claimant was given somewhere over 24 hours' notice of the need to return. I find that the furlough letter dated 24 March 2020 and signed by the claimant on 27 March 2020 (page 104) was clear that any changes to furlough arrangements would be notified to him *"immediately".* The letter states that if the respondent could offer the claimant work *"we will notify you immediately and change the status of your employment".* I find that the email dated 16 September 2020 provided written details of the new arrangements. I also find that the claimant was invited in that email to contact Mr Thorne-Farrar if he had any questions about the contents of the email. I find that the claimant

chose not to raise any detailed concerns with Mr Thorne-Farrar, apart from during the brief phone conversation on 16 September 2020

25. The claimant submits that the respondent should have written to him about the change from furlough to flexi-furlough and the consequences of his refusing, and then held discussions with him to discuss his refusal. He provided no related evidence in support. There is no reference in the letter at page 104 to the consultation process which the claimant submits should have taken place. I find that whilst the notice was indeed short, notice was given to the claimant in accordance with the furlough letter. I find that it was in the respondent's gift to change the status of the claimant's employment, as provided for in the furlough letter. I find that the possibility that there may be consequences to refusing to return to work could not have been entirely unexpected by the claimant, given that the furlough letter sets out the possible consequences of declining furlough.

26. I find that there is no evidence that the claimant raised any specific concern about the process for changing from furlough to flexi-furlough (apart from in the context of his complaints about the short notice given of the requirement to return to work) prior to his resignation. I find that the claimant had the opportunity to raise these specific concerns with the respondent during the conversations with Ms Baldwin and Mr Thorne-Farrar on 16 September 2020, in response to the email from Mr Thorne-Farrar on 16 September 2020 which specifically states that the claimant was being placed on flexi-furlough, in response to the letter dated 17 September 2020 inviting him to the disciplinary hearing, or the email from Mr Edwards dated 17 September 2020 which I note stated that Mr Edwards had tried to contact the claimant by phone on 17 September 2020 without success. I find that the claimant had a number of opportunities to raise these particular furlough-related concerns with the respondent prior to his resignation on 23 September 2020, but he did not. I find that he was aware that the respondent intended to move him from furlough to flexi-furlough on 16 September 2020 by means of Mr Thorne-Farrar's email of that date.

<u>Health and safety concerns</u>

27. I find, and it is not disputed, that his resignation letter was the first time the claimant raised any concerns about health and safety with the respondent. I find that the claimant had a number of opportunities to raise such concerns before his resignation, specifically during the phone calls on 16 September 2020, in response to the email of 16 September 2020, and the email and letter of 17 September 2020. He could also have raised any such health and safety concerns during the period between 17 September 2020 and 23 September 2020 when he resigned. He did not. The claimant submitted that he did not raise any concerns after 16 September 2020 because he believed the respondent would be prejudiced against him due to Mr Thorne-Farrar's attitude towards him. He submitted that he believed the outcome of the disciplinary was prejudged. I find that this was not the case. There is no evidence of any such bias on the part of Mr Thorne-Farrar. He is not mentioned in either the email or the letter dated

17 September 2020, and would not be chairing the disciplinary hearing. Whilst I find that it is likely that Mr Thorne-Farrar would have been interviewed in relation to the disciplinary process, there is no evidence that the process was prejudged or that the claimant would not have been able to explain his concerns and the reasons for his refusal to work at the disciplinary hearing, if he had so wished.

28. The claimant was clear in his evidence that he was concerned about the general impact of Covid19. He referred in general terms to the risk of Covid19 for his family and friends, and for himself, and the need to make everyone around you safe. In his witness statement (paragraph 3) he referred to his concerns about health and safety at the respondent coming *to light at a time when the number of positive Covid19 cases are on the rise again in the UK.* I find that any concerns the claimant may have had about Covid19 were related to the virus in general and its likely impact. There was no evidence provided of any specific vulnerability.

<u>Resignation</u>

29. I find that prior to his resignation the claimant chose not to enter into discussions with the respondent to try to explain the reasons for his refusal to work or to try to reach a solution. I find that the claimant chose not to respond to communications from the respondent after his conversation with Mr Thorne-Farrar on 16 September 2020. I find no evidence that the respondent would not have been responsive to any such communication by the claimant, or that the respondent was already biased against him or that the outcome of any such discussions was predetermined. In this context, I note that prior to sending the invitation to the disciplinary hearing the respondent, in the person of Mr Edwards, had tried to contact the claimant by phone.

<u>Grievance</u>

30. On 24 September 2020, the respondent wrote to the claimant, accepting his resignation, and informing him of his right to raise a grievance and the related process. The claimant did not raise any grievance, stating in evidence that he did not believe there would be a fair process, referring to his concerns about Mr Thorne-Farrar. I find no evidence that the respondent would not have carried out any grievance process fairly.

