EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105652/2022

Held via Cloud Video Platform (CVP) on 30, 31 January, 1 and 24 February 2023

(14 April 2023 and 26 June 2023 in chambers)

Employment Judge B Beyzade

Mr. G Kelly	**Claimant** **In person**
Perle Hotels Ltd	**Respondent** **Represented by:** **Mr M Ramsbottom – Senior Litigation Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal (constructive) is not well founded, and it is hereby dismissed.

2. The complaint of breach of contract (notice pay) is not-well founded and is dismissed.

3. The complaint of unauthorised deductions from wages in respect of arrears of pay between 15 July 2022 and 30 September 2022 is not well founded and it is hereby dismissed.

4. The complaint of unauthorised deductions from wages in respect of holiday pay is not well founded and it is hereby dismissed.

REASONS

Introduction

1. The claimant presented a complaint of constructive unfair dismissal, unauthorised deductions from wages (arrears of pay), breach of contract (notice pay and holiday pay), which the respondent denied.

2. A final hearing was held on 30, 31 January and 01 and 24 February 2023. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in hearing were able to see and hear the proceedings. The Tribunal considered its decision in chambers (in private) on 14 April and 26 June 2023.

3. The parties prepared and filed a Joint Inventory and File of Productions in advance of the hearing consisting of 285 pages.

4. The respondent's representative indicated that the claimant provided copies of transcripts prepared from covert recordings made by the claimant that have been included in the File of Productions. It was suggested that the transcripts were not accurate or complete, and that the claimant had been requested to provide full copies to the respondent. Whilst the respondent's representative was content for the claimant to refer to the transcripts, the Tribunal were invited to give the transcripts appropriate weight in the circumstances and the respondent's representative indicated that he would put any relevant issues relating to the transcripts to the claimant in cross examination.

5. I was provided with a copy of an agreed chronology and cast list (save that the claimant indicated that Mrs Rehman's job title should be Consultant Brand Director, Mr Wickman's job title should be General Manager, and Mr Docherty should be added to the cast list). The claimant indicated that his employment started on 31 August 2019 and that the 13 May 2022 meeting had in fact taken place on 12 May 2022. Having discussed the Chronology in detail with parties, it was confirmed that the remainder of the Chronology was correct.

6. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

In respect of the unfair constructive dismissal claim:

(i) Was the claimant verbally instructed to break the law on several occasion by his line manager Angela Finlay? In particular did the Respondent:

(a) Ask the claimant to work while he was on furlough?

(b) Ask him to breach HMO regulations?

(c) Ask him to breach employment law regarding young people workers?

(ii) Did the CEO ambush the claimant at a meeting on 8 May 2022 blaming the claimant and culminating in the CEO stating that the claimant should resign?

(iii) The claimant says that being informed on 11 May 2022 that his Assistant General Manager/Operations Manager had been dismissed was the last act which led him to tender his resignation on 11 May 2022.

(iv) Was the claimant instructed to take a lesser role than that set out in his contract of employment?

(v) Was the claimant verbally abused and harassed by his line manager Angela Finlay?

(vi) Was the claimant unreasonably instructed to work at an alternative location in Oban?

(vii) Was the request to work at the Oban location a deliberate act by the respondent to cause the claimant inconvenience knowing the claimant had childcare commitments and was unable to comply?

(viii) Did the claimant have his salary reduced in July 2022?

(ix) Were the claimant attempts to raise a grievance thwarted by the respondent?

(x) Was the claimant forced to contact ACAS in order to try to resolve the dispute with the respondent?

(xi) Did the respondent institute an unfounded and suspiciously timed allegation and start disciplinary proceedings against the Claimant?

(xii) Was the claimant denied sufficient time and access to evidence to prepare a defence to the disciplinary allegations?

(xiii) Was the claimant unreasonably summoned to a disciplinary meeting and threatened with dismissal? The claimant says this was the last act which led to him to tender his second resignation.

(xiv) Did the actions or omissions by the respondent set out in (i) to (xiii) above amount to a course of conduct that constitutes, when taken together, a repudiatory breach of contract? Did the actions or omissions as set out in (i) to (xiii) breach the implied term of trust and confidence?

(xv) Did the claimant resign in response to the breaches?

(xvi) Did the claimant affirm the contract before resigning?

(xvii) The respondent accepts that if the Tribunal finds that the claimant were dismissed, there was no fair reason for dismissal.

Notice pay

(xviii) What was the period of notice that the claimant was entitled to in accordance with his contract of employment? According to the claimant's contract if the claimant terminated his employment his contractual notice period was 4 weeks whereas if the respondent terminated his employment his contractual notice period was 3 months.

The claimant states that in the event he terminated his contract his notice period was 3 months whereas if the respondent terminated his contract was also 3 months (The claimant says he was told this at the start of his employment, and this was verbally agreed and confirmed in September 2021).

(xix) *It is not disputed that the claimant worked between 11 May 2022 and 16 May 2022, and he was then placed on garden leave from 16 May 2022. The claimant says he was on garden leave until his second resignation with the exception of 2 days when he was asked to attend disciplinary investigation meetings. The respondent says that the claimant was required to work from 15 July 2022 at Perle Oban Hotel and he failed to do so, and he was therefore on unauthorised absence from that date (except for any period when he was on authorised dependants leave). Was the respondent entitled to require the claimant to work at the Perle Oban Hotel and if so was the claimant ready, willing and able to work during the period between 15 July 2022 and 30 August 2022?*

(xx) *Is the claimant owed any outstanding monies in respect of notice pay? If the claimant resigned voluntarily, he would not be due further pay after 30 August 2022 whereas if the Tribunal finds the claimant was dismissed, he would be due notice pay up to 30 September 2022.*

Holiday pay

(xxi) *It is accepted that the claimant's holiday year ran from 1 April to 31 March in each holiday year. The claimant's entitlement to holiday between 1 April 2022 and 30 August 2022 was 12.5 days (the claimant accepts he was paid his 12.5 days' entitlement). Did the Claimant carry over 15 days' holiday entitlement from the previous holiday period during 1 April 2021 to 31 March 2022?*

(xxii) Was the amount of accrued holiday that was owed to the Claimant on the termination of his employment on 30 August 2022 15 days and if so, was the claimant paid any accrued holiday arising from the termination of his employment? Other payments

Other payments/Unauthorised deductions of wages

(xxiii) Was the claimant entitled to any other monies owed to him under the terms of his contract of employment namely payment of his salary between 15th July 2022 until 30th September 2022?

Remedy for unfair dismissal

(xxiv) The claimant does not wish to claim reengagement or reinstatement. He claims compensation only. If there is a compensatory award, how much should it be?

The Tribunal will decide:

(xxv) What financial losses has the dismissal caused the claimant?

(xxvi) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

(xxvii) If not, for what period of loss should the claimant be compensated?

(xxviii) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

(xxix) If so, should the claimant's compensation be reduced? By how much?

(xxx) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

(xxxi) Did the respondent unreasonably fail to comply with it by giving 24 hours and subsequently 48 hours' notice of the disciplinary hearing (and not allowing the claimant an opportunity arrange for an accompanying colleague to attend)?

(xxxii) If so, is it just and equitable to increase any award payable to the claimant? By what proportion, up to 25%?

(xxxiii) If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

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

(xxxv) Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

(xxxvi) What basic award is payable to the claimant, if any?

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

7. The claimant gave evidence at the hearing on his own behalf. In addition, Mr G Docherty, Operations Manager for both hotels on the Isle of Skye gave evidence on behalf of the claimant (who attended the hearing pursuant to a Witness Order). Ms A Finlay (Operations Director), Mr F Rehman (Chief Executive), Mrs B Rehman (Consultant Brand Director), and Ms J Anderson (HR Manager) gave evidence on behalf of the respondent.

8. At the start of the hearing, the claimant made an application for directions to enable him to rely on a witness statement that he sent to the Tribunal. No directions had been issued by the Tribunal requiring parties to prepare and send witness statements. There were no witness statements provided by any of the other witnesses. The claimant advised that a colleague of the respondent's representative had asked him to provide a written witness statement. The respondent's representative confirmed this and stated that it was an error on his colleague's part who mistakenly believed that directions had been issued requiring parties to prepare witness statements. He advised

that the respondent's preference was for evidence to be given orally and if the claimant was permitted to rely on his witness statement, he would require the respondent to be afforded an opportunity to prepare statements (and he submitted that this would necessitate a postponement). He referred to the overriding objective and the need for the Tribunal to ensure that parties were placed on an equal footing.

9. Upon application by the claimant made at the outset of the hearing to rely on a 19-page witness statement he provided on Friday 27 January 2023, upon the respondent's representative objecting to that application, and upon hearing submissions from both parties, I determined to refuse the application. Case Management Orders were made by Employment Judge O'Donnell and issued to parties on 23 November 2022. These did not require parties to produce witness statements. Neither party applied for permission to vary those orders. The claimant's witness statement was not supplied until Friday 27 January 2023 and the claimant made an application for directions relating to witness statements for the first time at the outset of this hearing. I noted that there were matters in the claimant's witness statement that were not relevant to the issues that the Tribunal was required to investigate and determine. The respondent had not produced witness statements. In those circumstances it is not appropriate for parties to give evidence by way of witness statements, and evidence will require to be given orally. When giving evidence parties may wish to refer to relevant documents in the File of Productions, the Chronology, the Cast List, and the List of Issues as necessary. I have considered the overriding objective and the need for parties to be placed on an equal footing (Rule 2 of Schedule one of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013).

10. Parties agreed to work to a timetable to ensure that the hearing concluded within the allocated time. It was, however, necessary to add a further hearing date on 24 February 2023 to ensure that the evidence and submissions could be completed, parties being in agreement with this.

11. The claimant represented himself and the respondent was represented by Mr M Ramsbottom, Senior Litigation Consultant.

12. On the afternoon of 31 January 2023, the claimant articulated an application for permission to adduce a number of further documents in evidence. Upon application by the claimant to add further documents to the File of Productions on the afternoon of day 2 of the Final Hearing, upon the respondent objecting (on grounds that the documents were produced at a late stage, they were not relevant, and that they caused potential prejudice to the respondent), and upon hearing submissions from both parties, I refused permission for the claimant to rely on the documents with the electronic file names MC1 to MC6 and MC8 to MC10 (which for the avoidance of doubt means that the claimant has permission to rely on the document named as MC7 only, subject to relevance). I was satisfied that this decision was in accordance with the Tribunal's overriding objective, and that the respondent's representative will have the opportunity to put any relevant questions to the claimant's and to the respondent's witnesses in relation to document MC7. The respondent's representative was given a period of time to consider document MC7 with the respondent's witnesses and to take any required instructions.

13. Both parties provided written submissions and also made oral closing submissions, which the Tribunal found to be informative.

Findings of Fact

14. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –

Background

15. The claimant was employed by the respondent as a General Manager between 31 August 2019 and 30 August 2022.

16. The respondent, Perle Hotels Ltd, is a private limited company which has its registered office at Bosville Hotel, 9-11 Bosville Terrace, Portree, Isle of Skye, IV51 9DG.

17. At all material times the respondent owned and operated five hotels located in Scotland including but not limited to two hotels located on the Isle of Skye and hotel located in Oban.

Claimant's terms of employment

18. The claimant's statement of terms of employment indicated that his start date was 2 September 2019 and that he would normally be required to work at The Bosville Hotel and Marmalade Hotel on the Isle of Skye. However, his terms of employment also stated:

"Please note that you may be expected to work at any of our other hotels for a period of time. You will not be required to work outside the United Kingdom."

