EMPLOYMENT TRIBUNALS

Claimant: Miss E. Raftery

Respondents: (1) Young & Co's Brewery PLC **(First Respondent)**
(2) Modern Rustic Limited (formerly Dominic's Pub Company Limited) **(Second Respondent)**

Heard at: London South (Hybrid) **On:** 9th, 10th, 11th & 12th May 2023

Before: Employment Judge Sudra

Representation:

Claimant: In person

Respondent: (R1) Mr R. Hignett of Counsel
(R2) Mr. D. Worrall (via CVP).

(References in the form [XX] are to page numbers in the Hearing bundle. References in the form [XX,para.X] are to the paragraph of the named witness's witness statement)

RESERVED JUDGMENT

(i) The Claimant was not constructively unfairly dismissed.

(ii) The Claimant was not wrongfully dismissed/ in breach of contract.

(iii) The Claimant was not owed arrears of pay or other payments.

(iv) The Claimant is owed holiday pay in the sum of, £735.57p from the First Respondent.

(v) The First Respondent did not fail to inform and consult the Claimant as per, Regulation 13 of the Transfer of Undertakings (Protection of Employment Regulations 2006 ('TUPE').

REASONS

Background

1. The Claimant began working for the Second Respondent on, 11th April 2003 as a general manager at The Bull public house. The Claimant's employment with the Second Respondent ended on 23rd November 2021, as the Claimant's employment was transferred to the First Respondent pursuant to the TUPE Regulations.

2. The Claimant resigned from her employment with the First Respondent on, 6th December 2021 and provided 12 weeks' notice. It is the Claimant's case that the actions of the First Respondent amounted to a fundamental breach of her contract of employment thereby, entitling her to resign. She further alleges that the First Respondent breached its duty, under the TUPE Regulations, to inform and consult on the transfer of her employment.

3. The Claimant's ET1 only brought claims against the First Respondent. At a Preliminary Hearing heard on, 9th November 2022 the First Respondent applied to add the Second Respondent to the claim and the application was successful.

4. The Respondents deny the Claimant's claims. The complaints presented are therefore, as follows:

3.1 Unfair constructive dismissal;
3.2 breach of contract in relation to notice pay;
3.3 other payments (service charge, bonus payment and accrued annual

leave); and

3.4 failure to inform and consult under Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

The Issues

5. At a Preliminary Hearing on 9th November 2023, Employment Judge Harrington recorded the agreed list of issues to be determined. These are reproduced here,

'The Issues

29. The issues the Tribunal will decide are set out below:

Unfair Constructive Dismissal

30. Was the Claimant dismissed?

30.1 At all relevant times, what was the Claimant's contract of employment?

The Claimant will say that at all relevant times she worked according to the Contract of Employment issued to her by DPC Limited. The Claimant has a copy of this contract which will be disclosed.

30.2 Did the Respondent do the following things:

a) Fail to properly inform and consult

The Claimant will say that the First Respondent did not adequately discharge its obligations to inform and consult. The Claimant was invited to a meeting on 15 November 2021 to discuss proposed measures and following this, she received a letter from the First Respondent dated 19 November 2021 confirming that no further consultation was required. The transfer went ahead and The Bull was acquired by the First Respondent on 23 November 2021. The Claimant will say that on 15 November 2021 she was told that every member of staff would be given a contract on the transfer date but that did not happen and also questions which were raised about the new contract were not answered.

b) Presented the Claimant with a new, different and detrimental contract of employment.

i. The Claimant was made to work additional hours outside of her contracted hours. This resulted in unacceptably long working days without allocated breaks.

ii. The Claimant was asked to attend work on her scheduled days off.

iii. The Claimant was made to change her working schedule with inadequate notice.

iv. The First Respondent provided the Claimant with a personal work laptop with the expectation that she would take work home.

v. Paragraph 2.3 from the proposed new contract stated that the Claimant was expected to agree to work whatever hours were deemed necessary within the industry and that she was expected to sign out of the Working Time Directive. The Claimant was told by Jonathan Brown and Connal Donovan, the First Respondent's managers, that she would be expected to work whatever hours the business required and that she should be available whenever senior management expected including working at short notice or on days off, possibly up to 80 hours per week if necessary.

vi. Paragraph 4.1 of the proposed new contract stated that the Claimant was 'expected to be responsible for the employment of all staff'. However the Claimant had not been provided with any training that would enable her to carry out this role appropriately.

vii. Paragraph 7.3 of the proposed new contract referred to an open ended liability for losses to the business. The First Respondent was able to deduct cash and stock deficits directly from the Claimant's salary.

viii. Paragraph 2.4 of the proposed new contract stated that the Claimant could be required to manage or reside in alternative premises at the discretion of the First Respondent with 5 days notice, on a temporary or permanent basis.

ix. Paragraph 7.10 of the proposed new contract stipulated that if there was a temporary shortage of work for any reason, the Claimant could be placed on short-time working hours to
be laid off.

