EMPLOYMENT TRIBUNALS

Claimant: **Mr G Mason**

Respondent: **Park Holidays (UK) Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **8 and 9 October 2020**

Before: **Employment Judge A Ross**

Representation

Claimant: Mr Paul (CAB Representative)

Respondent: Mr M Grant (Legal Executive)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The complaints of constructive unfair dismissal and breach of contract are upheld.**

2. **A remedy hearing will take place at East London Hearing Centre, 2nd Floor Import Building, 2 Clove Crescent, London E14 2BE on 16 November 2020 at 10.00am.**

REASONS

1 The Claimant was employed by the Respondent between 28 May 2012 until 10 March 2020. After a period of early conciliation, the Claimant presented a claim of constructive unfair dismissal and breach of contract (in respect of notice pay).

Complaints and Issues

2 At the outset of the hearing, I investigated whether the Claimant relied on an

express or an implied term for the constructive unfair dismissal complaint. Mr Hall explained that the Claimant relied only on the implied term of trust and confidence. He explained that a series of events amounted to a breach of this implied term.

3 With the assistance of the parties, a list of issues was agreed during the first part of the hearing, which I read to the parties at the outset of their submissions to check that it was correct. The parties confirmed that it was.

The Issues

4 Was the Claimant dismissed, that is:

4.1 did the Respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant?

4.2 if so, did the Claimant affirm the contract of employment before resigning?

4.3 if not, did the Claimant resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation)?

4.4 If the Claimant was dismissed, they will necessarily have been wrongfully dismissed because they resigned without notice.

5 The conduct the Claimant relies on as breaching the trust and confidence term is:

5.1 The manner in which the Respondent dealt with its decision for the Claimant and his family to move out of his accommodation on the Steeple Bay site, including failing to consult with the Claimant, failing to investigate the impact on the Claimant and his family of the forced move, and failing to provide the Claimant with adequate reasons for it.

5.2 In February 2020, a request by management that the Claimant move to work at another site in Clacton, to work there as Siting Manager.

5.3 The demotion of the Claimant when he started work at the site in Clacton from Siting Manager to team member.

6 In addition, I asked Mr Grant to take instructions on whether if constructive dismissal was established, the Respondent contended that it was a fair dismissal, because such an argument was not part of the ET3 response. Mr Grant confirmed that the Respondent did not allege that there was any potentially fair reason for dismissal, if constructive dismissal was proved.

The Evidence

7 There was an agreed bundle of documents. Additional pages were added when a further email came to light, and I gave permission for an email from the Housing

Department of Maldon District Council to the Respondent to be added to the bundle.

8 I read witness statements for and heard oral evidence from the following witnesses:

8.1. The Claimant;

8.2. Daniel Duffy, Regional Manager;

8.3. Gordon Bush, Area Manager;

8.4. James Garland, Regional Manager.

9 There were few real conflicts of fact. I found the Claimant to be an honest witness whose evidence was generally reliable on matters of fact. I preferred his evidence where there was a conflict of fact to the evidence of the Respondent's witnesses, for reasons that I shall come to.

10 It is probable that there would have been no conflicts of fact at all had there been the documentary evidence normally produced by employers in the Employment Tribunal. It is not my role to advise or criticise any party, but in this case it is necessary for me to point out the complete lack of consultation documents provided to staff, a lack of any job description for the role of Siting Manager offered to the Claimant, and a lack of any amended statement of terms and conditions (a legal requirement by the Employment Rights Act 1996). These are documents that the Respondent, given its size and resources, should have created and given to all employees in the Claimant's position as a matter of course. After all, the Respondent employs 1400 persons in the UK. I was taken aback by the lack of an appropriate and suitable consultation procedure in this case, despite my experience and the volume and varied nature of cases that I hear in this Tribunal.