19. The respondent's Employee Handbook stated:

"*E) JOB FLEXIBILITY*

It is an express condition of employment that you are prepared, whenever necessary, to transfer to alternative departments or duties within our business. During holiday periods, etc. it may be necessary for

you to take over some duties normally performed by colleagues. This flexibility is essential for operational efficiency as the type and volume of work is always subject to change.

F) MOBILITY

Although you are usually employed at one particular site, it is a condition of your employment that you are prepared, whenever applicable, to transfer to any other of our sites. This mobility is essential to the smooth running of our business."

20. The claimant had previously worked at the respondent's hotel located in Oban along with working at another hotel that the respondent operated when he was required to do so.

21. The claimant was required to work a minimum of 45 hours each working week and he worked five days per week. The claimant's salary was £52,500.00 per year (his original annual salary was £45,000).

22. The claimant's terms of employment stated in relation to Annual Leave:

> *"Your holiday year begins on 1st April and ends on 31st March each year, during which you will receive a paid holiday entitlement of 30 days. In your first holiday year your entitlement will be proportionate to the amount of time left in the holiday year.*
>
> *Conditions relating to the taking of holidays are shown in the Employee Handbook to which you should refer.*
>
> *In the event of termination of employment holiday entitlement will be calculated as 1/12th of the annual*
>
> *entitlement for each completed month of service during that holiday year and any holidays accrued but not taken will be paid for. However, in the event of you having taken any holidays in the current holiday year, which havenot been accrued pro-rata, then the appropriate payments will be deducted from your final pay."*

23. There were no provisions relating to carry over of annual leave from one holiday year to the next in the claimant's contract of employment.

24. Page 7 of the respondent's Employment Handbook section A) provided, "*It is our policy to encourage you to take all of your holiday entitlement in the current holiday year.*" It was also stated that the respondent did not allow holidays to be carried forward.

25. The respondent's CEO had authorised that as an exception due to the COVID-19 pandemic, a proportion of leave not taken during 2020 could be taken in 2021 (and the claimant was afforded the opportunity to do so).

26. In the event that the respondent terminated the claimant's employment, they were required to give "*On successful completion of your probationary period but less than 5 years' service – 3 Months*" notice, whereas, if the claimant

terminated his employment he was required to provide "*On successful completion of your probationary period - 1 month*." notice.

Furlough leave

27. The claimant was placed on furlough leave between March until around July 2020, during the period that the respondent's hotels were closed due to COVID-19 related restrictions. The claimant was not required to attend work during this period. The respondent's hotels were open from sometime in July 2020 until December 2020 (the claimant worked part time for a period of 10 weeks), and at the end of this period the respondent's hotels were required to close again due to COVID-19 restrictions. The claimant was paid the relevant furlough leave payment (80% of normal salary) and this was also topped up by the respondent.

Allegation regarding young person workers

28. Between 2 and 3 April 2022 the following text messages were exchanged between the claimant and Ms A Finlay (who was the Operations Director and who reported to Mr Rehman):

"*Is Gary serious? Working Daisy 5 Bosville breakfast shifts when she is a part time 2 DAY A WEEK 14 YEAR OLD WHO HAS NEVER WORKED BREAKFAST AT BOSVILLE AND IS ON HERSELF WITH A RECEPTIONIST? Tell Gary she will work Monday and Tuesday to cover her 2 weekly scheduled shifts only, then after Gary will s…*"

"*No problem, I'll discuss it with Gary again, I'm fairly sure he was trying to adhere to the regulations as we did have that conversation. Most of the team have flexed up during the holidays as normal. Must be some crossed wires somewhere, I'm certain we can find something that will suit for Daisy and will have her finished for 7pm. James is desperate for more hours I will get him to cover the extra.*"

"*If Gary is adhering to the regulations then Daisy works no more than 2 shifts a week, this has been her work pattern since August 2020. To completely change her part time, 2 days a week weekend position to 5 day a week*

breakfast shifts without a conversation or any form of consultation is in complete breach of her current contractual obligations. I don't need you to "find something that will suit Daisy" she will continue to be rota'd on a Friday evening and a Saturday day or night. I need to discuss this and previous serious breaches in HR with you on Monday. Let me know when you are free."

29. On 6 April 2022 the claimant and Ms Finlay discussed the matter further and the following conversation took place:

"Claimant: …Sarahs picking up extra shifts there was other people who were working at different times and he said I've had to put Daisy on Breakfast shifts and I said "fine" if that's what you've had to do.. and he said but no I've had to put her on breakfast shifts because she's away at the weekend and we cant do the late shifts because she's cant work after 7 and I said well ok!

Ms Finlay: its not after 7

Claimant: it is its 7 until 7

Ms Finlay: Nnnn on the weekends they can! up till 9 o'clock they can

Claimant: it says 7 till 7

Ms Finlay: No… during the week when it's a school night they can work at….

….

Claimant: That's that's just that's just the thing, right so restrictions right, but there's several restrictions when children are allowed to work and it is its Under 16, right! So these children are not allowed to work before 7.

Ms Finlay: During school hours

Claimant: No, no, no. That's not that's they're not,

Ms Finlay: Okay, ok

Claimant: they're not allowed to work during school hours! So these are, they're not allowed to work on any of these things before 7 or 7AM, right.

…

Ms Finlay: Okay, I see,… I have no issue and neither does your wee guy's Camerons or any of these have issues, all their parents of all your abby's and your Rubby's and and all the rest of it and whatever else anyway as I say … All I ask is a Friday night and a Saturday Night or a Friday during the day or whatever else it is, OK? And if I thought for one minute, that Gary was (inaudible) try to get to me through Daisy, honest to God Graham, I kind of nearly lost it over the weekend, I was just like you little shit you fucking done that deliberately to me, or whatever you know and I was just like you know.."

Meeting on 08 May 2022

30. On 08 May 2022 Mr F Rehman, Chief Executive Officer visited the hotel at which the claimant was working.

31. He held a meeting with the claimant and Ms Finlay.

32. There were concerns expressed by Mr Rehman in relation to the Bosville hotel, which he stated was deserving of a higher ranking. A discussion ensued in relation to the reasons for this.

33. The claimant suggested that Ms Finlay had previously said she wanted Mr Rehman to get into the rooms at the Bosville Hotel. Ms Finlay disagreed and stated that she said it was probably a good idea for Mr Rehman to have a view of all the hotels and their accommodation.

34. Mr Rehman said:

"Let's go this way. But let's, lets put it this way Graham.. put this way again if you think. Frankly If you think that fundamentally you coming to me and saying, you know, if you look at your rooms in your hotel, can you change the hotel then, then you know what, we might as well just finish the conversation now and I'll walk out right now because then I don't want to have any conversation!"

35. He also said:

"I cannot, I cannot demolish Bosville hotel I cannot build a new one.

So you know what 'I am crap.'

So I deserve to be crap. My rooms are crap. My hotel is crap. I should be right there with the hostel.

Right!

I will not accept that conversation! It could be that we agree to disagree!"

36. He said that he was proud of his hotels and "*And as far as I'm concerned. If you guys feel the same. Please go and deliver the product! If you fundamentally don't believe in the product…really. Go and think about it deeply*!"

37. Mr Rehman was clearly frustrated during the meeting. Before ending the meeting he stated, *"I don't operate, I don't operate on a level where im, basically crap, and im trying to do something, and be somebody im not! And I accept and I move on. And im telling you I don't accept that, with these two propertie. If we can make it work great, if you believe in that please do, if you don't believe in that I think you are going to have to make a more fundamental re- assessment!"*

38. Ms Finlay and Mr Rehman left the meeting together, whereas the claimant left separately and went to make a telephone call to his partner.

39. The claimant telephoned his partner to discuss the position. He had discussed with his partner the fact that he intended to resign from his employment, but that he would first ensure that Mr G Docherty's employment rights were protected.

40. On the same day after the meeting with the claimant, Mr Rehman and Ms Finlay, the claimant had a conversation with Ms Finlay. Ms Finlay confirmed during that conversation that Mr Docherty was a huge problem and there was a severe problem with his attitude. She stated she did not think the claimant was tackling the issue with Mr Docherty. She also stated that she did not know if the claimant could tackle this and that they may be just too close. She

suggested that things had been missed, she mentioned the turnover, and the claimant advised that he did not think that all came from Mr Docherty. Furthermore, she complained that the claimant was giving a great deal of responsibility to Mr Docherty, that he could not perform (including that did not have the ability to delegate, attention to detail and his communication), and it was better when the claimant performed the tasks.

41. Ms Finlay suggested that the claimant was not doing his job, that she was going to deal with Mr Docherty (she did not want him in the business anymore) and that she wanted the claimant to come on board with her. The claimant said that there was a strain on communications. In addition, Ms Finlay referred to what Mr Rehman had conveyed, and she stated,

"*I get it (stutters) and its my fault and that's what he's saying to me, ultimately he's saying if you don't think, if you think my rooms are shit and hes saying to me as well you think my rooms are shit, "I don't think your rooms are shit Fasih!" and he's just absolutely hauling me, and the point is. That I know your potential, I know what you've got I know your ability I*

absolutely fundamentally think that you are a fantastic General manager, one of the best actually that I have worked with in a long time, but I think you are off Piste just now, I think you have put too much int this guy, I think you are relying on him too much and I think hes letting you down, and I think you cant see it. And I want to bring this back to where it should be and I want to work with you with that to do that and that's where it is and im not wanting to be the General Manager," She later acknowledged that Mr Rehman was not blaming the claimant and that a lot of it was on her. The claimant stated that it was not her, and it was him.

42. On 09 May 2022 a conversation took place between the claimant and Ms Finlay. He advised that he did not want them to be at each other's throats. Ms Finlay commented that she was at fault although the claimant was also at fault.

Claimant's resignation with notice

43. Thereafter the claimant sent his letter of resignation dated 11 May 2022 at 11.46pm to Mr Rehman. He stated that as this was the start of the high season, and recruitment was exceptionally difficult in the current climate, he would stay until the end September and his late date of employment would be 30 September 2022. He further stated:

"*Reflecting on our chat in the Marmalade guest lounge last Sunday, I thank you for your authenticity.*

I appreciate the scope afforded me in making the gainful changes to both hotels. I am delighted to have seen both Food & Beverage operations move swiftly up the guest feedback rankings in the local area. When the Ashlea accommodation solution comes into effect, and the current UK recruitment

crisis is resolved, both hotels are poised for continued growth. I am genuinely disappointed that I will no longer be part of this journey: I was looking forward to realising the impact of a proper bar area in Marmalade."

44. He advised that he would hand over his responsibilities, ongoing projects, and tasks to whomever he deemed to be a suitable replacement.

45. Mr Rehman replied on 12 May 2022 at 09.47am as follows:

"*I acknowledge your letter. I have forwarded this to Angela and Jane for the m to discuss next steps with you.*

I appreciate you giving us time for the season and to find a replacement.

I wish you the best in your future endeavours and even more so happiness

in whatever you do."

Meeting between the claimant and Ms Finlay to discuss resignation

46. On 12 May 2022 the claimant and Ms Finlay had a conversation. During that meeting there were discussions surrounding the position of Mr Docherty. She stated that the claimant had decided to leave, and she believed this were

because he was upset about the fact that Mr Docherty left or many factors. She wanted to confirm that the claimant was going to be flexible, contactable, and not going to be obtuse. The claimant advised he would not be obstructive or obtuse.

47. The claimant complained that he lost 3 weeks holiday entitlement from the previous year. Ms Finlay commented that after the claimant started working for the company, he was placed on furlough between March and July. She mentioned that the company had topped up his pay also. She stated that they worked a four-month season from July (July was a write off), August, September, and October and then onto the quieter season of November and December (and then they had to close down again).

