Case No.: 1602272/2019
1602277/2019
(Admin Code: V)

EMPLOYMENT TRIBUNALS

Claimant: Mr. M. Duffy (C1)
Ms S. Murphy (C2)

Respondent: Mr. B & Mrs S. Jones in partnership as Shelbourne Hotel (R)

HELD BY: CVP **ON:** 1st – 3rd March 2021

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Ms. M. McGee, Counsel

Respondent: Mr. J. Franklin, Counsel

JUDGMENT

The judgment of the Tribunal is:

1. The claimants were constructively unfairly dismissed by the respondents; C1 was dismissed on 15th July 2019 and C2 was dismissed on 16th July 2019.

2. The claimants were dismissed because of a relevant transfer where their employment was protected by the Transfer of Undertakings Protection of Employment Regulations 2006 (TUPE); the claimants are treated as having been dismissed by virtue of Regulation 4 (9) TUPE, and the dismissal was automatically unfair by virtue of Regulation 7 TUPE.

3. The respondents breached the claimants' contracts of employment by dismissing them without notice, in circumstances where the claimants treated their employment as having been terminated and they did not work a notice period.

4. Remedy - C1: The parties agreed these calculations, the loss of statutory rights figure and that in the circumstances notice pay is not awardable by virtue of Reg 4 (9) and (10) TUPE.

   4.1. R shall pay to C1 and to C2 respectively the sums shown below:

4.1.1. Unfair Dismissal:

Basic Award: £11,812.50
Compensatory Award:
4.1.1.1. Statutory Rights: £350.00
4.1.1.2. Net losses: £ 4,430.77
£16,593.27

4.1.2. Breach of contract (Notice): NIL

4.1.3. Total: £16,593.27. The recoupment provisions do not apply.

5. Remedy - C2: The parties agreed these calculations, the loss of statutory rights figure and that in the circumstances notice pay is not awardable by virtue of Reg 4 (9) and (10) TUPE.

5.1. Unfair Dismissal:

5.1.1. Basic Award: £ 8,996.40
5.1.2. Compensatory Award:
5.1.2.1. Statutory Rights: £ 350.00
5.1.2.2. Net Losses: £ 3,536.40
£12,882.80

Loss of earnings of £3,536.40 (the prescribed amount) are awarded for period 16.07.19 – 08.10.19 the prescribed period). The recoupment provisions apply. C1 has provided the tribunal with her National Insurance number and local office of the DWP.

5.2. Breach of contract (Notice): NIL

5.3. Total: £12,882.80.

REASONS

1. **The Issues**:

1.1. Were the claimants, or either of them, constructively dismissed or did they resign?

1.2. If there was a dismissal of either claimant, was it for a potentially fair reason (where the respondent says it was for “some other substantial reason”) and was/were the dismissal(s) reasonable in all the circumstances?

1.3. Did a relevant (TUPE) transfer involve, or would it involve, a substantial change in working conditions to the material detriment of the claimants, or either of them, and if so, were the claimants, or either of them, entitled to treat their contracts of employment as having been terminated, such that they

were dismissed, and automatically unfairly dismissed because of the said transfer?

1.4. If there was a dismissal of either claimant did the respondent break their contracts with regard to notice of termination and may any award be made?

2. **The Facts**:

2.1. AGREED FACTS:

2.1.1. C1 was continuously employed to work at the Shelbourne Hotel, Llandudno (the hotel) for 19 years until his resignation on 15th July 2019 and C2 was continuously employed to work at the Shelbourne Hotel, Llandudno for 18 years until her resignation on 16th July 2019.

2.1.2. For most, if not all of their respective employments, C1 was employed as the General Manager and C2 was the Assistant or Deputy manager of the hotel, and this was the situation when R bought it from a company, referred to as A, in 2019.

2.1.3. Prior to R's purchase of the hotel the claimants had been involved in two TUPE transfers and were aware of the implications of the TUPE regulations; they had continued in employment as General Manager and Assistant Manager respectively notwithstanding changes in ownership of the hotel and of employer.

2.1.4. Prior to the TUPE transfer from A to R the claimants managed all aspects of the day to day running and activities of the hotel. They met the directors of A three to four times each year to report to and update A, but otherwise in all respects save for capital expenditure the claimants ran the hotel independently.

2.1.5. Upon purchasing the hotel Mr and Mrs Jones (R) moved into the hotel to live with their adult sons (or at least one of the two sons moved in but

they both performed work in the running of the hotel). R became more active in the day to day running of the hotel than had the directors of A previously.