The Facts

11 The Claimant was employed by the Respondent as a Maintenance Supervisor at the Steeple Bay Holiday Park near Maldon in Essex. When recruited, he was told by the recruiting manager that accommodation in a unit on the site went with the job, which was confirmed by the former manager in an email (at page 31). This part of the Claimant's evidence was not disputed.

12 The Claimant entered a contract of employment, which included a mobility clause and an "accommodation" clause. The accommodation clause is at page 26 which included:

> "*Where accommodation is provided with a position it is allocated at the discretion of the general manager. The employee will be responsible for paying council tax (or equivalent if applicable). The accommodation is provided on the basis that it does not become the employee's primary residence and will be vacated on termination of employment. An accommodation charge is payable for any accommodation provided and is payable by way of a deduction made from your*

> *monthly salary. An accommodation agreement must be completed and signed before occupying the accommodation.* ***The offer of accommodation may be reviews (sic) and/or withdrawn at any stage but only after a period of consultation.****"*

13 The Claimant moved to live at a caravan unit on the site. He was joined by his partner and their daughter, who has a significant learning disability. Care for their daughter was provided by the Claimant and his partner. Their daughter has incontinence and severely impaired communication. She attends a school for children with learning disabilities in Chelmsford, and requires arranged transport to and from school. Her schooling (and transport to it) took months to arrange after the Claimant started in the role at Steeple Bay Park, so he took the job and commuted to the Park from Clacton each day until arrangements were agreed for her to attend a school in Chelmsford.

14 It is part of the Claimant's case that the way in which management dealt with the decision to require him and his family to leave accommodation on site failed to take into account any of the impact that this would have on his family. This was because any change in the location of their home would require re-arrangement of plans for their daughter, whether in terms of schooling, if they were to move area, and/or transport to school. Moving home to a new area involved local authority panels and took a considerable amount of time.

The requirement to move out of accommodation at Steeple Bay Park

15 In October 2019, Maldon District Council notified the Respondent that it had refused its application for planning permission for staff to be permitted to occupy seven units in the Park during the closed period from November to March each year. The reasons for the decision was set out in an officer's report at pages 34 – 36, which I infer the Council has accepted (although I was surprised the actual decision was not produced).

16 The officer report included a description of the site and also explained why the planning permission had been refused. At page 35, the report states as follows (with my emphasis added):

> *"Although it is recognised that some activities would be carried out outside the period that the caravan site is open for the tourists it is not considered essential for a sales or retail manager to live on site. Furthermore staff that deal with the upgrading or maintenance of the site, as any other employees of a similar work nature can commute to the work for the time period of duration of the works on a daily basis during working hours and thus it is not considered essential for them to be present on site at a 24/7 basis throughout the year. Furthermore whilst it is acknowledged that night warden may be required on site, it has not been demonstrated that there is an essential need for a worker's dwelling on a permanent basis. Similar to other employees on night shifts there can be a designated space for them to stay overnight, and then return to residential properties after the night shift. Therefore in light of the above it has not been demonstrated that there is an essential need for seven caravans to be used for staff accommodation which can reasonably accommodate to more than seven members of staff in a year round basis."*

17 The council permitted only two caravans to be occupied by staff during the closed season from November to March.

18 After receiving this decision Mr Duffy discussed it with Mr Airs, General Manager of Steeple Bay Park. They agreed that, in their view of the best interest of the business, the two members of staff who could remain on site during the closed season were the park warden and the retail manager. This was despite the contents of the report set out above.

19 It was admitted by Mr Grant in oral submissions that, prior to reaching these decisions, the Respondent did not consult with the Claimant. In fact, the Respondent did not consult with any employee affected by the decisions before they were made. There was no written notification of the proposals nor was the report of the local authority provided to the staff affected including the Claimant.

20 In submissions, the Respondent appeared not to have considered even the possibility of consultation before selecting the two employees who could remain on site during the closed season, despite the report stating that it was not considered essential for either a retail manager or an employee carrying out maintenance to live on site.