48. During the further closure period the claimant was paid furlough pay once again and he worked part time for a period of 10 weeks (the claimant stated he had worked full time during furlough).

49. She advised that the claimant received a bonus of £2000 during the 2021 season to compensate for extra hours worked (summer 2021) and he received a pay rise also. She stated that following two pay rises and a bonus, she thought that absolutely compensated him (and that included in relation to any holidays).

50. The claimant stated that he disagreed with this, and Ms Finlay replied that the claimant scheduled his own holidays. She said there was no point during which he had asked for time off and she refused. He was advised that although he had been carrying out the receptionist role, that the respondent had receptionists and that the idea was that moving forwards he would go into the General Manager role. This included preparing the rotas, stock takes, the ordering, training, one to ones, appraisals, and everything else. She suggested that she worked above him or whatever else in a supportive role to him, and that that mostly took her off the radar "…*kinda from the top or whatever else and*". The claimant said, "*Off of Fasih's radar?*" and Ms Finlay replied, "*Off of Fasih's radar!*" and "*Im still on Fasih's radar though*" Ms Finlay clarified that this meant in terms of Mr Rehman's ability to get hold of her and

expect her to do certain things or whatever else. The claimant mentioned not having an Operations Manager or Assistant Manager and there was a discussion about recruitment which may take some time.

Call and Email dated 13 May 2022

51. On 13 May 2022 there was a telephone call between Ms Anderson and the claimant. Ms Finlay also joined the call. There were some discussions relating to staff who joined the company, their accommodation needs, and how the available accommodation use could be maximised to meet staff needs. There was discussion in relation to a chef who would not be joining until July 2022.

52. The claimant sent an email to the HR Manager on 13 May 2022 complaining about a conversation earlier that afternoon:

"*I find it highly inappropriate and unacceptable that the Operations Director would slam her laptop shut, roll her eyes and tell me "you're just being awkward" before storming away and telling me to "fuck off" when I point out accommodation challenges which clearly have been forgotten about, namely: having a chef staying in a Marmalade guest room, which I am led to believe that Fasih does not find acceptable. This situation occurred in the middle of the public restaurant whilst members of my team were at reception and bar guests were coming and going!*"

53. He also complained in relation to the conversation with Mr Rehman the previous week. He said he was not certain why he was on "Fasih's Radar". He stated that he was made to double his workload as his Operations Manager was asked to leave by Ms Finlay.

54. He advised he was originally told he would receive two weeks' pay for holidays in the previous leave year, this did not materialise, and he was later told he would receive one week and be permitted to carry over a further week. However, he was not paid, and he was told this was not company policy. He felt that his concerns about filling the staff accommodation and not having anyone for a management replacement were clearly not well received (in addition to his offer to stay until September not being well received).

16 May 2022 Grievance

55. On 16 May 2022 the claimant sent a letter to the HR Manager raising a grievance relating to the situation and events which he said led to his resignation. He complained that his notice which was dated until end of September 2022 had been cut short by Ms Finlay and changed to 11 June 2022. He said he had been told by Ms Finlay that he should part company on 16 May 2022, and there was a fundamental breakdown in the relationship. He said:

"*To highlight in writing the reason that I felt that I had no choice but to resign from my position was after I was given an ultimatum from Fasih Rehman himself when discussing guest feedback in the Marmalade guest lounge. I tried to explain some of the challenges that we have with a percentage of*

the rooms in the Bosville Hotel, so Fasih may better understand where some of the guest feedback could be coming from. Unfortunately, he very quickly became agitated and very animated, abruptly standing up and stating in a stern fashion…"

56. He said there was a breakdown in communication with Ms Finlay and he believes she should have attempted to fix this breakdown. He referred to the manner in which Mr Docherty was dismissed and being on Mr Rehman's radar.

57. He asserted that:

"*After making this claim of me breaching HR regulations and having previously sent me the GOV.UK guidelines on Child employment. Angela and I spoke on Monday in The Marmalade Guest Lounge. I discussed the regulations with Angela and showed her the law stating that children*

of Daisy's age are not permitted to work outside the hours of 7am and 7pm. Angela responded with the following statement with reference to her daughter:

"she can work a Friday night up till nine o'clock, all the kids are doing it and all the parents have signed off on it, and whatever, I'm nearly sure that if the

parents have signed off on it or whatever else then it should be ok Right! All I ask is can she work Friday night, a Saturday night, take it up to nine o'clock, no issue and a Saturday Morning. That's all, that's all I want!"

This was in clear contradiction to the information I was sent and the written instructions I was given. I was stunned that Angela would use and abuse the law, working time regulations, and her position of influence just to manipulate a situation to suit herself."

58. He also complained that "*In another recent incident of a similar vein where I was sent written confirmation instructing me not to do something, only later to have this verbally contradicted. Specifically in reference to the law in relation to an HMO application*." He included a copy of an email from Ms Finlay dated 04 May 2022 sent to an employee called Moira in relation to Ashlea "*As we have not received confirmation of the HMO only 2 bedrooms can be utilised within the staff house until further notice, both bedrooms will be ready for occupancy by Friday 6th May*." He stated that,

"*Point 6 which was highlighted bold in Angela's email clearly stated that we were not to utilise more than two bedrooms in Ashlea until we had received an HMO certificate. However, as Jane will recall when you were on the phone on the 13th May, I was verbally instructed to ignore the requirement for an HMO certificate and put team members into the accommodation*…

"*I expressed my discomfort with this situation, putting people in the house when we had not had the HMO approved. I felt it was inappropriate and worrying as my name was on the HMO application. At this stage I also raised concern with the adequacy of the existing HMO for the Heatherfield property which has eight rooms occupied*."

59. He reiterated that his notice period will stand until 30 September 2022, and it was now even more apparent that it will be very difficult for him to return to the business.

Grievance meeting and investigation

60. A grievance meeting took place on 01 June 2022 chaired by Ms C Beck, Financial Controller and Ms Anderson, HR Manager took notes (please see pages 153-159 of the File of Productions). During this meeting the claimant said he wanted financial security for himself and his wife, he did not want to come to work where he could risk losing his job, and he was not convinced that coming back to the company would be any different.

61. The claimant advised:

"*Due to the current situation and how I was dealt with by two senior directors in the company. It would be hard to return. I don't feel welcomed. Appears that I am not wanted in the company. Not able to return to previous role*."

62. He said he felt pressurised into giving his resignation by Mr Rehman and that when he spoke about operational challenges, these were not well received. After describing his account of the conversation, he said it was a shock, he spoke to his wife, agreed it was not acceptable, and this resulted in his resignation.

63. When asked what resolution he was seeking, the claimant replied that he wanted to move on from the company. He said "*Don't feel welcomed and my input is not wanted. Which is fine – I have started to look for my next role*." However, he could not move to another role elsewhere until October 2022 and he wanted his notice period to be honoured.

64. In relation to his concerns in his grievance relating to "youngsters working practices" he stated:

"*GK – Angela flagged the issue, prior to it being discussed. Angela sent the Gov link – directing to the law. Gary and I looked into it, at the time we had around 6 young workers – we did have scheduling conflicts that were not permitted. Angela said look at the regulations and ensure corrected.*

There are exceptions within the regulations throughout holidays etc.

When in holidays – Gary had several on breakfast shift (including Daisy – Angela's daughter). Angela took exception to that. Angela said that Gary was being awkward and upsetting her with the rota. Then Angela wanted a meeting about serious breaches of HR – arranged to meet. Angela wanted to discuss her daughters shift – weekends to 9pm. It is fine as long as she has my permission. That is not the law. It is ok – that is against the text communication that said to comply with.

CB – Was this recent?

GK – (note no longer has work laptop access) 3rd April 2022

CB – more of a one off or generally with employees still in post?

GK – what a one off? What had been happening – when we looked at it / had happened previously /before having looked at the issue.

CB – stopped now?

GK – Yes except with relation to Daisy.

CB – did you raise it to anyone further?

GK – I fully intended to raise it to Fasih as part of my notes / but didn't get the chance."

65. There was also a brief discussion in relation to the claimant's allegation that the respondent were in breach of its HMO licencing obligations, as follows:

"*CB – Another compliance issue raised is in relation to the HMO? Heatherfield / Ashley*

GK – not sure about Heatherfield. I asked the question.

CB – did you raise it to anyone's attention / Ashley HMO.

GK – no"

66. A grievance investigation meeting took place with Ms Finlay on 08 June 2022 (please see pages 160-164 of the File of Productions). In addition to various

other matters Ms Finlay indicated that it would be difficult for the claimant to return to work as she felt the team have moved on, difficulties and lack of standards, procedures, induction, and recruitment were being tackled. She commented that the claimant had wiped 2 years' worth of work from his laptop deliberately and she thought he would be taking his holidays as part of his garden leave.

67. A grievance investigation meeting took place with Mr Rehman on 08 June 2022 (please see pages 165-168 of the File of Productions). He said he had heard the claimant wanted to resign during the previous year in August as he had been offered more money to join a competitor named Cuillins Hills.

Grievance outcome

68. Ms Beck sent the grievance outcome letter to the claimant on 27 June 2022. The claimant's grievance was partially upheld. The outcome letter stated in relation to each point that had been considered:

"• This is upheld as you had not expressed consent to a reduce period.

• This is not upheld because while Fasih Rehman had raised valid and significant operational concerns to both yourself and the Operations Director, he did not pressurise either party to resign. Further to investigation meetings with both Operations Director and Managing Director, it was clear that there were frustrations, legacy issues which hadn't been resolved resulting in an incredibly challenging peak season approaching. There was no undue influence or pressure to resign on you or indeed the Operations Director. The concerns were raised to both yourself and Operations Director, as the management team responsible for the operational issues.

• This is partially upheld as although HR processes have been followed, there has been a lack of documentation. Also due to the confidentiality of settlement agreements, I can confirm that this has been reviewed.

• Discussions regarding the allocation of staff accommodation and the awaited

confirmation of HMO being granted were in their infancy. There was no instruction to breach the HMO but discussions took place to plot the full allocation only as an illustration of what could be offered to employees."

69. The letter stated that the claimant would now continue to work until end of September 2022, that he raised concerns in relation to returning to work and a call would be arranged with him.

Grievance appeal

70. The claimant appealed against the grievance outcome by letter dated 1 July 2022.

Conversation between claimant and Ms Anderson 05 July 2022

71. Ms Anderson arranged a call with the claimant to discuss his return to work. She explained to him that the claimant was to work during his notice period at the respondent's hotel in Oban with the expectation that he worked three days on site and two days from home. The claimant had supported the respondent's other locations previously, including its hotel at Oban. She considered that this would be in line with the terms of his contract and that expenses would be paid to the claimant in respect of mileage, and he would be staying at the respondent's hotel (at the respondent's cost). According to Ms Anderson, the claimant would attend to new starters, he had a wealth of experience and he had worked at the Oban hotel previously. He mentioned that he had a teenage son at home. Ms Anderson advised him that he may wish to make arrangements in respect of his son, and it was discussed that he would need time to do this.

Claimant's email dated 06 July 2022

72. The claimant advised Ms Anderson by email dated 06 July 2022 that:

"*Further to our conversation yesterday where it was proposed that I could:*

Support Oban! And also decant my knowledge to "Marco" the newly appoint ted assistant GM at Oban.

I reiterate that I do not believe that this is a reasonable request or appropriate solution.

The distance from my home to Oban (some 175 miles), makes this highly unfeasible and incongruous with my home life and personal commitments."