c) Failed to support the Claimant with the transfer, including:

i. At a meeting with Andy Hoffman, Area Manager, on 29 November 2021 the Claimant asked for assistance with how
to manage potential promotions for two members of her team. Mr Hoffman failed to offer any direction or guidance regarding the First Respondent's policies or procedures.

ii. On 29 November 2021 whilst the Claimant was enrolling new starters onto the payroll system, Jonathan Brown threatened her by saying that if she made a mistake, it would lead to a written warning. The Claimant had not received any formal training on the new system.

iii. The Claimant was told by Jonathan Brown that she needed to produce financial forecasts. The Claimant told him that she had no experience in doing this and she asked for assistance. The Claimant was told that it was easy and that she had to complete the task. Having submitted the forecasts to Mr Hoffman, they were rejected and Mr Brown told the Claimant that Mr Hoffman was 'horrified by your costs and has rejected them as he can't have it affecting his area budget'.

iv. Despite requests, the Claimant was not provided with any induction to the First Respondent's health and safety documents to enable her to ensure compliance. The Claimant says that she should have been given access to CPL online training. She chased this with Mr Hoffman and the First Respondent's human resources but she never received any access.

30.3 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

a) whether the First Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the First Respondent; and

b) whether it had reasonable and proper cause for doing so.

30.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

30.5 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

30.6 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that she chose to keep the contract alive even after the breach.

31. If the Claimant was dismissed, what was the reason or principal reason for dismissal?

32. Was it a potentially fair reason?

33. Did the First Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

Wrongful Dismissal

34. What was the Claimant's notice period?

35. Was the Claimant paid for that notice period?

36. If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

Arrears of Pay, Holiday Pay etc.

37. Was the Claimant entitled to service charge? If so, was she paid?

38. Was the Claimant entitled to a bonus payment? If so, was she paid?

39. Was the Claimant entitled to a payment for accrued annual leave?

It is agreed that the Claimant's annual leave entitlement was 28 days. However the Claimant will say that she had accrued 30.25 days (as notified to the First Respondent at the time of transfer) which included some additional holiday due to Covid (2.25 days were carried over) and that she was owed 18.25 days rather than the 14 days the Respondent paid.

Accordingly, the Tribunal will consider: what was the Claimant's holiday entitlement including whether the Claimant was permitted to carry over leave from one holiday year into another, what holiday had accrued and whether the Claimant was paid for the totality of her accrued holiday.

Failure to Inform and Consult

40. The Claimant complains of a failure by the First Respondent to comply with Regulation 13 of TUPE Regulations 2006.

41. The relevant contact between the parties appears to be as follows: a letter on 11 November 2021, a meeting on 15 November 2021 and letters dated 19 November and 24 November 2021.

42. The Claimant will say that the First Respondent did not discharge its Regulation 13 obligations including failing to consult sufficiently and failing to fully address the queries raised by the Claimant.

43. Following the addition of DPC Ltd as Second Respondent, the First Respondent identifies issues with Regulation 11 and the failure by the Second Respondent to
provide a copy of the Claimant's contract of employment (see paragraph 5 of the
Second Respondent's ET3).

Procedure and Evidence

6. This matter was listed for a four-day Final Hearing (hybrid) from 9th to 12th May 2023. The Claimant and First Respondent attended in person and the Second Respondent attended remotely via CVP.

7. The Tribunal was provided with:

   (i) A bundle consisting of 498 pages;
   (ii) a file of witness statements;
   (iii) a skeleton argument and counter Schedule of Loss from the First Respondent;
   (iv) a document titled, '*Doctored and Falsified Evidence Submitted by Young & Co's Brewery PLC*,' from the Second Respondent;
   (v) an email with attached documents in respect of legal advice and payslips

from the Claimant (sent to the Tribunal and Respondents on the morning of the second day); and

(vi) closing written submissions from all parties.

8. The Tribunal heard oral evidence from:

(a) The Claimant;
(b) Kerry McGillivary and Jack Morris (for the Claimant);
(c) Kaye Walsh, Connal Donovan, Jonathan Brown, Cormac Rawson, Edward Cornwell, and Andrew Hoffman (for the First Respondent); and
(d) Dominic Worrall (for the Second Respondent).

9. On the morning of the first day, the Claimant raised an issue about doctoring of documents by the First Respondent and referred me to a document prepared by the Second Respondent alleging that the First Respondent had doctored and falsified evidence. The relevant documents referred to were emails [pp.124 and 498] sent by Andrew Harper to Kay Desai. The Tribunal adjourned for reading and informed the parties that it would deal with any applications in the afternoon.

10. When the Hearing resumed in the afternoon the Second Respondent raised similar concerns in respect of the documents at pp.124 and 498 of the bundle and said that there has *'certainly been some evidence of doctoring or falsifying.'* .

11. The First Respondent disputed that documents had been interfered with and stated that it was a serious accusation to make. It was said that the bundle had been compiled with the documents sent to the First Respondent's representatives by their client and the fact that the Claimant and Second Respondent questioned two documents, did not cast doubt on the integrity of the entire bundle. Mr. Hignett made the point that Ms. Walsh was in attendance and would be giving oral evidence. Any questions in respect of the allegations made by the Claimant and Second Respondent could be put to her during the process.