<u>Legal principles</u>

31. Section 95(1)(c) ERA provides that an employee is dismissed by his employer if 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. This is commonly referred to as "constructive dismissal". In *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221*, it was held that for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract.

32. To prove a constructive dismissal, the employee must therefore show that there was a repudiatory or fundamental breach of the contract by the employer, that the employer's breached caused the employee to resign, and that the employee did not delay too long before resigning, thereby losing the right to claim constructive dismissal by affirming the contract after the breach.

33. The relationship of employer and employee is regarded as one based on a mutual trust and confidence between them. In *Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR 84*, it was held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner "calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties".

34. Employers are also under a duty to take reasonable care and reasonable steps to ensure the safety of their employees while at work. *Dutton and Clark Ltd v Daly 1985 ICR 780 EAT* held that the employer's duty to protect employees from harm does not extend beyond taking reasonable precautionary steps.

35. In this case the claimant relies on the implied term of trust and confidence, and/or the implied term that the respondent would provide a safe place of work. *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606* establishes the definition of the implied term of trust and confidence, and makes clear that the test in such cases is objective, that is all the circumstances must be considered. *Malik* establishes that the employer's conduct must be likely to destroy or seriously damage the relationship of confidence and trust. Acting in an unreasonable manner is not sufficient. The implied term is only breached if the employer demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. The Tribunal must consider whether there was "reasonable and proper cause" for the employer's conduct, and if not, was the conduct "calculated or likely to destroy or seriously damage trust and confidence".

36. The burden of proving whether there was "reasonable and proper cause" for the respondent's conduct lies in this case on the claimant. In *Sharfudeen v TJ Morris Ltd t/a Home Bargins EAT 0272/16*, it was confirmed that even if the employee's trust and confidence in the employer is in fact undermined, there be no breach if (viewed objectively) the employer's conduct was not unreasonable. The employer's conduct will not be found to be calculated or likely to destroy or seriously damage trust and confidence just because the employee feels that such a breach has occurred. The circumstances must be looked at objectively, from the perspective of a reasonable person in the claimant's position.

37. Section 100(1)(d) ERA provides that an employee is automatically unfairly dismissed if the reason, or principal reason, for dismissal is that he in circumstances of danger, which he reasonably believed to be serious and imminent and which he could not reasonably be expected to avert, left, proposed to leave or (while the danger persisted) refused to return to his place of work or any dangerous part of his or her place of work. Where

(as in this case) an employee lacks the necessary continuous service to claim ordinary unfair dismissal, he has the burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason, *Smith v Hayle Town Council 1978 ICR 996, CA.*

38. Therefore, if the claimant is able to prove that he was constructively dismissed, he must then show that the reason for his dismissal was automatically unfair, in that the reason for his dismissal was prohibited under Section 100(d) ERA.

39. In this context, I am assisted by the case *of Rodgers v Leeds Laser Cutting Limited [2022] EWCA Civ 1659* which related to a claimant's beliefs about Covid19 and his refusal to return to work. In that case an argument that even if there had there been Covid19 safety measures in place, there was still a reasonable belief held by the claimant of a serious and imminent danger which he could not avert, was not accepted by the Tribunal. The Court of Appeal quotes from the Employment Judge's reasoning in that case where she stated *"To accept this submission would essentially be to accept that even with safety precautions in place, the very existence of the virus creates circumstances of serious and imminent danger, which cannot be averted. This could lead to any employee relying on s100(d) or (e) to refuse to work in any circumstances simply by virtue of the pandemic".*

<u>Conclusion and application of the law to the facts</u>

40. The claimant has not proven that the respondent's conduct amounted to a breach of the implied term of trust and confidence, or the implied term to provide a safe workplace, as required by Section 95(1)(c) ERA.

41. The conduct relied on by the claimant to evidence the breach was an isolated incident, a photograph, which he knew had been taken over two months before he resigned (paragraph 14 above). He also relied on the short notice of the requirement to return to work, his submission that Mr Thorne-Farrar was biased against him, and his submission that the disciplinary outcome was pre-determined due to the involvement of Mr Thorne-Farrar.