73. The claimant received a letter from Ms Finlay dated 13 July 2022 stating:

"*You had advised that you do not want to go back to work in Skye, therefore, we have made arrangements for you to work at Perle Oban Hotel in Oban. It states in your contract that you may be required to work at other locations and this is something you have previously done before. You have been willing to work at other sites when the company has required it of you on two occasions, January 2020 in Oban and February 2022 in Glencoe.*

We expect you back in work at 9 am on Friday, 15 July. If you do not come into work we would consider this an unauthorized absence, which may be subject to the Disciplinary procedure.

We will have specific duties for you to perform, which I will communicate by email. Please report to Adrianna upon arrival in Oban as we have arranged accommodation for you in Oban."

74. The claimant advised by letter dated 14 July 2022 that due to personal family and childcare arrangements it was not possible for him to attend the Perle Oban property tomorrow (15 July 2022).

75. Mr Rehman replied on 15 July 2022 advising that since Ms Finlay was off that day he was responding to the claimant's email and that the majority of concerns raised in his grievance were upheld apart from one, and his concerns had been addressed. He advised that failure to report to and take instructions from Ms Finlay will amount to failing to follow a reasonable management instruction and that his appeal would be heard on 19 July 2022. He was advised that he was being provided with unpaid time off work from that day to enable him to address his childcare arrangements. He advised that from the following Friday the claimant was expected to work in Oban for 3 days and he could work from home on the remaining 2 days

(accommodation had been arranged and travel expenses will be paid). He was advised that his failure to attend may be treated as unauthorised absence and may be subject to the respondent's disciplinary procedure.

Appeal hearing

76. Mrs B Rehman sent a letter to the claimant dated 18 July 2022 confirming that she will hear his appeal on 19 July 2022.

77. The claimant sent a letter to Ms Anderson on the same date querying why Mr Rehman's wife was due to conduct the appeal and he raised concerns about the use of the mobility clause.

78. The grievance appeal meeting took place on 28 July 2022.

79. In August 2022 the claimant asked if he could drive between Oban and his home each day he worked at the respondent's Oban Hotel (the journey was 175 miles each way). Ms Anderson did not consider the request to be reasonable. It was not reasonable in her view for the claimant to travel that distance (which would also be a difficult journey to drive over challenging roads) on top of his 8-hour working day. She considered that this would not allow the claimant a reasonable amount of rest between his shifts.

Non-attendance at work

80. The claimant was sent a letter from Ms Anderson dated 01 August 2022 advising that he did not attend work on 29 July 2022, and his absence was unauthorised. An explanation was provided that the claimant was not paid from 15 July – 31 July 2022 because he was requested to return to work, and he refused to come back into work. He was advised that if he did not return to work by 05 August 2022, the company may commence disciplinary action. By letter dated 11 August 2022, he was invited to attend an investigation meeting on 15 August 2022 to discuss concerns about his conduct. A report dated 25 August 2022 was prepared following the meeting on 15 August 2022 by an external Consultant (Peninsula Face2Face Report) which stated:

"*65. In light of the above findings, it is recommended that they are informed of the outcome of the Investigation Hearing and that GK is invited to attend a Disciplinary hearing to answer the following allegations.*

66. 1) It is alleged that you have failed to attend work and are absent from work without authorisation, further particulars are:

The company have requested you to work your notice period at Perle Hotels, Oban, as it was your wish, not to return to your normal place of work and despite given time to arrange adequate childcare, you have failed to return to work. If proven these allegations could amount to Serious/misconduct.

67. 2) It is alleged that you have failed to comply with company rules and procedures, further particulars are:

68. Company documentation was sent to a competitor hotel relating to kitchen plans and quotes on 10th December 2021 which is against company rules and procedures, and despite being warned by the CEO not to engage with this competitor hotel. If proven these allegations could amount to potentially Gross Misconduct."

81. By letter dated 26 August 2022 from Ms Finlay, the claimant was required to attend a disciplinary hearing on 29 August 2022 to discuss the following allegations:

"• 1) It is alleged that you have failed to attend work and are absent from work without authorisation, further particulars are: The company have requested you to work your notice period at Perle Hotels, Oban, as it was your wish, not to return to your normal place of work and despite given time to arrange adequate childcare, you have failed to return to work. If proven these allegations could amount to Serious/misconduct.

• 2) It is alleged that you have failed to comply with company rules and procedures, further particulars are; Company documentation was sent to a competitor hotel relating to kitchen plans and quotes on 10th December 2021 which is against company rules and procedures, and despite being warned

by the CEO not to engage with this competitor hotel. If proven these allegations could amount to potentially Gross Misconduct."

82. This was rescheduled to 30 August 2022 at 2pm, after the claimant advised he had not been given adequate time to prepare. By an email dated 29 August 2022 sent at 9.41pm the claimant requested that the hearing be delayed until 05 September 2022 and he advised that Ms Finlay was an unsuitable chair.

Grievance appeal outcome

83. The claimant was sent a letter dated 30 August 2022 stating that Mrs Rehman was upholding the original grievance decision.

Claimant's resignation on 30 August 2022

84. The claimant sent further correspondence on 30 August 2022 at 1.00pm advising that he was now left with little choice but to resign from his position with immediate effect due to Ms Finlay and Mr Rehman's conduct. He set out in bullet point form a number of concerns. He said he was forced to contact ACAS to have his pay reinstated and just days after this the company started unfounded disciplinary action against him.

85. Ms Anderson sent a letter to the claimant dated 30 August 2022 advising that there were two matters of concern under investigation, it was the company's intention to follow proper disciplinary procedures and at 12 noon that day he tendered his resignation verbally (he then sent an email at 1.00pm confirming his resignation with immediate effect). He was asked to contact her by 1 September 2022 if he wanted to withdraw his resignation so that the disciplinary process could continue. Otherwise, she would take steps to process the termination of his employment.

86. The claimant did not withdraw his resignation. The claimant's last date of employment was on 30 August 2022.

87. The claimant received his final payment from the company on 30 September 2022 which related to pay in respect of holiday in the amount of £2524.00 gross and £1951.25 net (units 12.50 and rate £201.92).

88. Although the claimant did not secure alternative employment between June and the end of September 2022, he received income from Airbnb rental amounting to approximately £4000.00. He had a job offer made to him in August 2021 which was not rescinded but it was delayed until May 2023. In the meantime the claimant's focus was on operating an Airbnb business using his own property to provide a source of income. He said during April – September this was likely to be particularly busy, so it was his intent to pursue that business opportunity moving forwards.

89. The respondent conducted a number of online searches in terms of available hospitality roles (including Hospitality Area Manager, Team Leader, Holiday Lodges Managers, Operations Manager, Site Manager, Planning Manager, Customer Team Leader, Operations Support Manager, Area Manager, Territory Sales Manager, Restaurant Manager, Front of House Manager, General Manager) after the claimant's employment ended, copies of which are at pages 259 to 269 of the File of Productions. The claimant confirmed that he did not apply for any of those roles and did not apply for any other roles. The claimant's focus was on trying to build his Airbnb business.

Observations

90. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

91. The Tribunal observed that in terms of the witness evidence it heard, different witnesses were able to assist with or comment on specific aspects of this case. Where there was a conflict of evidence, the Tribunal made findings of fact on the balance probabilities based on the documents, and having considered the totality of the witness evidence, and accepted the evidence that set out the position most clearly and consistently.

92. I did not accept that the Ms Finlay requested or gave an instruction to the claimant to breach HMO Regulations as alleged by the claimant. I also did not accept the claimant's account of events in respect of the allegation that he was asked to work while on furlough leave or being asked to breach

employment law regarding young people workers. I reached my findings in relation to those matters having considered the documents, and the evidence of Ms Finlay which was on the whole supported by Ms Anderson's evidence (who I considered gave evidence consistently and clearly).

93. I considered that the claimant's account of the meeting with Mr Rehman and Ms Finlay on 08 May 2022. Having reviewed the claimant's transcript of that meeting, I relied on the transcript to a significant degree, as this most accurately reflected the conversations that took place, and it was the best available evidence.

94. I found that Ms Finlay and Ms Anderson's explanation of the reasons why the claimant was required to work at the respondent's hotel in Oban in July/August 2022 to be credible and consistent, and the respondent's request was reasonable (and in line with the claimant's contract of employment) in the circumstances. He was required to work at that hotel in order to assist new starters and he had worked there previously. Given the content of the grievance meeting on 1 June 2022, it was not appropriate for the claimant to work at the respondent's hotels on the Isle of Skye. I accepted that Ms Anderson's concerns about there being no adequate rest breaks between shifts if the claimant were to travel to and from his home location to the respondent's Oban Hotel were both genuine and reasonably held concerns. Although the claimant said childcare was not available, it was not clear from the claimant's evidence specifically what steps he had taken to make childcare arrangements since he was informed of the requirement to work in Oban in July 2022, and, further, I was not satisfied that the claimant had taken any adequate steps in this regard.

95. The respondent had engaged an external consultant to investigate to disciplinary allegations relating to the claimant not attending work at the respondent's Oban hotel and sending information to a competitor. I considered that there was a substantial delay in terms of preparation of the grievance appeal outcome but there were some reasons proffered which included staff sickness absence. I took into account the absence of an apology from Ms Finlay in respect of the bad language the claimant said she

had used during a telephone conversation with the claimant in May 2022, and I considered this in the context of the content of that conversation as a whole.

96. There was an absence of documentary evidence in relation to the claimant's claim for outstanding annual leave. The parties did not produce any annual leave records. The claimant did not adduce any documents to show the annual leave he had taken and to evidence any alleged agreement to carry over any outstanding annual leave. He also asserted that it was custom and practice that annual leave could be carried over, but the only evidence led in relation to this was the claimant's oral evidence, and Mr Docherty's evidence about his own experience including in respect of being paid in lieu of a days' leave (and his evidence was rather limited, and it did not include a detailed explanation or particulars).

Relevant law

97. To those facts, the Tribunal applied the law –

Unauthorised deductions from wages

98. Section 13 of the Employment Rights Act 1996 ("ERA 1996") provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by statute, or by a provision in the workers contract advised in writing, or by the worker's prior written consent. Certain deductions are excluded from protection by virtue of s14 or s23(5) of the ERA 1996.

99. A worker means an individual who has entered into or works under a contract of employment, or any other contract whereby the individual undertakes to personally perform any work for another party who is not a client or customer of any profession or business undertaking carried on by the individual (s230 ERA 1996).

100. Under Section 13(3) there is a deduction from wages where the total amount of any wages paid on any occasion by an employer is less that the total amount of the wages properly payable by him to the worker on that occasion.

101. Under Section 27(1) of the ERA 1996 “wages” means any sums payable to the worker in connection with their employment including salary and holiday pay. S 27(2)(c) of the ERA 1996 excludes pension contributions from the scope of unlawful deduction from wages claims: *Somerset Council v Chambers* [2017] IRLR 1087 and therefore a claim for pension contributions would need to be brought as a breach of contract claim.

102. The words 'properly payable' refer to a legal entitlement on the part of the employee to the payment (*New Century Cleaning Co Ltd v Church* [2000] IRLR 27). The claimant’s case is that his legal entitlement to payment derives from his contract of employment with the respondent.

103. It does not automatically follow that an employee is not entitled to be paid if they do not work. There are, however, some cases in which the express or implied terms of the contract, properly construed, do not give rise to any obligation to pay when work has not actually been performed, even if the employee is ready, willing, and able to work.