21 The Claimant learned that his family was to lose their accommodation on 14 November 2019. The Claimant was telephoned by Mr Airs to return to the yard at the Park. The Claimant was informed in the yard by Mr Airs that his family had two weeks to move out of their caravan due to the Council's planning decision. Mr Airs stated that the move would be temporary and the Claimant could return to his same accommodation on site on 1 March 2020. The Claimant was offered a further two weeks accommodation at the Dover Court site, which was about two hours drive away. The Claimant knew that it was impossible to move to that site for two weeks because of Bobie's educational needs which meant that he would need to take her to school and back in Chelmsford each day, and his partner would be unable to work in her job in Maldon.

22 The Claimant was shocked at the news that his family had to leave their home. This was because it had not been suggested to him in the months before that his accommodation was at risk. There was no evidence that he had been warned of the risk of losing his home if planning permission was refused. He was also upset because no one in the Respondent's company realised the difficulties that he faced in moving his family at short notice particularly given the needs of Bobie. The Respondent did know about his family circumstances.

23 The Claimant applied as homeless the following day. After a stressful period trying to find accommodation and negotiating with the Council, the Claimant found accommodation in Bradwell-on-Sea, around 8 miles from the Park. The rent for the new accommodation was £550 per month. The property was unsuitable at the time but the Claimant and his partner decided to take it, because they were desperate.

24 On 31 January 2020, the Claimant was informed by Mr Airs that he could not return to live in his caravan on the Steeple Bay Park. This decision was made by the Respondent on or about that same day, again without any consultation with the Claimant.

25 As a result, the Claimant complained to Human Resources: see his email of 31 January 2020 at page 41. The complaint was passed to the regional manager, Mr Duffy. His response included the following:

"We are in a situation where we will only be offering accommodation to seasonal employees, permanent employees that are required on park for business needs for short term and team members that have it included in their contract."

26 The Claimant asked Mr Duffy to reconsider and for his family to be able to stay living on site, and that other families did not have the problems that his family had because they were able to move in with their own family.

The Claimant's meeting with Mr Duffy on 13 February 2020

27 On 13 February 2020, Mr Duffy and the Claimant had a meeting at Steeple Bay Park. Mr Duffy knew the Claimant and his work before he commenced employment with the Respondent. He knew that the Claimant had a house in Clacton. Prior to meeting, Mr Duffy assumed, without consulting the Claimant, that the Claimant could move back to this house. I found that Mr Duffy had respect for the Claimant because of the length of service and his work, and wanted a win-win situation for the Claimant and the Respondent. At the meeting, Mr Duffy told the Claimant that the Respondent could no longer provide accommodation due to the Council's decision and that the Respondent did not want to be in a position where it had to ask team members with families to move out for four months each year. Mr Duffy referred to a contractual term in respect of accommodation. I found that Mr Duffy believed that accommodation provided for staff could be withdrawn at any time by the Respondent; he attached no relevance to the consultation provisions in the contractual clause.

28 At this meeting, the Claimant was not offered accommodation at or near a site in Clacton. Mr Duffy was mistaken about that, demonstrated by the fact that there was no mention of such an offer in his witness statement nor in the ET3. The Claimant's house in Clacton was raised, however, at the meeting, but the Claimant told him that it was rented out on a 12 month tenancy and that three months' notice were required to be given before possession could be recovered.

29 Mr Duffy explained that it may be time for the Claimant to move from Steeple Bay Park because this could help both himself and the Respondent. I find that in advance of this meeting, Mr Duffy knew of a vacancy for a Siting Manager at one of two sites in Clacton. This role had been difficult to fill and had been vacant for over three months, as Mr Garland indicated in oral evidence. At this meeting, the possibility of offering the Claimant this role was made, if the Claimant was interested.