2.1.6. Prior to the purchase R had enquired of A about staff issues and they were provided with signed contracts for both claimants (and both contracts erroneously state the respective commencement of employment dates as the dates A purchased the hotel on 19th January 2004). C1's contract commences at page 56 of the hearing bundle (to which all page references refer unless otherwise stated). C2's contract commences at page 45. They are both dated 3rd October 2018 and were prepared with the sale of the hotel in mind. The hotel was marketed for sale by A in or around September/October 2018 until its eventual sale on 26th March 2019.

2.1.7. R had visited the hotel on a few occasions between October 2018 and March 2019 to view it and how the claimants were operating it. They saw the claimants about their duties and spoke to them. They told the claimants of their intention to move in to live at the hotel and to run it as their business. The claimants knew that R owned another commercial holiday property in Llandudno.

2.1.8. The holiday season at Llandudno is principally March – October, the other months potentially being "quiet months", but the hotel does not close down and Llandudno has residential trade outside the principal season (a matter of which I also took judicial note).

2.1.9. At the date of the TUPE transfer to R, in addition to the claimants, there was a night porter, a Housekeeping Manager and two staff members referred to by all parties as “chambermaids”.

2.1.10. The claimant’s contracts of employment with A transferred, and their employment transferred, from A to R on 26th March 2019.

2.2. C1’s contract and duties when employed by A prior to the TUPE transfer to R:

2.2.1. C1’s position was described as General Manager although he could be required “to work in other departments, to meet business demands (especially during the quiet months, out of season)”.

2.2.2. C1 was entitled to 4 weeks annual leave “plus bank holidays or days off in lieu of bank holidays”. Leave was to be taken “within one year of it falling due (accruing in accordance with “government legislation”) and on occasions negotiated with A (C1’s manager).

2.2.3. Notice from C1 to A of termination of employment was capped at 4 weeks.

2.2.4. It was stated in the contract that a probationary period was inapplicable.

2.2.5. The claimant’s salary was stated as £23,304 per annum for a four day week, wages being paid monthly. There was provision for an annual review.

2.2.6. The contract states that C1 was employed to work 45 hours per week, over four days, between 7.00am – 11.30pm, with additional hours if the business demanded it (paid in the usual way, that is without any premium over time rate).

2.2.7. C1 did not have a written job description but his general management duties comprised everything to do with managing day to day activities in the hotel including:

2.2.7.1. Supervision of staff;

2.2.7.2. Hiring and disciplining staff;

2.2.7.3. Organising staff rotas;

2.2.7.4. Preparing wages;

2.2.7.5. Balancing and bank takings;

2.2.7.6. Forwarding reconciliations to A's accountant;

2.2.7.7. Petty cash expenditure and control;

2.2.7.8. Arranging annual leave for the staff;

2.2.7.9. Arranging cover during periods of staff ill-health absence;

2.2.7.10. Training staff;

2.2.7.11. Overseeing health and safety compliance, with A's directors and insurance approved traders;

2.2.7.12. Meeting & greeting guests and general customer service;

2.2.7.13. Ensuring the guests' security and safety;

2.2.7.14. Purchasing stock and provisions;

2.2.7.15. Stock control and security;

2.2.7.16. Preparing menus for evening meals;

2.2.7.17. Chef and bar duties; C1 would cook the breakfasts and evening meals;

2.2.7.18. Responsibility for managing bookings and payments from guests.

2.2.8. There was no provision in C1's written contract concerning the following matters, which also did not feature in fact in the employment relationship between C1 and A (and the same applies in relation to C2):

2.2.8.1. When holidays must and must not be taken;

2.2.8.2. About breaks during the working day being unpaid;

2.2.8.3. Deductions being made from salary to cover fines, defaults and the like;

2.2.8.4. Short-term working;

2.2.8.5. Lay-off.

2.2.9. When C1 was working late he used to stay overnight in the hotel, which was also convenient when he was due to work early. A provided for C1 to stay over. He used to use the same room on a regular weekly basis and did so throughout his employment before the TUPE transfer to R; he effectively had his own room in the hotel for 4 nights each week both for his convenience and to meet the demands of the business. When C1 did not stay overnight at the hotel a night porter provided cover for him.

2.2.10. When C1 was not working for any reason C2 provided cover and acted up, save for over-night stays which the night porter covered.

2.3. C2's contract and duties when employed by A prior to the TUPE transfer to R:

2.3.1. C2's contract described her as "Deputy Manager, reporting to the General Manager" (C1). She could be required to work in other departments if the busines needs so dictated and she could be required to work additional hours (at her usual hourly rate).