104. In determining whether an employee is entitled to be paid for a period during which they have not worked, the terms of the contract are the starting point. As Lord Justice Coulson said in the case of *North West Anglia NHS Foundation Trust v Gregg* [2019] EWCA Civ 387, [2019] IRLR 570: *"the starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself… Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract?*”

105. In the case of Gregg, Coulson LJ went on to say this: “*If the contract did not permit deduction then… the related question is whether the decision to deduct pay for the period… was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the “ready, willing and able” analysis… falls to be considered*."

106. A complaint for unlawful deduction from wages must be made within 3 months beginning with the due date for payment (Section 23 ERA 1996). If it is not reasonably practicable to do so, a complaint may be brought within such further reasonable period.

Breach of contract

107. In terms of the claimant's breach of contract complaint, the starting point is that contracts of employment which give rise to the entitlement to pay are a matter of contract: based upon an agreement between the parties, employer, and employee, although it is recognised that those two parties rarely have the same bargaining power. Many forms of employment protection have been established by Parliament over the years to ensure that employers deal properly and in accordance with minimum contractual entitlements with their employees. In short, employers will not be acting lawfully if they act on a unilateral basis. The statutory provisions dealing with the relevant employment protection rights are set out in the Employment Tribunals Act 1996, at Section 3 read with the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624 for the pay arrears claim, Part II of the Employment Rights Act 1996, particularly at Sections 13, 14, 23 and 24, for the unlawful deduction from wages claim.

108. In relation to his claims for notice pay and holiday pay, the claimant relies on the relevant contractual provisions (set out in the findings of fact above).

Unfair dismissal (constructive)

109. The Tribunal had regard to the terms of section 95(1)(c) of the ERA 1996 which provides that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal 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 known as constructive dismissal.

110. The Tribunal also had regard to the case of *Western Excavating Ltd v Sharp 1978 ICR 221* where it was stated that:- "*if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then*

he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

111. An employee pursuing a claim of constructive dismissal must establish that:

a. there was a fundamental breach of contract on the part of the employer;

b. the employer's breach caused the employee to resign and

c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

112. The claimant asserted the employer had, by their actions, breached the implied duty of trust and confidence. This term is implied into all contracts of employment, and means that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (*Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84).

113. In the case of *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 it was stated that "*to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*."

114. This was developed further in the case of *Malik v BCCI* [1997] IRLR 462 where it was stated that "*in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer's behaviour on the employee that is significant – not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively*."

115. In *Hilton v Shiner Limited* [2001] IRLR 727, it was held that the implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which a complaint is made must be engaged in without

reasonable and proper cause. Thus, in order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts.

116. In *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35, the Court of Appeal held that a final straw, if it is to be relied upon by the employee as the basis for a constructive dismissal claim, should be an act in a series whose cumulative effect amounts to a breach of trust and confidence. The act does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. However, the final straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be the final straw, even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of his trust and confidence in the employer.

117. In *Wright v North Ayrshire Council* [2014] IRLR 4, the EAT found that the Tribunal had been wrong to rely on the principle that, where there was more than one cause, it was only the main (i.e. effective) cause of the resignation which should be considered to decide whether there had been a constructive dismissal.

118. If the dismissal is established, then the Tribunal must also consider the fairness of the dismissal under Section 98 of the ERA 1996. This requires the employer to show the reason for the dismissal (i.e. the reason why the employer breached the contract of employment) and that it is a potentially fair reason under Sections 98 (1) and (2) ; and where the employer has established a potentially fair reason, then the Tribunal will consider the fairness of the dismissal under Section 98 (4), that is: (a) did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissal; and (b) was it fair bearing in mind equity and the merits of the case. A

constructive dismissal is not necessarily an unfair dismissal: *Savoia v Chiltern Herb Farms Ltd* [1982] IRLR 166.

119. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, relying on an argument that there was no dismissal, then a Tribunal is under no obligation to investigate the reason for the dismissal itself. The dismissal will be unfair because the employer has failed to show a potentially fair reason for it: *Derby City Council v Marshall* [1979] ICR 731.

Submissions

120. I have already set out the key legal issues at paragraphs 98 to 120, and paragraph 7 confirms the 13 acts outlined by the claimant at the start of the hearing in respect of the constructive unfair dismissal claim. In addition to both parties' written submissions, the claimant and the respondent's representative made oral submissions, which the Tribunal found informative. I will deal with any essential points from those when setting out my own reasoning.

Discussion and decision

121. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Claim for Unfair Dismissal (constructive)

122. I have considered all of the facts in the round and have attempted to assess the aggregate effect on the relationship of trust and confidence between the claimant and the respondent. I have carefully applied the definition of the implied term of trust and confidence set out in *Malik* and *Courtaulds* (above). My approach has been to consider the facts objectively and not from the subjective perspective of either side, since that is how breaches of contract must be assessed. The important words used to describe the implied term in the above cases must be applied, and it is certainly not a question of simply seeking to identify objectively unreasonable behaviour.

Aspects of the alleged breach of contract

(xiv)Did the actions or omissions by the Respondent set out in (i) to (xiii) above amount to a course of conduct that constitutes, when taken together, a repudiatory breach of contract? Did the actions or omissions as set out in (i) to (xiii) breach the implied term of trust and confidence?

(xv)Did the Claimant resign in response to the breaches?

123. Thus, the first issue for this Tribunal to determine is the complaint of constructive dismissal. The claimant asserted the employer had, by their actions, breached the implied duty of trust and confidence. The claimant argued that the respondent had breached the implied duty of trust and confidence by reason of the acts and/or omissions of the respondent that are set out in paragraphs (i) to (xiii) of the list of issues set out above. I considered each of those matters in turn.

Were the Claimant attempts to raise a grievance thwarted by the Respondent?

(i)Was the Claimant verbally instructed to break the law on several occasion by his line manager Angela Finlay? In particular did the Respondent: (a) Ask the Claimant to work while he was on furlough?

124. There was reference to the claimant's assertion that he had been asked to work whilst on furlough leave during the meeting he had with Ms Finlay on 12 May 2022. Ms Finlay advised the claimant during that meeting that he was on furlough leave between March until around July 2020. The respondent's hotels were open from sometime in July 2020 until December 2020 (she said the claimant worked part time for a period of 10 weeks), at the end of which the respondent's hotels were required to close again due to COVID-19 related restrictions. She commented that the claimant was paid the relevant furlough leave amount and that this was topped up by the respondent (he also received a pay rise, bonus [he was paid a payment of £2000] to make up for any extra hours during which he worked). The claimant asserted he had worked full time, albeit it was not clear during what dates he alleged he worked full time.

125. During Ms Finlay's oral evidence she stated that the claimant did not work during the furlough period, and he did not attend the hotel until a week prior to the reopening (which was in order to come and see the set up). While the hotels were closed, there was no work for the claimant to carry out and there were receptionists that were available to deal with any enquiries. I accepted her evidence relating to this which was provided in a consistent and logical manner. The claimant did not provide any details of when or how he asserted he was required to work during any period of furlough leave. There was no evidence before the Tribunal that the claimant was asked to work during any period of furlough leave, and there was no evidence of any telephone calls or emails in which he allegedly was told he had to attend work during furlough.

126. It was therefore not clear how and when it was asserted that the claimant was asked or required to work while he was on furlough leave, or indeed, that the respondent was in breach of their legal obligations in respect thereof. I was unable to accept the claimant's account in relation to this

(b) Ask him to breach HMO regulations?

127. The claimant submits that Ms Finlay and the respondent have illegally overpopulated HMO properties (Ashlea and Heatherfield) for many years and he as General Manager of both hotels in Portree was instructed to continue this activity. The claimant was questioned about his allegations relating to both properties during the grievance hearing on 01 June 2022. He stated that he was not sure about Heatherfield, and he questioned this. He also indicated that he did not bring the matters relating to the Ashlea HMO to anyone's attention.

128. During Ms Finlay's grievance interview on 8 June 2022, she referred to a telephone call she had with the claimant when she was questioned about Ashlea. In the grievance outcome letter dated 27 June 2022 Ms Beck concluded that there was no instruction to breach the HMO rules, but discussions took place to plot the full allocation only as an illustration of what could be offered to employees.

129. The claimant raised this issue again in his letter of appeal sent to Ms Anderson on 01 July 2022. Ms Rehman reviewed the evidence and sent a letter to the claimant dated 30 August 2022 advising that there was no evidence that the HMO legislation had been breached. She referred to the email correspondence from Ms Finlay dated 04 May 2022 stating that only 2 bedrooms can be utilised at the Ashlea property until further notice as the respondent had not yet received confirmation of the HMO licence. The claimant did not specify in his letters dated 16 May 2022 or 01 July 2022 the precise terms in which he was allegedly asked to breach HMO legislation. He stated that Ms Anderson was on the telephone call on 13 May 2022 when he was allegedly asked to breach the HMO legislation, but in her oral evidence she stated that Ms Finlay did not instruct the claimant to breach HMO legislation.

130. Despite referring to having a transcript of the conversation from 13 May 2022 in his letter dated 1 July 2022, the claimant did not provide this to the respondent at the time of his grievance or grievance appeal, and this was not supplied as part of the File of Productions. The claimant did not proffer any good reason for this.

131. Mr Docherty who attended the hearing pursuant to a witness order (obtained following an application by the claimant) on 24 February 2023, said he believed 8 bedrooms of a property were in use, but he had only shown a council representative 5 rooms. The claimant asked him whether he recalled Ms Finlay instructing the claimant to utilise all 8 rooms and he answered “yes.” He was unable to confirm when the alleged conversation took place. Mr Docherty confirmed he believed Ms Finlay knew this was illegal, but the source of this information was not clear. In cross examination he accepted in the email dated 4 May 2022 he was advised what the HMO requirements were and what he needed to do to ensure the property was populated in accordance with the HMO regulations (Mr Docherty also confirmed during his oral evidence that the contents of that email were genuine). Although he confirmed he was not asked to overpopulate the property in that email, he said he could not recall being asked to do this in any other email.

132. Mr Docherty's evidence on this matter was difficult to rely upon as it was devoid of any detailed particulars, such as when the alleged conversation took place, he was not asked to give an account of the alleged conversation or the terms of any alleged instruction given to the claimant in his own words, and he did not complain about Ms Finlay's alleged conduct at the material time. Additionally, he purported to confirm that Ms Finlay knew that instructing the claimant to utilise 8 rooms at the relevant property was illegal, but it was not clear how he obtained information relating to Ms Finlay's state of knowledge. He was not present during the conversation relied upon by the claimant on 13 May 2022. The claimant's oral evidence similarly did not contain any detailed particulars relating to the conversation on 13 May 2022. On balance, I preferred Ms Finlay and Ms Anderson's evidence in terms that there was no instruction given to the claimant to breach the HMO rules (and I do not accept the claimant's submission that either of those witnesses gave dishonest accounts).

(c) Ask him to breach employment law regarding young people workers?

133. The above findings refer to the claimant's allegations relating to alleged breach of employment law. The claimant submits that Ms Finlay knew that her daughter could not work beyond 7pm but instructed him to break the law by asking for her daughter to work until 9pm for her selfish personal gain. This, however, does not accurately reflect the contemporaneous documents in terms of the conversations that took place between the claimant and Ms Finlay. According to the transcript of the conversation between the claimant and Ms Finlay dated 6 April 2022, the claimant advised that Ms Finlay's daughter had been rostered to work on breakfast shifts because she was away at the weekend, and she could not work late shifts. During that conversation the claimant told Ms Finlay that her daughter could not work from 7pm until 7am according to the relevant website, although Ms Finlay advised that on the weekend (on a Saturday) she believed she could work. Ms Finlay did not say she was certain, and in fact, she indicated that she was 99% or "nearly sure…", and she spoke of the need to double check the position. She

expressed concern that her daughter was being treated differently in terms of her rostered shifts when compared to other young workers.