30 After this meeting, on 16 February 2020, the Claimant emailed (at page 43) that he would like the opportunity to transfer to one of the Clacton-on-Sea parks and asked about his new salary and whether he would be taking up the position of a Siting Manager. He explained that he did not want to uproot Bobie again, because she had settled into new accommodation and arrangements for her education and travel took months to change so he was going to wait until his house in Clacton became available and commute until then.

31 I accepted the Claimant's evidence that in his meeting with Mr Duffy, the Claimant felt that he had no real option but to accept the proposal of the role in Clacton. However, Mr Duffy did not impose any ultimatum. The offer of the role in Clacton was not what the Claimant wanted but having discussed it with his partner, the Claimant felt that it was necessary to make the best of things and he did not want to be out of work, and that he had to accept it. As he explained in cross-examination, his daughter and her education and travel to school were his priority.

32 In submissions, Mr Hall accepted that the Claimant's evidence was not that he would work on under protest.

33 In response, by email (at page 43B) Mr Duffy replied that the role was at the Martello site as Siting Manager. The Claimant was not told what duties the role at the Martello site involved. He was not given any job description, and nor was he given an amended statement of terms and conditions.

34 By 18 February 2020, the Claimant was looking forward to the new challenge at the new site indicated by his email of that date.

35 On 28 February 2020, the Claimant had a meeting with Mr Bush, the Area Manager for the Clacton sites. At the meeting, the Claimant was told by Mr Bush that he would not be doing a Siting Manager role. The Claimant found this embarrassing because this was in effect a demotion from manager to team member. On balance I preferred the Claimant's account of the meeting with Mr Bush for several reasons:

35.1 After the meeting, the Claimant immediately complained by email (page 44) to Mr Duffy that Mr Bush had told him that the Siting Manager role was not available.

35.2 On receipt of the Claimant's complaint, Mr Duffy did not respond by denying what the Claimant had said; I inferred that Mr Duffy believed that the Claimant was telling the truth.

35.3 Mr Duffy emailed Mr Garland (page 45). His email indicated that he accepted Mr Bush had wanted the Claimant to be called something other than a Siting Manager.

35.4 There was no evidence that the Claimant was ever told by Mr Duffy or any other manager that he had misunderstood what Mr Bush was saying.

36 Contrary to the Respondent's case, I find that the Claimant did not misunderstand what Mr Bush was saying at that meeting. There was no miscommunication as the Respondent alleged.

37 I did not find Mr Bush's evidence convincing nor reliable. Even in his witness statement he said: *"I informed Glenn that regardless of position or title he would need to fit in and do the job that was being requested rather than being focussed on siting all day everyday. I advised that even though he was joining us as the siting manager he would need to earn his stripes and demonstrate his value by leaving the team to the standards*

expected." This extract tended to suggest that Mr Bush had told the Claimant he was one of the siting team not their manager.

38 Moreover, in the absence of a job description, there was some confusion over the role that the Claimant was to perform amongst the ranks of the Respondent's regional managers:

38.1 Mr Garland said that "site foreman" and "site manager" were the same and interchangeable titles. The Respondent had never previously mentioned the term "site foreman" in its ET3 nor in any witness statement. I formed the view that this was introduced as an attempt to explain what Mr Bush may have said, which revealed that there was an understanding that Mr Bush may not have seen the Claimant's role at that time as that of Siting Manager but rather as first among equals in a team.

38.2 Mr Duffy told the Claimant that he was going to the Martello site in Clacton whereas Mr Bush's evidence was that the Claimant was appointed to Saint Osyth Beach Site.

39 After his meeting with Mr Bush on 28 February 2020, the Claimant sent an email to Mr Duffy (page 44). The Claimant stated that he could not understand why, after the position was offered, it was not available, but because of the position that he was in he would still be going to Clacton.

40 The Claimant did not hear back from Mr Duffy after his email of 28 February 2020 at any time and his position as Siting Manager was never confirmed again orally or in writing.