2.3.2. The contract says that the claimant was contracted to work 45 hours per week. She had only ever worked 40 hours per week spread over 6 days, working split shifts so that she was available to wait on table at breakfast and at the evening meal; C2 says that A acknowledged that there was an error relating to stating 45 hours, and confirmed to her that a correction would be made, but no correction was made prior to the transfer to R. The understanding that C2 would not be required to work after 8pm was included in the contract.

2.3.3. C2's contract contained the same general clauses as C1's regarding holidays and policies. Her rate of pay was confirmed at £8.33 per hour, paid monthly and subject to annual review.

2.3.4. As stated above the matters listed in paragraph 2.2.8 above did not feature in writing or in practice in C2's contract of employment.

2.3.5. C2's duties were to be assistant to, and to deputise for, C1 in respect of all of his duties and responsibilities. Specifically she would:

2.3.5.1. Staff reception;

2.3.5.2. Handle payments by guests;

2.3.5.3. Arrange bookings;

2.3.5.4. Deal with telephone and email enquiries;

2.3.5.5. Wait on table at breakfast and dinner (a role, along with reception duties, that she cherished as she enjoyed interacting with guests).

2.3.6. C2 would provide cleaning cover for the housekeeper and "chambermaids" if anyone was absent from work but this was a small feature of her job. C2 did not routinely clean hotel rooms. She was

prepared to do so when the need arose but she was conscious that this was not her job and she did not find it easy or enjoyable when she was required to do it.

2.4. The sale by A to R was protracted with an on/off evolution. Just as the claimants thought it would not happen they received written notification dated 22nd March that it was going to happen on 26th March and on that day, written confirmation that the transfer had occurred. Both letters to each of the claimants confirmed that there would be no change to their respective terms and conditions.

2.5. R issued new contract documents to both claimants. C1 was given the document that commences at page 61 and C2 was given the document that commences at page 50. They are in the same terms as each other's save for personal matters including job titles and pay which mirrored the claimants' existing contracts that "TUPE'd over".

2.6. The significant differences between the claimants' existing contracts and R's terms are that R's terms, and to which the claimants took exception, included:

2.6.1. Probationary Period: This clause is ambiguous and caused C2 some alarm, not least in light of her length of service and that her existing contract specifically stated that it did not apply. R's terms referred to "new employees" being subject to probation but did not say whether the claimants were classed as such by R; the clause referred to "your" work being assessed and reviewed and provided for a one month probation subject to which one might be dismissed. R wanted the claimants to know provisions that applied to actual new starters but did not delete or modify the clause, which caused C2 concern.

2.6.2. R's clause 7 sought to impose deductions from pay in respect of a variety of matters such as certain fines, penalties or losses, damages and expenses, and costs in given circumstances.

2.6.3. R's clause 10 stated that after 6 hours work an unpaid break of 30 minutes could be taken.

2.6.4. R's clause 13 provided short-time working and lay off on reduced or no pay.

2.6.5. R's clause 14 concerning holiday entitlement said that bank holidays were not recognised and would be viewed as normal working days. R retained to itself discretion to require the claimants to take all or part of any holiday entitlement without advance notice. Holidays would not be approved in May, June, July or August save at management's discretion.

2.7. The claimants did not sign and return R's terms of employment. They sought advice and representation from their Trade Union.

2.8. The respondents and their family moved into the hotel around 26th March 2019. There was a large group of school children in residence. R observed how matters were done during part of that week while the hotel was busy, and gradually took over the staff rotas with some input from C1. They then introduced a new booking system and gave the claimants some 5 minutes or so training on it. They made clear that neither claimant would be responsible for the guests, for reception and booking in guests, although they may be called upon if required. The respondents exercised their proprietorial status by taking command of the day to day running of the hotel:

2.8.1. C1 was given some say in the initial rotas but was otherwise assigned by R primarily to cooking duties. He was instructed to vacate the room he

habitually occupied and to remove his clothes from there; he was not required to work at nights and so he was not allowed the use of the room. He was told that R was considering ceasing provision of evening meals to guests (and presumably the public but it was not clear if anyone other than residents could dine at the hotel). His role and responsibilities as detailed at paragraph 2.2.7 (save for cooking) were to all intents and purposes taken over by R, as C1 had always expected from their visits pre-purchase. There was some, limited, dialogue with C1 and co-operation between them about those duties and their performance, but the responsibility switched to R. C1 felt marginalised and as if he were effectively confined to the kitchen.