42. I find that the claimant chose not to communicate the Health and Safety concerns he raised in his resignation letter with the respondent. I find that he chose not to raise any specific concerns about being placed on flexi-furlough prior to his resignation. I find no evidence that due process would not have been followed by the respondent should the claimant have chosen to raise any such concerns (paragraph 29 above). I find that it was reasonable for the respondent to proceed to a disciplinary hearing following the claimant's refusal to return to work, particularly so as the claimant chose not to communicate with the respondent after 16 September 2020. I find that the respondent had no additional information about the claimant's reasons for not returning to work beyond those he raised in his conversations on 16 September 2020 (paragraphs 19 and 20 above). I find that there were opportunities for the claimant to raise any Health and Safety concerns (paragraph 20 above). I find no evidence that

the respondent would not have considered the claimant's Health and Safety concerns, should he have raised them (paragraph 27 above). In this context, I find no evidence that the respondent would not have followed its own processes with regards to what it perceived to be a disciplinary matter, and I find no evidence that any such process would not have been fair as a result of bias on the part of Mr Thorne-Farrar, or any other member of staff (paragraph 29 above). I do not accept the claimant's submission that the golf incident from May/June 2020 was evidence that Mr Thorne-Farrar was biased against him (paragraphs 9, 21 and 27 above). I find no evidence that the outcome of the disciplinary hearing was predetermined (paragraph 29 above). I find that there is no evidence that the respondent had broken the implied term of trust and confidence by its actions.

43. I find that there was reasonable and proper cause for all the conduct of which the claimant complains. In terms of the photograph, it was taken to promote the hotel as Covid19 rules and restrictions were beginning to relax, and I find that this was a legitimate business aim (paragraph 16 above). It was a brief and isolated incident (paragraph 17 above). There was no other evidence that the respondent did not take Covid19 precautions and guidance seriously (paragraph 17 above). Viewed objectively, I find that that conduct (the photograph) was not calculated or likely to destroy or seriously damage trust and confidence between the claimant and the respondent. For the same reasons, I also find that the conduct (the photograph) was not a breach of the implied term that the respondent would provide a safe place of work.

44. I find that there was also a reasonable and proper cause for the short notice of the requirement to return to work (paragraph 18 above). I find that the claimant had previously indicated his willingness to work as a night porter (paragraph 12 above), and that it was reasonable for the respondent to treat that previous indication as a willingness to work as a night porter when it instructed him to return to work. The respondent gave notice of the requirement to return to work as a night porter, albeit short notice (paragraph 25 above). In giving that notice, the respondent stated that the claimant was being placed on flexi-furlough and explained the arrangements (paragraph 24 above). I find that viewed objectively, that requirement to return to work as a night porter and the short notice of that requirement was not calculated or likely to destroy or seriously damage trust and confidence between the respondent and the claimant. The claimant had previously shown a willingness to work as a night porter. He chose not to return to work, as he was entitled to do. However, he was not entitled then to avoid the likely consequences of this choice.

45. I find that the decision to proceed to a disciplinary hearing was in accordance with the respondent's relevant policy (pages 81-84), and I find that there was a reasonable and proper cause for the respondent to take such action; I find that the respondent believed the claimant had refused to follow the instruction to return to work made on 16 September 2020. I find that there is no evidence at all to suggest that the outcome of any such disciplinary hearing would have been predetermined, and I find no evidence that Mr Thorne-Farrar or those conducting the disciplinary

hearing were prejudiced or biased against the claimant (paragraphs 9, 21, and 29 above). In this context, I also find that there was no evidence that any grievance process, should the claimant have chosen to raise a grievance, would have been predetermined or biased against the claimant (paragraph 29 above). I find that the claimant chose not to engage with the disciplinary process, as he was entitled to do, but that there was no justification for that decision in terms of evidence that the outcome would be predetermined or biased against him (paragraphs 21 and 29 above). Viewed objectively, I find that the decision to proceed to a disciplinary hearing was not calculated or likely to destroy or seriously damage trust and confidence.

46. I must consider the effect of the alleged breach on the claimant. I find that the photograph did not cause the claimant to resign. In reaching this finding, I note that there is no evidence of the claimant acting once he became aware of the photograph in early September 2020 or raising any Health and Safety concerns at that point (paragraphs 14 and 27 above). There is no evidence, and the claimant accepts, that he mentioned any concerns about Health and Safety during the telephone conversations with Ms Baldwin and Mr Thorne-Farrar on 16 September 2020 (paragraphs 19 and 20 above). The claimant did not raise any Health and Safety concerns in writing in response to Mr Thorne-Farrar's email of the same date. The claimant did not raise any Health and Safety concerns after he received the letter from Mr Edwards on 17 September 2020 inviting him to the disciplinary hearing, or to Mr Edwards' email of the same date saying that he was being removed from furlough and put on unpaid unauthorized absence leave (paragraph 27 above). Viewed objectively, I find that the claimant did not resign due to Health and Safety concerns.

47. I must also consider the impact of the short notice of the requirement to return to work on the claimant's decision to resign. I do not find that the short notice was a breach of the implied duty of trust and confidence. I find that there were opportunities for the claimant to discuss any practical implications of the short notice of the requirement to return to work (paragraphs 26 and 29 above), which he did not take. I also find that the way that the respondent chose to inform the claimant of the requirement and its process for transfer from furlough to flexible furlough did not amount to a breach of the implied term of trust and confidence.