12. The Second Respondent then made an application to be removed as a respondent. The thrust of the application was that the claim had not been brought against the Second Respondent and that he had not breached any of the obligations or requirements of TUPE. The Claimant stated that she supported the

Second Respondent's application as she had not brought a claim against him and was '*happy with what he had done*.'

13. The First Respondent submitted that the Claimant's claim for failure to inform and consult under TUPE was squarely against the Second Respondent (even if the Claimant had not intended this), the Tribunal are able to add/remove parties under rule 34, indemnities had been given by the Second Respondent which would make him liable, and that it was in the interests of justice for the Second Respondent to remain as a respondent.

14. After deliberation, the Tribunal denied both the application to treat the Hearing bundle as falsified and doctored, and the application to remove the Second Respondent as a Respondent.

15. Before the Tribunal heard evidence, Mr. Hignett mentioned that the Claimant has presented her constructive unfair dismissal claim under the ERA 1996 rather than her right under TUPE Regulation 4(9) to terminate their employment and claim constructive unfair dismissal. Quite properly, Mr. Hignett believed the Claimant should clarify if she sought to put her claim under the TUPE Regulations.

16. The Tribunal explained Mr. Hignett's query to the Claimant who confirmed that she was content to proceed on the basis she had pleased i.e. under the ERA 1996.

Findings of Fact

17. The following findings of fact were reached, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

18. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the

findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

19. The First Respondent is a retail company operating around 220 public houses and hotel establishments in London and South England. The Second Respondent (formerly known as 'Dominic's Pub Company Limited') is a company which used to own and operate public houses in Sussex. Dominic Worrall is a director of the Second Respondent. One of the public houses owned by the Second Respondent was 'The Bull.' The Bull was purchased by the First Respondent on 23rd November 2021.

20. The Claimant began her employment, with the Second Respondent, at The Bull on 11th April 2003 and at the time her employment ended, she was the General Manager.

21. The Claimant had known Mr. Worrall and his family since she was 15 years of age and had a healthy professional relationship with him. Mr. Worrall was happy with the Claimant's performance in her role and she was a valued member of his staff. In fact, Mr. Worrall believed that the Claimant had made an outstanding contribution to his business and during late spring/early summer 2017, the Claimant and Mr. Worrall had discussed the possibility of the Claimant acquiring a 5% shareholding of The Bull and, by around August 2017, had agreed on the terms of a partnership offer.

22. The partnership agreement between the Claimant and Mr. Worrall contained a clause stating what would happen if The Bull was sold or rented before the end of a 10 year term. Essentially, the effect of the clause was that the Claimant would receive a payout of approximately 5% of any sale monies or rental income. By virtue of the partnership agreement, the Claimant received £148,300.00p in or around February 2022; post the sale of The Bull to the First Respondent. Somewhat unusually, the Claimant did not have any emails or letters in respect of the payment she had received in respect of the partnership agreement.

23. On 11th October 2021, Kaye Walsh (Senior HR Business Partner for the First Respondent) became aware of the First Respondent's intended acquisition of The Bull when Kay Desai (Legal Director for Gowling WLG (the First Respondent's

legal representatives)) emailed her attaching the necessary documents in respect of due diligence under TUPE. Ms. Walsh noticed that although Ms. Desai had stated that the Second Respondent's staff contracts had been attached to her email, they were not. Therefore, Ms. Walsh requested the relevant contracts from Ms. Desai.

24. Ms. Desai responded to Ms. Walsh on 18th October 2021 and forwarded to her an email from TLT Solicitors (the Second Respondent's solicitors) which stated that they did have the contracts Ms. Walsh had requested but that, due to them containing personal information, a non-disclosure agreement or written undertaking would be required before the contracts were supplied. Ms. Walsh informed Ms. Desai that if the actual contracts containing staff details could not be provided - in the absence of a non-disclosure agreement or written undertaking - then maybe template contracts could be provided instead.

25. Before the Tribunal, the only contracts of employment, between the Claimant and Second Respondent, were an unsigned copy which the Claimant attached to her grievance appeal [255] and a signed copy [296], provided during the disclosure process for this Hearing. The latter contract was signed by the Claimant on 1st July 2021.

26. Both contracts of employment, referred to in the preceding paragraph, contain the following terms:

    (a) The Claimant is employed as a, General Manager;
    (b) the renumeration payable is £45,000 gross per annum;
    (c) the normal working hours are 45 hours per week over five days with two days off;
    (d) the Claimant's holiday entitlement is 28 days per annum;
    (e) the Claimant will qualify for a bonus of 0.25% of the net turnover (subject to conditions); and
    (f) the Claimant will receive a service charge payment of £3.00 gross per hour worked (such payment being at the discretion of the Second Respondent whom retain the right to amend the level with one months' prior notice).