2.8.2. C2 was told that she was not wait on the guests at table and that she would not be working in reception but was primarily assigned to cleaning duties, even when the housekeeper and “chambermaids” were available and when one of them was assigned to work on reception in place of C2; this was more than all hands to a deep clean when the opportunity arose. C2 was given the task of annotating bookings to assist the transfer of information to R’s new system, a relatively straightforward and finite task. C2 was disallowed from working split shifts as she had done previously.

2.8.3. It was made clear to the claimants by R that the respondents wanted to run the hotel and to assume full and direct responsibility for the guests and for customer service, that all staff would be required to “muck in” (my phrase) as and when required doing whatever was asked of them but without reference to previous practice e.g. C2 being assigned to cleaning rooms and a “chambermaid” being assigned to substitute her in

reception. The claimants were not to meet and greet guests henceforth, or to serve them in the bar.

2.8.4. Over a relatively short period of time any impression that the hotel was run by the claimants, with them being the visible human face of the hotel, was removed. The hotel was under new management and the public face was that of R.

2.9. On 30th April 2019 R wrote to C1 (page 119) noting that he had not signed "your Contract of Employment", referring to C1 saying he had no concerns but noting that he had sought Union advice, and suggesting that he pursue a grievance if he had one. In the letter R asks C1 to confirm his "intentions with regard to Transferring your [C1's] employment to us [R] at the Shelbourne Hotel", despite C1 having transferred a month earlier. R stated that the respondents would not meet with the Union to discuss "YOUR contract". There was repeated reference in the letter to "the grievance procedure". C1 interpreted this letter as asserting that he was already working under R's terms and should follow R's grievance procedure, as opposed to it being a consultation about a negotiated variation of the terms and conditions C1 had enjoyed pre-TUPE transfer to R. There was no mention of consultation or agreed variation in the correspondence or any dialogue at the time.

2.10. In response to R's said letter and with the assistance of their Union, the claimants raised a collective grievance dated 1st May 2019 (p119). The grievance was stated as being in relation to proposed changes to the claimants' terms and conditions of employment.

2.11. In the interim C2 had been certified unfit to work since 9th April 2019; she did not return to work before her resignation letter. C2 ascribed her ill-

health to the situation at work described above and what she perceived as being the off-hand and offensive way that R had spoken to her. She described how she felt and why she felt it was making her ill to R on 9th April 2019. There was also a meeting between C2 and R on 29th April 2019 (R's note of which commences at page 165; it is not an agreed note). At the meeting R stated that there had been no job descriptions in place and they had been provided with A's contracts. C2 explained why she was unhappy with how her role had changed and especially the loss of congenial contact with guests. R said that its business was like a train and that both claimants were being left behind; they were expected to agree to R's way of doing things and to work as the business required. The respondents referred C2 to their grievance policy and re-iterated they would not discuss C2's contract with their Union even though C2 had said she would only leave it to the Union to discuss with R.

2.12. MD absented himself from work on 5th May 2019, pending the outcome of the grievance and he did not return to work before his letter of resignation.

2.13. R appointed an external consultant to handle the grievance which was rejected. R appointed an external consultant to hear the claimants' appeals, which were rejected. Neither consultant gave evidence to the tribunal. While the grievances and appeals were rejected a recommendation was made that the parties meet to discuss roles and responsibilities, and that the claimants should work to the unchanged terms of their contracts with A. R wrote to C1 confirming that he was to return from his "unauthorised leave" on 15th July 2019 and that during that day they would "discuss the recommendations… namely your job description".

2.14. In the light of the grievance findings (that the claimants' contracts had not been changed when they both felt that they had been changed clearly and fundamentally), and a failure to consult about the changes, C1 resigned by letter dated 15th July 2019 (p. 150). C2 resigned in the same terms and for the same reasons by letter dated 16th July 2019 (p.196). They both felt that they were getting no-where with R despite their stated disquiet at being effectively demoted to kitchen and cleaning duties respectively; they understood that R would be running the hotel as it had started to from the date of purchase, without the need for the claimants to exercise their full range of duties and responsibilities commensurate with their titles of General manager and Assistant Manager. They saw that they were effectively Cook and Cleaner respectively in all but job title and that was the likely future for them.

2.15. I find that from within days of the TUPE transfer R exercised full proprietorial and managerial control commensurate with taking over the hotel from the claimants' management; R saw no need for a duplication of roles in terms of having the claimants operating as they had done pre-TUPE transfer.