134. In the claimant's grievance dated 16 May 2022 he referred to the text message sent by Ms Finlay on 3 April 2022 advising him that Ms Finlay's daughter would continue to be rota'd on a Friday evening and a Saturday, day, or night and that she needed to discuss this and previous serious breaches of HR. He said that her response during their conversation on 06 April 2022 was in contradiction to the information he sent to her. The claimant accepted during the grievance meeting that the issue related to Daisy only and that he said that he intended to raise it with Mr Rehman. The grievance response dated 27 June 2022 concluded that although HR processes were followed, there was a lack of documentation. In terms of the grievance appeal response on 30 August 2022, Ms Rehman advised that she found no evidence that the claimant were given verbal instructions to breach employment law after having received guidance in relation to legislation on employing minors. The claimant's oral evidence not only lacked particulars of the relevant conversations including relevant dates, but this was also inconsistent with the documents to which the Tribunal was referred.

Issue (i) (a) to (c) conclusion

135. On the analysis above, I did not find that the above incidents were likely to (or that they in fact did) undermine trust and confidence without reasonable and proper cause.

136. Alternatively, assessed objectively, even if I were to I find that these incidents (i) (a) to (c) were likely to, and did, undermine trust and confidence without reasonable and proper cause, on their own, it would not in my mind amount to a breach of the implied term because it does not reach the level of destruction of, or causing serious damage to, the relationship of trust and confidence. It was at best regrettable that there was no clear document trail to show the arrangements during the claimant's furlough leave or a paper trail relating to the Ms Finlay's daughter's working hours. On the claimant's own case, he was an actively concerned in matters relating to staff accommodation

in HMO properties and rostering young person workers. It goes without saying that if the alleged illegal conduct did take place (contrary to my findings), the alleged conduct should not have happened. I have taken into account the nature and extent of the alleged breaches. In any event, although the alleged breaches may have caused some damage to the relationship of trust and confidence, that relationship was certainly not seriously damaged or destroyed.

137. In any event I do not accept that the claimant resigned in response to the alleged breaches of contract at issue (i) (a) to (c). The claimant resigned on 11 May 2022. There was no evidence that the claimant had asserted or complained that he was required to work during his furlough leave prior to the meeting on 12 May 2022, or that the respondent was in breach of HMO regulations. He had discussed young persons' working hours and requirements with Ms Finlay on 06 April 2022. He did not refer to these matters in his correspondence dated 11 May 2022 when he tendered his resignation. Taking account of this, subsequent correspondences between the parties, and the claimant's oral evidence, I was not satisfied that these alleged breaches caused or contributed to the claimant's resignation on 11 May 2022 or his subsequent resignation on 30 August 2022.

(ii)Did the CEO ambush the Claimant at a meeting on 8 May 2022 blaming the Claimant and culminating in the CEO stating that the claimant should resign?

138. The respondent's representative submits that the meeting on 8 May 2022 at the hotel was a routine business meeting for Mr Rehman. Mr Rehman met with Ms Finlay and then the claimant. There was no evidence of a pre-planned meeting to *'ambush'* the claimant. During the meeting Mr Rehman set out his concerns about the respondent's hotel performance. There were several concerns that were outlined, including a drop in guest ratings and general standards.

139. The relevant comments made during that meeting that the claimant relies on were directed toward both the claimant and Ms Finlay and not solely at the claimant. Mr Rehman said "*I am crap…So I deserve to be crap. My rooms are*

crap. My hotel is crap. I should be right there with the hostel." I am satisfied that the use of the word "*crap*" by Mr Rehman, was an expression said in the heat of the moment, it was not intended to be offensive. It was used in the context of the suggestion that the rooms at the hotel not being up to standard and in any event, it was not directed at the claimant. He said he was proud of his hotels "*And as far as I'm concerned. If you guys feel the same. Please go and deliver the product. If you fundamentally don't believe in the product. If you don't fundamentally believe in what we have. Really. Go and think about it deeply!*" He suggested that the claimant and Ms Finlay should have a talk and that if they could not make it work, they would have to make a more fundamental reassessment.

140. Having reviewed the claimant's transcript of that conversation, I did not accept Mr Rehman stated that the claimant should resign during that meeting. Mr Rehman said during his oral evidence that he dd not threaten the claimant with resignation and that just six weeks prior to that meeting he had written to the claimant promoting him, he had given him a bonus and pay rise (he said this was even though the claimant had not met his KPIs) and he did not want to demotivate the claimant as it was the start of the season. He also pointed out that he addressed both Ms Finlay and the claimant, and he simply wanted to ensure that attention was not deflected onto other things. His aim was to make sure that management were working as they should be. His account of the meeting and rationale were clear and consistent.

141. Ms Finlay met with the claimant immediately after the meeting with Mr Rehman and re-assured the claimant that Mr Rehman's criticism of the standards at the hotel was directed and both her and the claimant and a number of constructive matters were discussed with a view to addressing the issues within the respondent's hotel. She mentioned to the claimant that he was defensive, and he did deflect (and the claimant said it was not a deflection, but it was more about giving an understanding of the big picture).

142. Assessed objectively, I find that this incident was not likely to, and did not, undermine trust and confidence without reasonable and proper cause. In any event, even if it did (which I do not accept), on its own, it would not come close

to a breach of the implied term because it does not reach the level of destruction of, or causing serious damage to, the relationship of trust and confidence. At best, it would have been a matter for reflection and apology, sooner rather than later. It was, however, a one-off incident of relatively brief duration. This appeared somewhat out of character, and it was not suggested that Mr Rehman had been known to act in a similar way on any previous occasion, whether towards the claimant or anyone else. That is why I find that although the incident on the claimant's account (which I do not accept) caused some damage to the relationship of trust and confidence, that relationship was certainly not seriously damaged or destroyed.

143. The claimant's resignation letter dated 11 May 2022 (giving notice until 30 September 2022) did not refer to any issues during that conversation being a cause or the effective cause of the claimant's resignation. The claimant did not resign immediately after this conversation. He spoke to his partner and he, thereafter, spoke to Ms Finlay. In his submissions he stated that he did not resign immediately due to Ms Finlay confiding in him that there was an intention to terminate Mr Docherty's employment from the business unlawfully. He wanted to protect Mr Docherty and his employment rights. Although it is not clear how he intended to do this. I did not find that the claimant resigned in response to the alleged breach of contract that took place during the conversation on 8 May 2022. In fact the claimant thanked Mr Rehman for his authenticity during the conversation on 8 May 2022 and he gave more than 4 months' notice (the contractual notice he was required to give was one month).

(iii)The Claimant says that being informed on 11 May 2022 that his Assistant General Manager/Operations Manager had been dismissed was the last act which led him to tender his resignation on 11 May 2022.

144. Mr Docherty's employment was terminated following concerns in relation to his conduct and performance and 'protected conversations' between Mr Docherty and Ms Finlay, by mutual agreement. The claimant was not party to any of those conversations, and there was no suggestion by Mr Docherty

during his evidence that he was unfairly dismissed or that his employment rights had been breached.

145. The claimant said during his evidence that the removal of Mr Docherty from his role meant that his own workload was about to increase at the start of the summer season. In his submissions he states that the increase in his workload together with the ultimatum he was given by Mr Rehman made his position no longer tenable.

146. Assessed objectively, I find that this incident was not likely to, and did not, undermine trust and confidence without reasonable and proper cause. In any event, even if it did (which I do not accept), on its own, it would not come close to a breach of the implied term because it does not reach the level of destruction of, or causing serious damage to, the relationship of trust and confidence. The claimant did not raise his concerns in terms of his workload increasing prior to tendering his resignation. Had he done so, he is likely to have been provided with the assurance that was given to him by Ms Finlay the following day that that she was under no illusion in terms of how important it was to get the claimant a replacement "*number two ASAP*." Any requirement to provide temporary cover while a replacement was sourced was not unreasonable given the circumstances, and the claimant could have asked for agency or other temporary support staff to be sourced in the meantime if required (to assist).

147. I also find that the claimant did not resign in response to being told that Mr Docherty was no longer employed by the respondent. This issue was not referred to on the claimant's resignation letter dated 11 May 2022. The claimant advised during his evidence that he prepared the resignation letter in draft form on 08 May 2022, and he delayed sending this as he wanted to remain employed to protect Mr Docherty's employment rights.

(iv) Was the Claimant instructed to take a lesser role than that set out in his contract of employment?

148. The claimant was advised during the meeting on 12 May 2022 that the idea moving forward was that he would take the General Manager role including

preparing rotas, stock takes, ordering, training, one to ones, appraisals, and other tasks. Those roles were previously performed by Mr Docherty. Ms Finlay stated that she would be "...*kind of working above that or in a supportive role for you*." The claimant was advised that he also had a HR person, finance team and Farouk was also coming back to work, and that recruitment would be undertaken for a replacement Operations Manager or Assistant Manager.

149. The claimant's contractual role was General Manager, his contract of employment referred to his duties being detailed in his Job Description, and that this may be modified from time to time to suit the needs of the business.

150. Given the provisions of the claimant's contract, the nature of the work he was being asked to perform, the fact that this was intended to be short term cover while recruitment took place, and that the claimant was offered support, and assessed objectively, I find that this matter was not likely to, and did not, undermine trust and confidence without reasonable and proper cause.

151. In any event this matter occurred after the claimant's resignation on 11 May 2022, so it did not play any part in respect of his decision to resign. This was also a number of months prior to his resignation on 30 August 2022 with immediate effect and I do not find that he resigned on that date as a result of this matter (or that his resignation on that date was connected with this matter to any degree).

(v)Was the Claimant verbally abused and harassed by his line manager Angela Finlay?

152. The claimant submits that the term "*on Fasih's radar*" is used as a scare tactic by Ms Finlay to harass managers and to identify people who were soon to lose their job. The claimant relies on the text message from Ms M C Jenkins at page 286 of the File of Productions and the oral evidence of Mr Docherty, both of which I have reviewed. Mr Docherty said that this phrase meant the company no longer wished that person to be employed by them. However, he was not referred to any particular conversation or the context in which this comment was made to the claimant.

153. Mr Rehman said in his oral evidence that these were not his words (and I accepted his evidence which was consistent with the contemporaneous documents). This was a phrase that was used during a meeting between the claimant and Ms Finlay. Ms Finlay stated during the meeting on 12 May 2022 that in her capacity as "…*a supportive general manager for you [the claimant] or whatever else*…", this would mostly take her "…*off the radar from the top or whatever else and*." The claimant replied, "Off of Fasih's radar?" to which Ms Finlay responded, "Off of Fasih's radar!" The claimant said he will still be on Mr Rehman's radar. Ms Finlay advised "*No No I means in the ability for fasih to get hold of me. That's what I mean? For Fasih to physically, you know, expect me to do certain things or whatever else*." In that context, viewed objectively, it cannot be discerned that Ms Finlay was using the phrase "*on Fasih's radar*" as a scare tactic or to harass managers. Mrs Rehman concluded in the grievance appeal outcome letter dated 30 August 2022 that the phrase was used to identify operational or business areas of concern (KPIs out with the accepted norms) and was not used to target individuals.

154. The claimant also complains that Ms Finlay used bad language towards him during a call on 13 May 2022. As the grievance appeal outcome dated 30 August 2022 states, while bad language is not condoned by the respondent, this was understood to have occurred due to Ms Finlay's frustration. There was no evidence that this was anything other than a one-off incident. It may have been best practice for Mrs Rehman to recommend that Ms Finlay provided an apology.