27. On 18th October 2021, Andrew Harper (Legal Director with TLT Solicitors)

provided the Second Respondent's written statement of employment for front of house and kitchen staff but not a template of the Claimant's contract of employment.

28. Prior to the First Respondent's acquisition of The Bull, Mr. Worrall informed the Claimant (and her colleagues), at a team meeting on 8th November 2021, that The Bull was being sold to the First Respondent and she (along with other staff) would be TUPE transferred. Mr. Worrall understood that the Second Respondent's employees would automatically transfer to the First Respondent upon sale of The Bull, unless they objected to the transfer. If an employee objected to the transfer, then the Second Respondent would be liable for the termination of that employees employment. The Claimant was nervous at the prospect of working for a new larger company especially as she had had such a long standing professional bond with Mr. Worral. Whilst the Claimant was aware that she could have objected to being TUPE transferred she did not do so. The Claimant has also not alleged that the Second Respondent breached its duty to inform and consult and made clear during cross-examination that she did not want to bring a claim against the Second Respondent who had been joined as a party at the behest of the First Respondent.

29. On 11th November 2021, Ms. Walsh wrote to the Claimant advising that the First Respondent would be acquiring The Bull on 23rd November 2021 and that as a result, her employment would be TUPE transferred to the First Respondent. The Claimant was also informed, inter alia, that:

    (a) Her period of continuous employment would remain unbroken;
    (b) her hours of work and basic salary/basic hourly rate would remain the same;
    (c) any contractual supplementary service charge payment would be combined with the basic rate of pay;
    (d) there would be some unavoidable changes due to the First and Second Respondents' different administration systems; and
    (e) £1.20 would be deducted from staff wages for any meals eaten.

30. The Claimant was also notified that a group consultation meeting would be taking place on 15th November 2021, to discuss the transfer of employment and to answer any questions which staff may have. The meeting was a joint consultation

meeting held by both the First and Second Respondents. The Second Respondent had not or did not elect any employee representatives in respect of the consultation process. As the Transferor, the onus was on the Second Respondent to properly inform and consult with the Claimant.

31. In anticipation of the group consultation meeting, Ms. Walsh had prepared a script [127-130] which Andrew Hoffman (operations manager for the First Respondent) read out at the meeting. Following the group consultation meeting, Ms. Walsh and Mr. Hoffman met with the Claimant to answer any specific question she may have had; Mr. Worral was also present. The Claimant sought clarification on her pay structure, benefits and working conditions. She also asked when she would receive an employment contract from the First Respondent.

32. Ms. Walsh and Mr. Hoffman explained to the Claimant that as her employment terms and conditions would continue the First Respondent did not propose to issue her with a new employment contract. In respect of the First Respondent's bonus scheme, it was explained to the Claimant that whilst the practice of bonus payments being paid may not be the same as with the Second Respondent, she would be no worse off financially. Regarding customer service charge payments the Claimant was informed that the First Respondent did not provide service charge payments ('TRONC') to General Managers however, the Claimant would have her present contractual service charge payments rolled-up into her salary so that she would not be at a financial detriment as her annual salary would be higher than it was with the Second Respondent.

33. On 19th November 2021, Ms. Walsh emailed the Claimant a follow-up letter from Mr. Hoffman [131] informing her that the proposed date of TUPE transfer was 23rd November 2023 and that there were no further consultation meetings planned. An email address and telephone number were provided in case there were any questions in respect of the transfer. On the same day, the Claimant responded to Ms. Walsh's email and asked if 'contracts' would be sent ahead of the TUPE transfer or if this would happen in-person. Ms. Walsh responded on 20th November 2021 stating that she would be bringing *some* contracts with her on the date of transfer to begin the process and the process may continue over the next two weeks.

34. Ms. Walsh's evidence was accepted that a new starter would be issued with a contract from the First Respondent but that it would not be a priority to issue existing employees, i.e. the Claimant, with a contract as it was accepted that their existing terms and conditions transferred over and therefore, issuing them with a contract from the First Respondent was not business critical. The priority for the First Respondent was to ensure the smooth transition of the Bull to it from the Second Respondent.

35. The First Respondent's acquisition of the Bull was actioned on 23rd November 2021 as planned and the First Respondent began business at the Bull. The day was, as can be imagined, hectic and the Claimant would have been overwhelmed at the change in ownership and the installation of systems novel to her. It would also have been a frantic time for the First Respondent who had to settle into a new location, install their generic systems and gain the confidence of staff who had been employed by the Second Respondent, some whom had been employed for many years.

36. During the day, the Claimant asked Ms. Walsh how the bonus scheme would operate and was assured that it would continue as it had done so but if there was any change to the arrangements Mr. Hoffman would discuss them with her. The Claimant also queried why, as a general manager, she would not be receiving TRONC payments. Ms. Walsh advised that the Claimant would not lose out as all the components of the pay she had previously received would be rolled-up into her salary. The final relevant matter the Claimant raised with Ms. Walsh was that she would like to see the First Respondent's general manager contract.