2.16. The claimants were instructed to operate reduced roles. The claimants were demoted to the primary roles of Cook and Cleaner with some flexibility allowing for their use as and when required performing other ancillary but not managerial functions.

2.17. Despite that development, R's stated case and sworn evidence was that there was no economic, technical or organisational reason entailing any change in the workforce, and that the claimant's contracts and roles had not changed; furthermore on the basis of R's evidence, it was submitted on the

respondent's behalf that the claimants were not redundant as General Manager and Assistant Manager respectively.

2.18. It was however submitted on behalf of the respondents, despite R's evidence to the contrary, that there was an ETO reason entailing changes to the workforce. In the face of R's evidence that there never was a change to the claimants' contracts, then despite the implications of my findings of fact I also find that R has not established an ETO reason entailing changes to the workforce as at the date of the claimants' respective letters of resignation, where such changes include to the place of work or to the requirements to perform the work for which the claimants were employed. R did not advance evidence that there was a reduction in its requirements in respect of the work but rather that there was no change. R chose to demote the claimants and to reduce their status and roles in fact, preferring instead to delegate their duties to others. An example of this preference and re-allocation of work was when C2 was told by R that she would not know from one day to the next what duties she would be asked to fulfil in meeting business needs, and when one of the "chambermaids" was substituted for her on reception and she for the "chambermaid" cleaning rooms. I find that the latter examples occurred; I was unable to establish the date or dates of such occurrences. The claimants' evidence was plausible, clear, cogent and credible; Mr Berin Jones' evidence was less so, albeit given confidently. His evidence was, for example, inconsistent with the letter of 30th April 2019 and in any event where there was a difference, I preferred the evidence of the claimants to that of Mr. Jones for R.

2.19. Notwithstanding the grievance appeal officer's recommendations, given all that had occurred and the rejection of the grievance (including on appeal), the claimants did not believe that their contract (actual status and commensurate duties and responsibilities) would be re-instated. After the grievance appeal outcome the respondent only wrote to C1 in terms of discussing C1's job description. Based on consideration of the witness and documentary evidence before me I find that R did not consider stepping back from management and effectively re-instating the claimants as the managers of day to day running of the hotel and the public face of the Shelbourne Hotel.

2.20. Neither C1 nor C2 had made any retirement plans at the time of the TUPE transfer to R. Neither wanted to continue working in their reduced, demoted, roles and it is more likely than not that relieved of managerial duties, and of being the public face of the hotel, they would both have voluntarily left their employment within a year of the transfer to R.

2.21. C1 intended to continue working as General Manager at the hotel until his retirement in the near but not imminent future; it is more likely than not that had his congenial employment running the hotel continued post transfer to R then he would have remained in post for some two years or so, health allowing.

2.22. C2 intended to continue working as Assistant Manager at the hotel until her retirement not before age 65 in 2022; it is more likely than not that had her congenial employment assisting in the running of the hotel continued post transfer to R then he would have remained in post for more than three years, health allowing.

2.23. Following his resignation C1 visited his local job centre. He was informed that because of his age there was nothing available for him. He made enquiries locally in the hotel trade and checked the local newspapers but, as he suspected, hotels were fully staffed as it was mid-season and there were no vacancies. He enrolled on an IT course and on a date that was not specified he enrolled with an agency that assists people over 50 years of age seeking employment and with two other agencies more recently; he has not found work and says that his efforts have been stymied by the pandemic lockdowns, albeit they commenced in the UK as late as 23rd March 2020 (C1 having resigned in July 2019). He had his first job interview in February 2020. I find that C1 spent some weeks taking stock and establishing his equilibrium before taking active steps beyond visiting the job centre and looking for work in the local press and by informal enquiry in Llandudno. His focus was working in Llandudno and not further afield, as he valued its prestige in the tourist industry. He does not seem to have widened his geographical area of interest.

2.24. C2 was certified unfit to work at the time of her resignation. She has sadly suffered two bereavements in the recent past but whilst bereaved it would seem that work helped and comforted her; her loss of employment and failure to secure alternative employment was not directly affected by her bereavement and grief. She has lived with anxiety and depression from the time of her grievances with R onwards. C2 also says that the pandemic restrictions have stymied her job search, as has her age and wage expectation. She is interested in working and has recently enrolled on an IT course. She has not secured employment. C2 has not strenuously sought it. I

find that C2 spent some weeks taking stock and establishing her equilibrium before taking any active steps save for making an application for benefits which she has received since June 2019.