48. I find that the reason for the claimant's resignation was the practical considerations linked to his child care responsibilities and the relationship between these and the short notice within which to make any necessary arrangements (paragraph 19). I find that there was no related breach by the respondent of the implied term of trust and confidence.

49. I must also consider whether the claimant affirmed the contract before resigning. I find that the claimant's evidence indicates that he considered that the respondent had breached the contract on 16 September 2020 by requiring him to return to work at short notice, and by what he alleges were the Health and Safety concerns. I note that the claimant took no action between 16 September 2020 and 23 September 2020 when he resigned. Whilst this is a relatively short period of time, as I have found

above the claimant the chose not to have further contact with the respondent between that time. I have already found that his stated beliefs that the respondent was biased against him and that the disciplinary proceedings were predetermined were without substance (paragraphs 9, 21 and 29 above). I also find that there is no substance to his stated beliefs about Health and Safety concerns at the workplace. Whilst I find that the claimant chose not to have contact with the respondent and did not raise his detailed concerns until he resigned, I do not find that this amounts to evidence of affirmation of the contract.

50. Taking all the above into account, I find that the respondent was not in fundamental breach of the contract. The claim for constructive dismissal is not well founded, and is dismissed.

51. If I am wrong on this and the claimant was constructively dismissed, I must consider whether the claimant was automatically unfairly dismissed pursuant to Section 100(d) ERA. In doing this, it is helpful to treat the requirements of Section 100(d) ERA as a series of questions:
    a. Did the claimant believe that there were circumstances of serious and imminent danger at the workplace? If so,
    b. Was that belief reasonable? If so,
    c. Could the claimant reasonably have averted that danger? If not,
    d. Did the claimant leave, or propose to leave or refuse to return to the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so,
    e. Was that the reason (or principal reason) for the dismissal?

52. I find that there were no circumstances of serious and imminent danger at the workplace. The claimant was unable to explain what the circumstances of serious and imminent danger were, beyond a reference to a photograph which he knew was taken on 3 July 2020 (paragraph 14 above), and general references to Covid19 without any concerns specific to himself (paragraph 28 above). I find that the claimant's concerns were the general concerns about Covid19 which are likely to have been shared by many people, and therefore in parallel with the circumstances in *Rodgers v Leeds Laser Cutting Limited*.

53. I find that the respondent put stringent measures in place during the pandemic to protect staff and guests (paragraph 17 above), which the claimant accepted it had done (paragraph 17 above). I find that one isolated incident from over two months before the claimant resigned does not satisfy the requirement for circumstances of serious and imminent danger. Given the historic and isolated nature of that incident, and the lack of further enquires by the claimant and his lack of contact with the respondent after 16 September 2020 until his resignation on 23 September 2020 (paragraphs 19, 20 and 21 above), I find that the claimant could not reasonably have believed that any such circumstances of danger were serious and imminent. Despite a number of opportunities to do so, I find that the claimant took no steps to raise his concerns with the respondent. I find that his belief was based on a photograph which was over two months old. I find that this photograph is insufficient to

amount to the basis for the claimant forming a reasonable belief that circumstances of danger were serious and imminent.

54. I find that the claimant could have reasonably been expected to avert any such circumstances of danger should they have existed, for example by taking his own precautions against Covid19; he could also have raised his concerns with the respondent, and may then have been reassured that there were no such circumstances of danger. Despite opportunities to do so, he did not (paragraph 19 above).

55. I find that the claimant had no information about whether the perceived danger persisted, as he did not raise his concerns about compliance with Covid19 measures with the respondent prior to his resignation. I also find that any such concerns he may have had were based on information which was over two months old, and which was taken out of context (paragraphs 16 and 17 above). I find that there is no causal link between the claimant raising any Health and Safety concerns with respondent and his dismissal. At no point prior to his resignation did the claimant raise any such concerns, despite being aware of the photograph since early September 2020. There is no causal link between the claimant raising any Health and Safety concerns and the respondent's decision to proceed to a disciplinary hearing as the claimant had not raised any such concerns at that stage. I find that the respondent had no knowledge of the claimant's Health and Safety concerns (that is, his purported Section 100(d) ERA reason for refusing to return to work) at any point prior to the claimant's resignation on 23 September 2020. The reasons given by the claimant for refusing to work were family (childcare) commitments and the shortness of notice, and on that basis the respondent proceeded to a disciplinary process to investigate the claimant's refusal to return to work. I find that the claimant's Health and Safety concerns were not the reason, or principal reason, for his dismissal as required by Section 100(d) ERA.

56. I find that the claimant has not established that he was automatically unfairly dismissed for health and safety reasons under Section 100(d) ERA. The claim for automatically unfair dismissal is not well founded, and is dismissed.

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Employment Judge **Swaffer**

____Date_22 February 2023_______________