37. On the evening of 23rd November 2021, Ms. Walsh emailed the Claimant attaching the requested bonus scheme [134-135]. Ms. Walsh also advised that she did not have the latest general manager contract and would ask a colleague to prepare her specific contract which would be forwarded on. On 24th November 2021 Ms. Walsh emailed the Claimant and informed her that she had asked a colleague to prepare a contract for her to review and that she would send it to the Claimant as soon as possible. Ms. Walsh, also on the same day, sent the Claimant and colleagues a confirmation letter that their employment had successfully transferred to the First Respondent and that their statutory rights and period of

continuous employment would be unaffected by the transfer. Also on 24th November 2021 Ms. Walsh had emailed Clare Sanders (from FC Payroll Solutions; who dealt with the Second Respondent's payroll) asking for details of the Claimant's hitherto bonus payments.

38. On 25th and 26th November 2021 the Claimant was not at work as they were her days off.

39. On 29th November 2021 Jonathan Brown (general manager with the First Respondent) spent considerable time training the Claimant on the payroll system. Mr. Brown continued to train the Claimant on the payroll system on 30th November 2021. It is accepted by the Tribunal that Mr. Brown told the Claimant an anecdote about a colleague who had received a written warning for not properly completing an applicant's eligibility checks to be able to work in the UK. The Claimant alleged that Mr. Brown joked that if the claimant made a similar mistake she would receive a written warning. The Tribunal finds it more likely than not that Mr. Brown told the Claimant an anecdote and did not threaten her with a written warning should she mistakenly complete an applicant's eligibility to work in the UK check.

40. Mr. Hoffman was also in attendance at the Bull on 29th November 2021. The Claimant's shift consisted of commission of her job role and training. In addition to receiving payroll training from Mr. Brown, the Claimant spoke with Mr. Hoffman about potentially promoting two members of the team. In particular, the Claimant enquired about salary expectations for the staff whom were being considered for promotion and the actual promotion procedure itself. Mr. Hoffman advised the Claimant on salary matters and re-assured the Claimant that as the acquisition was in its early stages, there were bound to be a few 'teething' problems. It is notable that this was less than a week after the First Respondent's acquisition of the Bull and the transition would have been challenging for all involved. In such an environment it is understandable that Mr. Hoffman may not have been able to satisfactorily answer all of the Claimant's queries and would have had to seek further guidance and revert to her. Therefore, the Tribunal finds that Mr. Hoffman did not fail to guide or support the Claimant but was providing such assistance as was possible in the circumstances.

41. An aspect of the Claimant's role was to produce 'forecasts;' these are essentially rotas of staff which would be required for future shifts. A forecast is based on how busy the future shift is likely to be and accordingly, how many staff members need to be placed on the rota. This, of course assists in budgeting decisions. When the Claimant was general manager for the Second Respondent, this is a task which was contained within her job description and one she would have conducted, albeit using another system. In a similar vein, the Claimant drafted a forecast for the First Respondent and had received training from Mr. Brown on this task which used the payroll system 'Access/Selima.'

42. In the second week after acquisition, on or around 30th November 2021, Mr. Brown and the Claimant were discussing a forecast the Claimant had produced and Mr. Brown informed her that in her forecasts she had calculated *gross* spend instead of *net* spend. Mr. Brown told the Claimant that Mr. Hoffman had rejected the forecasts but did not say that Mr. Hoffman was '*horrified'* by them. On the balance of probabilities the Tribunal preferred the evidence of Mr. Brown on this point.

43. Whilst the Claimant had been employed by the Second Respondent, she had received Health and Safety training using a system called 'Alert65.' This was the same system used by the First Respondent. When the Bull was acquired by the First Respondent, it was compliant in matters of Health and Safety and the Claimant was asked by Mr. Hoffman to continue using the Alert65 system. During the Claimant's employment with the First Respondent, it is accepted that she was not provided with any specific Health and Safety training.

44. As at the beginning of December 2021, the First Respondent had not yet provided the Claimant with a general manager's contract specific to her. On 3rd December 2021 at around 14.20pm the Claimant received an email from the First Respondent, via the DocuSign system, with an offer letter and contract of employment [155-173]. The offer letter stated that the Claimant's appointment as general manager was effective from 23rd November 2021, subject to satisfactory references, and that there were '*no set hours of work applicable to this position*.' It is accepted that these aspect of the documents the Claimant received would have alarmed her as she had been TUPE transferred thus, her employment start

date was 11th April 2003 not 23rd November 2021 and she would not have needed to supply references.

45. At 5.17pm, also on 3rd December 2021, Mr. Hoffman emailed the Claimant advising that her personal contract of employment was in the process of being issued and attached a template general managers' contract for her perusal [466-481]; this was not purported to be the Claimant's *actual* contract. In light of the offer letter and contract the Claimant had received a few hours earlier, this would have no doubt confused the Claimant.