3. **The Law**:

3.1. Constructive Unfair Dismissal:

3.1.1 S.94 Employment Rights Act 1996 (ERA) establishes an employee's right not to be unfairly dismissed. S.95 ERA sets out the circumstances in which an employee is dismissed which includes where an employee terminates the contract of employment (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct (a constructive dismissal).

3.1.2 It is well established that for there to be a constructive dismissal the employer must breach the contract in a fundamental particular, the employee must resign because of that breach (or where that breach is influential in effecting the resignation), and the employee must not delay too long after the breach, where "too long" is not just a matter of strict chronology but where the circumstances of the delay are such that the employee can be said to have waived any right to rely on the respondent's behaviour as the basis of their resignation and a claimed dismissal.

3.1.3 The breach relied upon by an employee may be of a fundamental express term or the implied term of trust and confidence and any such breach must be repudiatory; a breach of the implied term will be repudiatory, meaning that the behaviour complained of seriously damaged or destroyed the essential relationship of trust and confidence. Objective consideration of the employer's intention in behaving as it did cannot be avoided but motive is not the determinative consideration. Whether there has been a repudiatory breach of contract by the employer is a question of fact for the tribunal. The test is contractual and not one importing principles of reasonableness; a breach cannot be cured and it is a matter for the employee whether to accept the breach as one leading to termination of the contract or to waive it and to work on freely (that is not under genuine protest or in a position that merely and genuinely reserves the employee's position pro temps).

3.1.4 As to whether a claimant has resigned as a result of a breach of contract, where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of

them is a response to the breach, rather than attempting to determine which one of the potential reasons is the effective cause of the resignation.

3.1.5 Even if an employee establishes that there has been a dismissal the fairness or otherwise of that dismissal still falls to be determined, subject to the principles of s.98 ERA. That said it will only be in exceptional circumstances that a constructive dismissal based on a repudiatory breach of the implied term will ever be considered fair.

3.1.6 "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions" **Kaur v Leeds Teaching Hosp [2018] EWCA Civ 978** (Per LJ Underhill):

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [that "the function of the Employment Tribunal when faced with a series of actions by the employer is to look at <u>*all*</u> the matters and assess whether cumulatively there has been a fundamental breach of contract by the employer"]) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* [trust and confidence] term? If it was, there is no need for any separate consideration of a possible previous affirmation, [because: "If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so").
(5) Did the employee resign in response (or partly in response) to that breach?

3.2. TUPE dismissal:

3.2.1. TUPE Reg 4:

3.2.1.1. where there is a transfer of an undertaking it shall not operate to terminate a contract of employment in the absence of an objection from the employee in question. Reg 4 (9) provides that where a transfer involves, or would involve, a substantial change in working

conditions to the material detriment of a person whose contract of employment is or would be transferred, such an employee may treat the contract of employment as having been terminated and the employee shall be treated as having been dismissed.

3.2.1.2. Tapere v South London & Maudsley NHS Trust (UKEAT/0410/08) held that two components must be established, namely a substantial change and a material detriment (meaning not trivial or fanciful).

3.2.2. TUPE Reg 7: Where before or after a relevant transfer any employee of the transferor or transferee is dismissed. That employee is to be treated as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

3.3. Notice of termination:

3.3.1. The Employment Rights Act 1996 (ERA) provides at s.86 the rights of an employer and an employee to minimum notice; subject to that, parties may agree to appropriate notice periods. Failure by a party to a contract of employment to give the other party due notice (contractual notice subject to the statutory minimum) will amount to a breach of contract unless summary dismissal is permitted, such as in the circumstances of gross misconduct or some other such fundamental and repudiatory breach of contract by the other party.

3.3.2. By Regulation 4 (10) TUPE no damages shall be payable by an employer as a result of a dismissal falling within 4 (9) in respect of any failure by the employer to pay wages in respect of a notice period which the employee has failed to work.

3.4. Remedy:

3.4.1. Section 122 Employment Rights Act 1996 (ERA) makes provision for the reduction in a basic award considered under section 120 ERA. Where a tribunal considers that any conduct of a complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. It has been established that in these circumstances a tribunal would have to find that there was blameworthy conduct and it would have to identify that conduct before addressing the justice and equity of a reduction or further reduction in the basic award.

3.4.2. Section 123 ERA provides that the amount of a compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by any complainant in consequence of a dismissal insofar as that loss is

attributable to action taken by the employer. Where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

3.4.3. A tribunal may also reduce any compensatory award where it considers it appropriate to do so to reflect the risk facing a claimant of being fairly dismissed. That risk may be reflected in a percentage reduction or by assessing compensation over a limited period of time. This is referred to as a Polkey reduction.