155. Assessed objectively, I find that this matter was not likely to, and did not, undermine trust and confidence without reasonable and proper cause. In any event, I also find that this was not a cause, or an effective cause of the claimant's resignation dated 11 May 2022 or 30 August 2022.

(vi)Was the Claimant unreasonably instructed to work at an alternative location in Oban?

(vii)Was the request to work at the Oban location a deliberate act by the Respondent to cause the Claimant inconvenience knowing the Claimant had childcare commitments and was unable to comply?

156. The respondent requested the claimant to work at the respondent's hotel in Oban. The clamant accepted during cross examination that he had worked at this hotel and other hotels operated by the respondent previously. The claimant's contract of employment stated that for a period of time he could be required to work at the respondent's other hotels.

157. The claimant had indicated during the grievance meeting on 01 June 2022 that due to the current situation and how he was dealt with by two senior directors in the company, it would be hard to return to work and he did not feel welcome. He advised that he would not be able to return to his previous role. In those circumstances, requiring the claimant to carry out work at a different location was deemed to be a reasonable way of avoiding the claimant returning to work within his previous role (which would have been contrary to his wishes). I accepted the evidence of Ms Anderson that there was substantive work to be carried out by the claimant at the Oban hotel including bringing on board new starters. The claimant was advised that he would be paid in respect of his travel expenses

158. The claimant presented no evidence in support of his assertion during the hearing that this was a deliberate act to cause the claimant inconvenience knowing that he had childcare difficulties. The claimant was advised that he would be required to work in Oban before he had communicated to the respondent that he had childcare issues. It was acknowledged that the claimant stated he was unable to work from Oban because of childcare issues and he was granted over two week's unpaid leave to make alternative arrangements for his son to be looked after but failed to do so. There was no evidence or insufficient evidence to show that the claimant made reasonable efforts to make childcare arrangements.

159. The respondent also offered the claimant the opportunity to work 3 days per week from home. Other than the request from the claimant made in August 2022 to allow him to travel from his home to Oban and back (175 miles each way) on a daily basis, the claimant did not request any further support from the respondent. Ms Anderson advised that travelling to and from Oban from the claimant's home would not be appropriate because it would not provide adequate rest between each shift.

160. Assessed objectively, I find that this matter was not likely to, and did not, undermine trust and confidence without reasonable and proper cause. The respondent was entitled to require the claimant to work from its Oban hotel in all the circumstances. In any event, if I am wrong (which I do not accept), I also find that this was not a cause, or an effective cause of the claimant's resignation dated 11 May 2022, albeit the respondent's requirement that he worked in Oban and the subsequent non-payment could well have eventually led to the claimant's decision to resign on 30 August 2022.

(viii)Did the Claimant have his salary reduced in July 2022?

161. The respondent accepted that the claimant's salary was reduced from 15 July 2022 to nil while he was placed on unpaid leave. This was in accordance with the respondent's policy to provide unpaid leave in order to enable the claimant to make arrangements relating to his childcare issues. The claimant stated that he was unable to attend work during that period, and he did not undertake any work for the respondent at the material time. As the claimant was not ready, willing, and able to work at the relevant time, he was not entitled to any pay. The reason for nonpayment was explained in Mr Rehman's email dated 14 July 2022 and in Ms Anderson's letter of 01 August 2022.

162. Assessed objectively, I find that this matter was not likely to, and did not, undermine trust and confidence without reasonable and proper cause. The respondent was entitled to require the claimant to work from its Oban hotel in the circumstances. In any event, if I am wrong, I also find that this was not a cause, or an effective cause of the claimant's resignation dated 11 May 2022,

albeit the respondent's nonpayment of salary from 15 July 2022 could well have eventually led to the claimant's decision to resign on 30 August 2022.

(ix)Were the Claimant attempts to raise a grievance thwarted by the Respondent?

163. The claimant's grievance was fully investigated by Ms C Beck and an outcome letter was provided to the claimant dated 27 June 2022. A detailed grievance investigation was conducted. The claimant's grievance was partially upheld.

164. The claimant presented a grievance appeal dated 01 July 2022. There was a delay, and the grievance appeal outcome was sent on 30 August 2022, which was regrettable. The respondent had proffered some reasons for the delay including in relation to staff absences. I previously suggested that it would have been best practice for Mrs Rehman to recommend that Ms Finlay apologised for the use of bad language on the one occasion described earlier. However I do not find any evidence to support the contention that the claimant's attempts to raise a grievance were thwarted. I also do not find that the delay and the absence of a recommendation to issue an apology, considered objectively, were likely to, or that it did in fact, undermine trust and confidence without reasonable and proper cause.

165. If I am wrong, I also find that this was not a cause, or an effective cause of the claimant's resignation dated 11 May 2022, albeit the eventual grievance appeal outcome could well have eventually made the claimant or contribute to the claimant's decision to resign on 30 August 2022.

(x) Was the Claimant forced to contact ACAS in order to try to resolve the dispute with the Respondent?

166. The claimant advised in his oral evidence that he contacted ACAS on 29 July 2022 to request assistance. It was not clear whether the claimant was seeking informal advice from ACAS at the time. I noted that the claimant commenced ACAS Early Conciliation on 9 August 2022 and the ACAS Certificate was issued on 20 September 2022. Due to the confidential nature of the ACAS process, I did not hear evidence about what was discussed with ACAS. I accept that the claimant may have felt that he had no option but to contact

ACAS for advice or Early Conciliation (which is a requirement prior to commencing proceedings). I do not find that, objectively, this matter was likely to, or that it did in fact, undermine trust and confidence without reasonable and proper cause.

167. As I stated in relation to issue (viii) above, in any event, if I am wrong, I also find that this was not a cause, or an effective cause of the claimant's resignation dated 11 May 2022, albeit the respondent's nonpayment of salary from 15 July 2022 (which the claimant says led him to contact ACAS) could well have eventually made the claimant or contribute to the claimant's decision to resign on 30 August 2022.

(xi)Did the respondent institute an unfounded and suspiciously timed allegation and start disciplinary proceedings against the Claimant?

(xii) Was the claimant denied sufficient time and access to evidence to prepare a defence to the disciplinary allegations?

(xiii) Was the claimant unreasonably summoned to a disciplinary meeting and threatened with dismissal?

168. I consider that the disciplinary allegations against the claimant as set out in the Peninsula Consultant's Face2Face report were genuine and based on reasonable grounds. The claimant had failed to attend work in Oban in July/August 2022 and there was evidence by way of an email that he sent company documentation to a competitor hotel on 10 December 2021.

169. On 15 August 2022 the disciplinary allegations were investigated by a third-party HR Consultant, Ms K Hegan. Her investigation report dated 25 August 2022 concluded there were disciplinary allegations for the claimant to answer (see File of Productions pages 191-217). By a letter dated 26 August 2022 the claimant was invited to attend a disciplinary hearing on 29 August 2022 where he would be given the opportunity to provide explanations to the allegations. The two allegations were set out in that letter along with a copy of the investigation report, and the letter stated that if the allegations are proven they will be regarded as gross misconduct (and that the claimant's

employment may be terminated). The claimant was advised of his right to be accompanied by a fellow employee.

170. There was no evidence before the Tribunal to show that the allegations against the claimant were unfounded or that the decision to start disciplinary proceedings was otherwise unreasonable. The claimant requested by email dated 29 August 2022 that the disciplinary hearing date be postponed, and this was subsequently rescheduled to 30 August 2022 (and the claimant was advised that Ms Finlay would not be an unsuitable chair as the grievance appeal had been considered separately). He sent a further email that evening at 9.41pm requesting that the disciplinary hearing be postponed to 5 September 2022 as he did not have sufficient time to prepare a defence or source a companion. He also advised that Ms Finlay was an inappropriate chairperson and referred to his outstanding grievance appeal against her. The claimant was sent the grievance appeal outcome the following day and a further email at 09.43am advising that the disciplinary hearing would proceed as planned as he had been provided with 48 hours' notice (which was said to be in line with the respondent's policy and the ACAS Guidance).

171. The respondent had provided the claimant with written notice of the disciplinary hearing, and I find the request for him to attend a disciplinary hearing was reasonable in the circumstances. The claimant was advised within the letter dated 26 August 2022 that if the allegations are proven the claimant may be dismissed, which is in line with the ACAS Guidance and requirements of good industrial relations practice. The claimant replied at 10.31am advising that his postponement request was reasonable, and he requested further information. It is not clear what relevance, if any, the information (by way of emails) the claimant requested had in terms of the allegations against him (and why he had not requested these earlier). The name, the capacity and availability of any companion he intended to bring to the meeting was also not provided by the claimant. He also did not provide a reasonable opportunity for the respondent to consider his requests for information made at 10.31am that day.

172. The claimant chose to resign prior to attending the disciplinary hearing on 30 August 2022, a decision he communicated verbally at 12 noon, and he confirmed his resignation in writing at 1.00pm on the same day.

173. My conclusion is that although the disciplinary hearing had been arranged relatively swiftly, and the claimant was not granted a second adjournment, there remained a realistic prospect of resolution and a satisfactory outcome. The investigation was carried out by an external consultant. Furthermore, if the claimant felt aggrieved by any subsequent decision that may be made by Ms Finlay, he would have been afforded a right of appeal in line with the respondent's policy and the ACAS Code of Practice, which would have provided a further opportunity to resolve the issues he raised with the disciplinary process. That is my assessment of the objective facts at the date of the claimant's resignation. In contractual terms, I find that there was no breach of the implied term of trust and confidence because although that relationship had certainly been damaged (by reason of the respondent's failure to grant a further adjournment and to consider the claimant's request for information) without reasonable and proper cause, the situation had not reached the level of serious damage to, or destruction of, the relationship of trust and confidence. In other words, the degree of damage to that relationship had not reached the level necessary to constitute a breach of the implied term of trust and confidence.

174. I do not find that, objectively, these matters were likely to, or that they did in fact, undermine trust and confidence without reasonable and proper cause.

175. In any event, if I am wrong, I also find that this was not a cause, or an effective cause of the claimant's resignation dated 11 May 2022, albeit the respondent's initiation of the disciplinary process could well have eventually made the claimant or contributed to the claimant's decision to resign on 30 August 2022.

176. I have considerable sympathy for the claimant's position. He feels he was let down by processes intended to ensure that disputes are resolved at an early stage without needing to bring an Employment Tribunal claim. However, at

the date of his resignation those internal processes had not been exhausted and the potential of the remaining stages was enough to mean that the relationship of trust and confidence had not been damaged sufficiently seriously to found a claim for constructive dismissal. As the authorities set out above emphasise, a breach of the implied term is not established simply by showing that the employer acted unreasonably.

177. Accordingly, none of the alleged 13 acts relied on by the claimant in respect of his constructive unfair dismissal claim either individually or considered together, viewed objectively, were likely to, or that they did in fact, undermine trust and confidence without reasonable and proper cause

(xvi)Did the claimant affirm the contract before resigning?

178. If I am wrong, and there was a fundamental breach of contract and the claimant resigned in response to that breach (which I do not find), I would have considered whether the claimant resigned within what is viewed as a reasonable time of the breach. If delay is involved, there comes a point where the claimant will be held to have affirmed the contract and thereby to have lost the right to make a claim of constructive dismissal.