46. Mr. Hoffman had earlier input the Claimant's details onto the First Respondent's Onboarding and Transfers approval form and in error, had entered her start date as 23rd November 2021 as was admitted in his witness statement at paragraph 66. The draft contract which Mr. Hoffman had wanted to send to the Claimant was created using a Laserfiche system which automatically generates an appointment letter and associated documents. It is unfortunate that the automated system led the Claimant to believe that the contract she had been sent was her ultimate contract and not a draft causing her considerable concern. However, the Tribunal is satisfied that this was a genuine error as it is not likely that the First Respondent were attempting to foist employment terms and conditions upon the Claimant which would have put them in flagrant breach of their duties under the TUPE legislation, or objectively viewed, would have had that effect.

47. The Claimant worked for the First Respondent from 23rd November 2021 until her effective date of termination which was 14th January 2022. The Claimant resigned with notice on 6th December 2021. On 9th December 2021 the Claimant was signed off work, for two weeks, with stress and on 22nd December 2021, the Claimant was signed off work for a further four weeks.

48. Between the date of acquisition and the Claimant's effective date of termination she actually worked for 57 hours in the first week and 36 hours in the second week, averaging 46.5 hours per week. The Claimant's pre TUPE contracted hours of work (45 hours per week) were not provided by the Second Respondent to the First Respondent [364]. If the First Respondent had been aware of the Claimant's

contracted hours of work they would have honoured them.

49. On 3rd December 2021, Mr. Hoffman became aware that Mr. Dardis (CEO of the First Respondent) would be visting the Bull on 9th December 2021 and asked the Claimant if she would be available to meet with him. The Claimant stated that 9th December 2021 was her day off and therefore, she could not attend to meet with Mr. Dardis. This was accepted by Mr. Hoffman and she was not asked to change her shift pattern to accommodate Mr. Hoffman's request.

50. As general manager, the Claimant was issued with a laptop by the First Respondent. This is standard practice, in many industries, and the Claimant was asked to take the laptop home. This would have enabled the Claimant to work flexibly if the need arose but the First Respondent did not ask or require the Claimant to use the laptop for the purposes of taking work home.

51. At paragraph 30.2(b)(v) of the List of Issues, the Claimant alleged that she,

> '…*was expected to agree to work whatever hours were deemed necessary within the industry and that she was expected to sign out of the Working Time Directive. The Claimant was told by Jonathan Brown and Connal Donovan, the First Respondent's managers, that she would be expected to work whatever hours the business required and that she should be available whenever senior management expected including working at short notice or on days off, possibly up to 80 hours per week if necessary*.'

52. It was accepted by the Claimant during cross-examination that she had misunderstood that she was obliged to sign out of the Working Time Directive and therefore, the Tribunal need make no finding on this aspect of the allegation.

53. During the first two weeks of acquisition, Mr. Brown regularly attended the Bull to ensure that the transition was smooth and that was in addition to his primary role as general manager of the Bear public house. On at least one occasion Mr. Brown attended the Bull on his day off. In conversation with the Claimant Mr. Brown mentioned that he had worked 80 hours in a particular week but there is no evidence that the Claimant was told that this was an expectation or her too.

54. Clause 4.1 of the First Respondent's general manager contract imposes a duty on a general manager to be responsible for the hiring or employment of staff. The

Claimant had, in her limited time with the First Respondent, not received any recruitment training but in her role with the Second respondent, had employed 'hundreds' of staff. However, if her employment had continued she would have been able to attend training and receive support in this regard.

55. The Claimant did not reside at her place of work i.e. the Bull. Whilst the First Respondent's general manager contract contains a 'relocation clause' (clause 2.4) the Claimant was not required to do so nor is there any evidence that she would be relocated to another of the First Respondent's premises.

56. The Tribunal accepts that the First Respondent's general manager contract contains clauses in respect of:

    (i) Liability for losses (7.3); and
    (ii) a shortage of work (7.10).

57. Neither of these clauses were engaged in respect to the Claimant and in respect of clause 7.10, the last time this clause was relied upon by the First Respondent was in or around 2016. During cross-examination the Claimant accepted that if she had known this she '*wouldn't have been uncomfortable with it*.'

58. On 6th December 2021 the Claimant resigned from her employment, citing a fundamental breach of her employment contract, [179] and provided the First Respondent with 12 weeks' notice. Soon after receipt of her resignation Mr. Hoffman telephoned the Claimant to enquire why she had resigned. Mr. Hoffman met with the Claimant on 7th December 2021 and recorded the contents of the meeting which included the Claimant's reasons for resigning [181]. Mr. Hoffman asked the Claimant to reconsider her resignation but she maintained that she stood by her decision. Later that day, the Claimant sent an email to Mr. Hoffman explaining her reasons for resigning and mentioned that after having sought professional advice, she was contemplating a claim for constructive unfair dismissal.

59. On 8th December 2021 Mr. Hoffman emailed the Claimant accepting her resignation and confirmed that he would treat the matters she had raised as a grievance. On 14th December 2021 the Claimant attended a grievance hearing

with Cormac Rawson (Operations Manager for the First Respondent); the hearing was held remotely and the Claimant was accompanied by a former colleague, Kerry McGillivary. The Claimant submitted a written schedule of complaints for consideration by Mr. Rawson.