4. **Application of law to facts**: I resolved the agreed issues. The issues are italicised below; my judgment is not italicised

4.1. *Were the claimants, or either of them, constructively dismissed or did they resign*?

4.1.1. R fundamentally changed the claimants' roles at the hotel because they intended running it as a family business and living-in. That entailed changing the public-facing service from being a hotel run by the claimants to one run by the respondents; the guests were Rs' guests henceforth and would have minimal, if any, contact with the claimants. This entailed the claimants having to relinquish or be relieved of managerial responsibility and working in demoted roles. They lost their congenial employment previously enjoyed, pre-Transfer. The claimants did not consent to, and in fact strenuously opposed, such a variation in their contractual status, responsibilities and duties.

4.1.2. R unilaterally varied the claimants' contractual terms and conditions by introducing restrictions and rules in relation to holidays and breaks, by imposing potential liabilities in respect of fines and the like, and by reserving to R the right to impose short-term working and lay-offs, even without pay. The claimants did not consent to, and in fact strenuously opposed, such variations in their contractual entitlements and provisions.

4.1.3. The changes were not only unwanted but were substantial, going to the root of the claimants' respective employments. After the changes they were no longer employed primarily in the same jobs as before and they were clearly at risk of financial loss, liability and job insecurity, none of which threatened them before. Management of their daily routines including breaks, and their annual leave was taken from them and made more limited. All of these changes amounted to material detriments, they were unfavourable changes and none of the changes benefitted the claimants.

4.1.4. The changes all undermined the claimants' security and what they valued in their previous roles, what I have repeatedly referred to as

congenial employment. The changes all went to underline what C1 had feared from a time before the relevant transfer, that they would be unwanted and would be pushed out. The changes enforced by R made that more likely and more easily achieved in the medium term.

4.1.5. By their conduct R acted in such a way as to destroy the relationship of trust and confidence between the parties. This was re-enforced by Rs repeated insistence that there had been no changes when there quite clearly were. Saying that the previous contracts remained in place and unaltered is not the same as honouring those contracts; R was playing lip-service rather than engage in otherwise inevitable consultation. This was unreasonable conduct, without reasonable and proper cause. There were reasonable and proper ways to go about changes and necessary consultation that would have avoided the distress to the claimants and either saved their employment in some role or led to a consensual parting of the waves on terms. The conduct was instead calculated to destroy or damage the relationship making reluctant, vexed, resignations and these allegations more likely.

4.1.6. Rather than consult, the respondents effectively imposed their terms on the claimants and insisted that problems with the new regime would not be handled through consultation involving the Union but an in-house grievance (albeit with external chairmanship). This does not cure a breach of contract; it cannot. A breach is not to be cured by arguably reasonable conduct. Once breached it becomes a matter for an employee to waive and continue in employment or accept the breach, accept being in terms of acknowledging it and resigning because of it. The claimants did the latter. In any event the formal outcome of both the grievance and appeal was to reject what the claimants said. Despite the recommendations contained in the appeal outcome the claimants had no faith that their situations would improve and the status quo ante be restored.

4.1.7. The reasons that the claimant's resigned were down to the imposed changes as found above. Those changes went to the root of the relationship and were related to the TUPE transfer from A to R. They did not delay too long after the imposition of the changes such that they can be said to have waived them; they did not affirm the contract. Delay here is not in terms of mere chronology. In fact neither claimant worked on pending the outcome of their grievance; they did not waive the breach expressly or by implied consent judged by their actions. Once they had exhausted the only avenue open to them, the grievance, and it was rejected, they resigned.

4.2. *If there was a dismissal of either claimant, was it for a potentially fair reason (where the respondent says it was for "some other substantial reason") and was/were the dismissal(s) reasonable in all the circumstances*?

4.2.1. This is complicated by Rs' insistence throughout that the claimants' employment continued post transfer as before. Trust and confidence was destroyed. In these circumstances it would have to be an exceptional case for a tribunal to find that a dismissal was fair and reasonable; it was not here.

4.2.2. Perhaps if they had approached matters with the claimants differently and pleaded differently at the tribunal a case for a fair dismissal could have been made out. The respondents did not do so. That is a pity for them but also for the claimants. I believe that there was a better way of dealing with this situation, which is not a novel one.