179. The authorities make clear that mere delay is not of itself sufficient to constitute affirmation. I accordingly acknowledged the fact that some time elapsed before the claimant resigned (both in terms of the delay between the acts set out in terms of issues (i) and (ii) and the period of notice in excess of four months that was provided by the claimant on 11 May 2022) was not, of itself, sufficient to constitute affirmation. I asked whether the claimant had, in that period of time, called upon the employer to perform its obligations under the contract. I concluded, for four reasons, that he had done so. I say that because (i) the claimant provided notice of his intention to terminate his employment on 30 September 2022 (over 4 months' notice) and he expected to be paid until the end of that period; (ii) the claimant raised a grievance on 16 May 2022 requiring the respondent to honour the full period of notice until 30 September 2022; (iii) the claimant lodged an appeal against the grievance on 01 July 2022 and (iv) the claimant substantially engaged in a disciplinary

process with the respondent and their external consultant in August 2022. The claimant's grievance was investigated, and he was sent responses in relation to both his initial grievance and the grievance appeal. The claimant explained he had given a long period of notice to align with his plans to start earning an alternative source of income in October 2022, but the Tribunal noted that this was an inordinate length of time in all the circumstances, and it may have been possible for the claimant to find alternative work and an alternative source of income with expediency given the likely availability of alternative hospitality roles.

180. I concluded, having had regard to the above points, that the claimant called upon the respondent to perform obligations under the contract following the alleged final straw. The claimant, having done so in May 2022 and having delayed a further three months (until 30 August 2022) before eventually ending his employment, affirmed the contract.

(xvii) The respondent accepts that if the Tribunal finds that the claimant were dismissed, there was no fair reason for dismissal.

181. As I concluded that the claimant was not constructively dismissed, I am not required to determine whether there was a fair reason for his dismissal. In the event that I am wrong, and the claimant was constructively dismissed, I note that the respondent accepted that there would have been no fair reason for dismissal in those circumstances.

Conclusion - constructive unfair dismissal

182. In conclusion, I decided there was no breach of the implied term of trust and confidence entitling the claimant to resign on 11 May 2022 and also in relation to his resignation on 30 August 2022. Since I have concluded that there was no breach of the implied term of trust and confidence, the claimant's resignations were not in response to a fundamental breach of contract. That means that both situations fall outside the definition of dismissal in section 95(1)(c) of the ERA 1996. Since the claimant was not dismissed following his resignation either on 11 May 2022 or on 30 August 2022, the claim for unfair dismissal is not well-founded.

183. Further, even if there had been a breach of trust and confidence, the claimant did not resign in response to that breach and, further, affirmed the contract following his resignation on 11 May 2022.

184. I decided for all of these reasons to dismiss the claimant's constructive unfair dismissal complaint.

Claim for Unauthorised Deductions of Wages

(xix) Was the respondent entitled to require the claimant to work at the Perle Oban Hotel and if so was the claimant ready, willing and able to work during the period between 15 July 2022 and 30 August 2022?

185. In determining whether the claimant was entitled to be paid for a period during which he did not work, the terms of the contract are the starting point.

186. The respondent's case is that it was entitled not to pay the claimant his salary between 15 July 2022 and 30 September 2022 because he failed to undertake any work for the respondent, and he unreasonably refused to attend work that was available for him at their Oban-based hotel.

187. I have considered the terms of the claimant's Statement of Main Terms of Employment and the extracts provided from the respondent's Employee Handbook. There were no express provisions contained in those documents that permitted the respondent to require the claimant to remain at home without pay if he was unable to perform work at Oban or if he was not able to undertake his duties at the Oban hotel in a safe manner.

188. It was not submitted that there is some other term of the claimant's contract, whether express or implied, that permitted the respondent to reduce the claimant's pay while requiring him to stay away from work. Nor does the evidence support the existence of such an implied term. This is not, for example, a zero-hour contract where pay was dependant on the claimant carrying out work and the employer could, in its discretion, decide not to offer any work. The claimant had normal hours of work and the contract did not give the respondent a general discretion to reduce those hours or provide no work, with a corresponding reduction in pay.

189. The claimant's entitlement to pay therefore depends on whether he was ready, willing, and able to perform his work.

190. I noted that the claimant stated that he had asked the company why he could not return to his original place of work in Portree on Skye. He advised Ms Anderson by email dated 6 July 2022 that the distance from his home to Oban made his journey of 175 miles unfeasible and incongruous with his home life and personal commitments, and he said he could not see how he would bring any additional benefit to the respondent's hotel in Oban with his limited knowledge of the area and the business. He advised that Mr A Wallace would be better placed to train new team members.

191. He told the Peninsula Face to Face Consultant that he did not believe he was absent without authorisation, and he wanted to return to his original place of work in Portree, Skye. The letter from Ms Finlay dated 13 July 2022 noted that the claimant did not want to return to work in Skye. Having reviewed the notes of the meeting on 01 June 2022, the claimant said "*Due to the current situation and how I was dealt with by two senior directors in the company. It would be hard to return. I don't feel welcomed. Appears that I am not wanted in the company. Not able to return to previous role*." He also said he wanted to move on from the company, he did not feel welcomed, and he had started to look for his next role (his resolution was to move onto another role working for a different company, but he was unable to do so until October). As indicated above, I find that the requirement for the claimant to work at the Perle Hotel in Oban was within the scope of his contract of employment and it was a reasonable requirement in the circumstances. He was offered accommodation and reimbursement of his travel expenses by the respondent. As noted in the letter dated 13 July 2022, he had worked at the respondent's hotel in Oban in January 2020 (and in February 2022 at Glencoe).

192. The claimant further stated that he is the premier care provider for his 15-year-old son, and he was therefore not able to attend Perle Hotel, Oban. The respondent had offered the claimant a reasonable period of time off for dependants leave (unpaid) during which he could make childcare arrangements. It was not clear whether the claimant made any or any

sufficient attempts to arrange childcare, and the claimant did not give any clear evidence about this matter. He was offered a hybrid working arrangement by the respondent. The respondent also offered accommodation at Perle Hotel, Oban for three days a week and the remaining two days the claimant would work from home, in addition to payment of his travel expenses (mileage costs). I was satisfied based on the evidence that I heard and the documents that the requirement for the claimant to work at Oban was in accordance with his obligations under his contract of employment. The respondent was not in breach of contract when they required him to work at Oban and the childcare issues raised by the claimant were taken into account. In any event the respondent provided the claimant with unpaid leave in July 2022 for a reasonable period of time in accordance with their dependants leave policy to make any necessary arrangements.

193. The claimant states, he asked at the start of August if he could drive from his home to Oban and back each day to care for his son (which he said would be a 3.5 hour drive each way), but this was denied, and he was requested to stay overnight at Oban. The Peninsula Consultant during the disciplinary report noted that, the journey to Oban from Skye is around 175 miles one way. Mrs Rehman stated that the claimant did not make a request to travel to Perle Hotel, Oban on a daily basis. Ms Anderson acknowledged that the claimant made this request to her, and she did not consider the request to be reasonable. It was not reasonable in her view for the claimant to travel that distance (which would also be a difficult journey to drive over challenging roads) on top of his 8-hour working day. She considered that this would not allow the claimant a reasonable amount of rest between shifts.

194. Considering the above, I was not satisfied that the claimant was ready, willing, and able to work at the respondent's Oban site, as required by the respondent, in accordance with his contractual obligations. The respondent had offered a hybrid working solution that included some home working and had also agreed to pay the claimant's travel expenses (and to meet his accommodation needs) while he worked at Oban.

Was that an unlawful deduction of wages?

195. Therefore, the claimant's claim for unlawful deduction of wages between 15 July 2022 and 30 August 2022 does not succeed.

196. As the claimant had taken the decision to resign on 30 August 2022 with immediate effect, I do not find that the claimant is owed any wages between 30 August 2022 and 30 September 2022. His claim for unlawful deduction of wages between 30 August 2022 and 30 September 2022, also, does not succeed.

Claim for outstanding annual leave on termination

197. It is not in dispute that the claimant's holiday year ran from 1 April to 31 March in each annual leave year. The claimant's holiday entitlement between 1 April 2022 and the date of his resignation on 30 August 2022 was 12.5 days. The claimant accepts that he was paid in full by the respondent in respect of his 12.5 days' holiday entitlement for this period.

198. I did not find on the evidence that I heard and the documents that I considered that the claimant carried over his annual leave entitlement (which he said was 15 days) from the previous holiday period during 1 April 2021 to 31 March 2021 or that he was entitled to do so.

199. There were no provisions relating to carry over of annual leave from one holiday year to the next in the claimant's contract of employment. The Employee Handbook explained the respondent's policy was that holidays could not be carried over from one annual leave year to the next. The claimant stated during his evidence that it was custom and practice for employees to be paid in lieu of untaken holiday pay at the end of the holiday year (he referred to Mr Docherty and other managers being paid in lieu of holiday at the end of the 2022 holiday year). Apart from Mr Docherty's oral evidence provided to the Tribunal, during which he confirmed he was paid one day in lieu of annual leave in April 2021 (which he claimed had taken him by surprise), there was no documentary evidence of any agreement between him and the company to carry over any annual leave. In respect of the claimant's

evidence that he was paid in lieu of holidays he could not take during 2020, in the 2021 holiday year, Ms Finlay advised that the CEO had authorised as an exception due to the COVID-19 pandemic that a proportion of leave not taken during 2020 could be taken in 2021 and the claimant was afforded this opportunity (and I accepted her evidence in respect thereof). There was no evidence of any other employee being paid in lieu of holiday or permitted to carry over any holiday at or around that time or on any other dates. I did not accept that the evidence before the Tribunal showed that there was custom and practice that the respondent's employees were paid in lieu of holiday pay at the end of the annual leave year.

200. Both Ms Finlay and Ms Anderson confirmed that the respondent's policy was not to allow holiday to be carried forward, and I accepted their evidence in relation to this. Mr Docherty also confirmed in his oral evidence that this was the respondent's policy.

201. The claimant confirmed during his evidence that other than his payslips which record the amount of holiday he had been paid, there were no other documentary evidence relating to his holiday entitlement. There were no emails, letters or any other documents which recorded any agreement for the claimant's holidays to be carried over. There was no evidence to show that the claimant sought permission to carry over holiday from the previous holiday period during 1 April 2021 to 31 March 2022 or that the respondent gave consent for the claimant to do so.

202. There was no contractual entitlement for the claimant to be paid in respect of the untaken holidays which he asserts he was owed by the respondent.

203. For this reason, the claim for holiday pay fails and it is therefore dismissed.

Claim for Notice Pay

204. The Tribunal considered the claimant's claim in respect of alleged non-payment of his notice pay.

205. As a matter of contract, the relevant provisions of which are set out in the findings of fact above, in the event that the respondent terminated the

claimant's employment they were required to provide 3 months' notice whereas if the claimant terminated his employment it was necessary for him to provide 1 month notice. For the reasons set out above, I did not find that the claimant was constructively dismissed by the respondent. On the first occasion the claimant resigned providing a period of notice (until 30 September 2022), but he subsequently resigned from his employment on 30 August 2022 with immediate effect. In the circumstances, I do not find that the respondent was required to pay the claimant notice pay.

206. For this reason the claim for notice pay fails and it is therefore dismissed.

Conclusion

207. The claimant's complaints for unfairly dismissal (constructive), unlawful deduction of wages (wages July –September 2022), notice pay, and holiday pay are dismissed.

Employment Judge: **B Beyzade**
Date of Judgment: **29 June 2023**
Entered in register: **03 July 2023**
and copied to parties

I confirm that this is my judgment in the case of Mr. G Kelly *v* Perle Hotels Ltd 4105652/2022 *and that I have signed the Judgment by electronic signature.*