60. Mr. Rawson sent the Claimant his grievance outcome on 10th January 2022 [243] - which was not substantially upheld - and advised the Claimant of her right to appeal his outcome. The Claimant appealed the grievance outcome on the same day and attached an unsigned employment contract between her and the Second Respondent [253-259].

61. On 14th January 2022, the First Respondent wrote to the Claimant confirming that they would not be requiring the Claimant to work out her period of notice. The First Respondent paid the Claimant in lieu of notice and confirmed that her employment would terminate on 14th January 2022. The Claimant was also paid for TRONC and sick pay and her last payslip was broken down within the First Respondent's letter [250-251].

62. The Claimant's grievance appeal hearing was heard on 2nd February 2022 by Edward Cornwell (Operations Manager for the First Respondent) which the Claimant attended with her companion, Ms. McGillivary. The Claimant had appealed on 3 grounds:

    (i) Not all of the allegations raised in the original grievance had been responded to;
    (ii) Mr. Rawson had not received a copy of the Claimant's contract with the Second Respondent therefore, he was unable to consider the comparable terms of it with the First Respondent's general manager contract; and
    (iii) Several conclusions from the grievance outcome did not match Mr. Rawson's findings.

63. Mr. Cornwell sent the Claimant his grievance appeal outcome on 22nd February 2022 [284]. Mr. Cornwell upheld one aspect of the Claimant's appeal; namely that Mr. Rwason had not addressed the Claimant's concern that she felt vulnerable and unsupported when asked to enrol new employees onto the Selima system. All other points of appeal by the Claimant were not upheld.

The Law

Constructive Unfair Dismissal

64. The test for constructive dismissal derives from the wording of section 95 of the Employment Rights Act 1996 (so far as material):

> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) … only if) – …*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*
>
> *….*

65. That definition does not provide any guidance as to what those circumstances might be. The leading case is *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221, CA, where the Court of Appeal held that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> '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.'

66. In order for there to have been a constructive dismissal there must have been:

- A repudiatory or fundamental breach of the contract of employment by the employer;
- a termination of the contract by the employee because of that breach; and
- the employee must not of affirmed the contract after the breach, for example by delaying their resignation.

67. An employee can rely on breach of an express or implied term of the contract of employment. In cases of alleged breach of the implied term of trust and confidence

the test is set out in the case of *Malik v Bank of Credit and Commerce International Ltd* [1998] AC 20; namely, has the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test of whether there has been such a breach is an objective one (see *Leeds Dental Team Ltd v Rose* [2014] IRLR 8).

68. It is open to an employee to rely on a series of events which individually do not amount to a repudiation of contract, but when taken cumulatively are considered repudiatory. In these sorts of cases the "last straw" in this sequence of events must add something, however minor, to the sequence (*London Borough of Waltham Forest v Omilaju* [2005] ICR 481).

69. On the question of waiving the breach, the *Western Excavating* case makes clear that the employee,

> *'must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will regarded as having elected to affirm the contract*.'

Arrears of Pay and Other Payments

70. Section 13 of the Employment Rights Act 1996 (so far as material) provides:

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the

employer has notified to the worker in writing on such an occasion.

Failure to Inform and Consult under TUPE

71. TUPE requires a sharing of information between the transferor and transferee prior to transfer, and for information to be provided, and consultation to be conducted where appropriate, with affected employees.

72. TUPE Regulation 13(2) provides that:

"*Long enough before a relevant transfer to enable the employer of any **affected employees** to consult the appropriate representatives of any affected employees, **the employer** shall inform those representatives of* [a list follows]" (my emphasis).

73. *'Affected employees'* are defined in TUPE Regulation 13(1) as:

'*any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly*.'

74. The obligations in TUPE Regulation 13 fall on the employee's employer at the relevant time (see the emboldened text quoted above), so in the case of an employee transferring from the transferor to the transferee in connection with the transfer, the obligations fall on the transferor. Mrs. Justice Slade DBE, giving the EAT's judgment in *Allen v Morrisons Facilities Services Ltd* [2014] IRLR 514 observed that:

'The standing of an employee to bring a claim for breach of an obligation under TUPE reg. 13 is determined at the date of the breach of the obligation, not at the date the claim is lodged. If a transferor fails to give representatives of their affected employees the information required by reg. 13(2)(d) they can pursue a claim against the transferor notwithstanding that at the time of lodging an ET1 the employees may have transferred to the transferee… An employee of a transferor cannot obtain standing to claim against a transferee for breach of pre-transfer obligations because he became an employee of the transferee on the transfer of the undertaking.'

Conclusions and Analysis

Constructive Unfair Dismissal

30.2 a)[1]

75. TUPE regulation 13(2) imposes a duty on the employer to inform and consult with their employees before a relevant transfer. At the material times the Claimant's employer was the Second Respondent and not the First Respondent (the transferee).