4.3. *Did a relevant (TUPE) transfer involve, or would it involve, a substantial change in working conditions to the material detriment of the claimants, or either of them, and if so, were the claimants, or either of them, entitled to treat their contracts of employment as having been terminated, such that they were dismissed, and automatically unfairly dismissed because of the said transfer*?

4.3.1. As found above the contractual changes imposed by R on the claimants were substantial and went to the very foundation of their employment status and security, the roots of their relationship with R.

4.3.2. The loss of status coupled with loss of security, limiting their daily tasks and their discretion and favourable terms such as concerning holidays and breaks, all undermined the claimants. They knew their continued employment was imperilled. Provisions were added to the terms that could impose liabilities on the claimants and that could make it easier for the respondents to lay them off with or without pay, or to reduce their pay and hours; that was inconceivable previously.

4.3.3. Such changes were by no means trivial. They were both substantial and detrimental by their very nature. The change from managerial to more practical roles, considered by the claimants to be effectively menial roles (albeit C1 always did the cooking and C2 on occasion helped cleaning), was major, substantial. Scope for taking holidays was limited. Potential financial penalties became a possibility; their job security could be more easily undermined. All of that was detrimental to the claimants and not something they would have wanted or endured. It worried them. They were suspicious that they were destined to be forced out and they were given no hope or credible assurance that they would be re-instated to their contractual roles on their contractual terms as previously enjoyed.

4.3.4. This all came about because of a relevant transfer. The changes being as described above and for that reason the deemed dismissal is deemed automatically unfair.

4.4. *If there was a dismissal of either claimant did the respondent break their contracts with regard to notice of termination and may any award be made*?

The claimants did not serve notice and did not work a notice period byt resigned summarily. They are therefore not entitled to an award of notice pay in relation to the TUPE related dismissal and I do not award it under the constructive dismissal claim or breach of contract claim as a separate head of damages. I am awarding 3 months pay as the loss of income compensatory award; they were each entitled to 12 weeks' notice. That seems to me to a fair and reasonable way of approaching it and appropriately compensating the claimants for their loss attributable to the actions of the respondents.

4.5. As regards remedy in general where separate Remedy Issues were not identified save at paragraph 4.4 above:

4.5.1. The claimants were faced with the prospect of finding work mid-holiday season in the holiday industry at what they both considered to be mature ages for that industry, importantly with age and experience that would tend towards the higher salaries available at the best of times. These were not then, nor have been ever since, the best of times for the claimants to secure employment. I accept that they both would like to work but that they are both also fairly resigned to never quite having employment like before, before the TUPE transfer, where they effectively ran their own hotel.

4.5.2. In the circumstances of their leaving the hotel they needed and took time to take stock, steady themselves and to make tentative, local enquiries for commensurate employment with that previously enjoyed, or thereabouts. Over time one would reasonably expect expectations to be lowered, geographical areas to be widened, and for consideration of other opportunities, beyond management of hotels.

4.5.3. I consider that 3 months represents a fair and reasonable time for the earlier stages of the process described in paragraph 4.6.2. I find that after that period the claimants have not reasonably sought to mitigate their losses by suitably increasing their efforts to find alternative employment. In other words this is the period of loss for which I find an award would be just and equitable.

4.5.4. I cannot identify blameworthy conduct on the claimants' part, or conduct causing or contributing to their dismissals and to their losses such as to reduce or further reduce any award, a basic or compensatory. The respondents submitted that the claimants were reticent about their job descriptions, let on that they were content with the new contracts issued to them, and sought only to negotiate a redundancy package thus indicating that they never had any intention of working for R, their protestations otherwise presumably being disingenuous. I find that R knew full well what the claimant's roles and responsibilities were on the transfer and were intent on reining them in; that R knew they were imposing different contractual terms which limited and disadvantaged the claimants making them more menial than managerial and that the

claimant's resented and opposed the changes. Given the circumstances I do not consider that the claimants' Union representative seeking a negotiated severance package was reprehensible or questionable at all and certainly not conduct making it just and equitable to reduce or further reduce any award.

4.5.5. I find however that they were at risk of being fairly dismissed as redundant or for some ETO reason entailing changes in the workforce and that had matters been handled differently it is almost inevitable that the claimants would either have been dismissed with 3 months' notice or would have in that timeframe given notice and left voluntarily. That risk is reflected in my award of loss of income of twelve weeks' wages.

Employment Judge T.V. Ryan

Date: 15.03.21

JUDGMENT SENT TO THE PARTIES ON 16 March 2021

FOR THE TRIBUNAL OFFICE