76. It was incumbent upon the Second Respondent to properly inform and consult with the Claimant. The fact that the First Respondent supported the Second Respondent at the consultation meeting on 15th November 2021 does not absolve the Second Respond of its duties under TUPE. In *UCATT v Amicus and others* UKEATS/0007/08 and 0014/08 the EAT held that there is no post transfer duty to inform and consult with new employees. Therefore, there was no repudiatory breach of the implied term of trust and confidence by the First Respondent.

30.2 b) i., ii., iii., and iv.

77. The First Respondent had not intended to issue the Claimant with its own general manager contract as it accepted that by virtue of the TUPE transfer, her existing terms and conditions prevailed and would be honoured.

78. It was the Claimant who insisted on being provided with the First Respondent's general manager contract. The First Respondent had not been provided with the Second Respondent's general manager contract until 14th January 2022 (the day of the Claimant's grievance appeal hearing). It was not therefore, unreasonable for the First Respondent not to have known that the draft general manager contract they had provided to the Claimant, had terms which may have differed from her contract with the Second Respondent. The Claimant did not provide the First Respondent with the opportunity to reassure her that her existing terms and conditions would be honoured.

79. These allegations were not fundamental breaches of the implied term of trust and confidence and are addressed at paragraphs 46 to 48 (supra.).

[1] The paragraph numbers in this section refer to the numbered paragraphs of the List of Issues reproduced at paragraph 5 (supra.).

30.2 b) v.

80. The Claimant had confirmed in cross-examination that she had misunderstood that she was required to sign out of the Working Time Directive but maintained that there was an expectation on her to work up to 80 hours a week if necessary. The Claimant, in the short period that she was employed by the Fist Respondent, worked an average of 46.5 hours. The reference to possibly being required to work up to 80 hours a week was because Mr. Brown had said he had worked 80hours during the week of acquisition.

30.2 b) vi.

81. Within the job role in her contract of employment with the Second Respondent the Claimant was required to identify recruitment needs and take an active role in selecting and appointing staff. Indeed the Claimant's oral evidence was that she had employed *'hundreds if not thousands'* of people. The First Respondent had not required the Claimant to be responsible for recruitment nor had they asked her to recruit staff. Thus, this was not a repudiatory breach of the contract of employment by the First Respondent.

30.2 b) vii.- ix. and 30.2 c) i.-iv.

82. These matters were not a fundamental breach of the Claimant's contract of employment by the First Respondent.

83. For the reasons cited above, the evidence of Mr. Brown is preferred to that of the Claimant. The Claimant received sufficient support from Mr. Brown during what would have been a difficult and tumultuous time for both the Claimant and First Respondent. The Claimant was an experienced general manager and would have directly approached Mr. Brown if she felt that any assistance was lacking. Whilst the Claimant kept a diary which was produced for the first time as part of this process, she could equally have engaged with the First Respondent to seek the assistance she sought.

84. It is also apparent that the Claimant has made allegations regarding matters of which she would already have had prior knowledge and experience. In respect of

allegation 30.2 c) iv., the Claimant had been asked by Mr. Brown to continue using the same Health and safety system as she had done with the Second Respondent yet the Claimant has citied this as a reason which caused her to resign.

85. Having enjoyed a long and close working relationship with the Second Respondent the Claimant was not fully engaged with the First Respondent. From the outset the Claimant had insisted that she receive a general managers contract from the First Respondent despite it not being necessary as her terms of conditions of employment transferred over to the First Respondent and they were bound to honour them and did. Once the Claimant received a draft general managers contract from the First Respondent instead of voicing her concerns and seeking assurances that the contractual terms she felt differed from her original contract were removed, she resigned. Once the Claimant resigned Mr. Hoffman met with her on 7th November 2021 and asked her to reconsider. The Claimant refused to do this even though she had resigned with notice and was still in the First Respondent's employ. The Claimant could have used this opportunity to ask the First Respondent to address the concerns she had.

86. Accordingly the Tribunal finds that the First Respondent did not breach the implied term of trust and confidence in a way which was calculated or likely to seriously damage the trust and confidence between the parties. In the circumstances the Tribunal accepts the First Respondent's submissions that the Claimant did not intend to pursue a career with them.

Wrongful Dismissal

87. The Claimant's wrongful dismissal fails on the facts. The Claimant was paid in lieu for her notice period and therefore, was not wrongfully dismissed.

Arrears of Pay

88. The Claimant's claims for a service charge (TRONC) payment and a bonus payment fail as she was paid this by the First Respondent in the January 2022 payroll.

Holiday Pay

89. The Claimant's claim for holiday pay is admitted by the First Respondent and succeeds. The Claimant is owed holiday pay in the sum of £735.57p from the First Respondent.

Failure to Inform and Consult

90. For the reasons in paragraphs 73 and 74 (supra.) this aspect of the Claimant's claim fails. The duty to inform and consult under TUPE Regulation 13(2) is incumbent on the employer i.e. transferor not the transferee which was the First Respondent.

91. Once the TUPE transfer had concluded there was no duty on the First Respondent to inform and consult.

_____

Employment Judge Sudra

Date: 1st November 2023