41 The Claimant commenced work at the Clacton site when it reopened in March 2020. The Claimant expected his position as Siting Manager to be resolved after his email of 28 February 2020 but he found that nothing came of his complaint. After starting work in Clacton. the Claimant asked Mr Bush if he had spoken to Mr Duffy. Mr Bush stated that he had not, and Mr Bush did not confirm to the Claimant that his title was that of Siting Manager.

42 Having commenced work at the Saint Osyth Beach Site, the Claimant found that he was part of a two man siting team. Mr Bush's oral evidence tended to support this: the Claimant was doing the same task as everyone on the siting team. To my mind, having seen and heard his oral evidence, Mr Bush viewed the title "Siting manager" as merely a label that he did not have to apply in substance.

43 After two days working at the site, the Claimant felt stressed and this was affecting his health. He attended his GP and was signed off sick. After this, neither Mr Garland nor Mr Duffy contacted the Claimant to see if his complaint about demotion had been resolved.

44 On 10 March 2020, the Claimant resigned by a letter (see page 47 – 48). The Claimant set out the reasons for resignation and said that he had lost all trust and confidence in the Respondent.

45 The Respondent alleged that the Claimant resigned solely because of the travelling time to Clacton and the cost of travel from Maldon to Clacton, which the Claimant said in cross-examination was £80 - £90 per week which was crippling. The Claimant denied this. I find as a fact that the travel time to Clacton was not part of the reason for the resignation of the Claimant. The Claimant had commuted from Clacton to Steeple Bay Park for months before his family had been able to move there with him. When he had done this, he had had the benefit of a company van and fuel, but neither of those benefits were provided to him in March 2020. I find that the cost of travel was inevitably, given the level of his salary, part of the reasons for his resignation. However, at least as significant as the cost of the travel, in terms of causation, was the treatment of the Claimant by the Respondent both prior to and on 2 and/or 3 March 2020.

46 The final straw was the work of the new post. It was not a manager role when viewed objectively by me. This is a matter of substance not form. The Respondent cannot retrospectively say it was labelled as "x", when in fact the substance experienced by the Claimant was "y", and where the Claimant's effective line manager, Mr Bush, did not accept the label in any event.

47 Mr Duffy stated in cross-examination that the Claimant did not feed back to him what work he was doing at the new site (and did challenge the Claimant's account of events). I find that there was no obligation of any sort on the Claimant to do so, not least because he had already complained by email on 28 February 2020 that he was told that he would not be doing the role of Siting Manager.

The Law

Constructive Dismissal

48 Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct.

49 Where there is a complaint of constructive dismissal, the burden is on the employee to prove the following:

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

49.2 That the employer's breach caused the employee to resign;

49.3 The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

50 The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

50.1 The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

50.2 It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust

and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

50.3 Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9.

50.4 The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied on as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in her employer.

50.5 A breach occurs when the proscribed conduct takes place: see *Malik*.

50.6 Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

50.7 In terms of causation, the Claimant must show that he resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

51 In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR, the Court of Appeal approved the guidance given in *Waltham Forest LBC v Omilaju* (at paragraph 15-16). These cases provide comprehensive guidance on the "last straw" doctrine:

51.1 The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: *Lewis v Motorworld Garages Ltd* [1986] ICR 157, per Neill LJ (p 167C).

51.2 In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (Glidewell LJ at p 169F).

51.3 Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application.

51.4 The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach,

although what it adds may be relatively insignificant.

51.5 The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

51.6 The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

51.7 If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

51.8 If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract, she cannot subsequently rely on these acts to justify a constructive dismissal unless she can point to a later act which enables her to do so. If the later act on which she seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

51.9 The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

51.10 Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

51.11 The affirmation point discussed in *Omilaju* will not arise in every cumulative breach case:

> "*There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed, in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)*." (per Underhill LJ).

52 The Tribunal noted that a breach of trust and confidence has two limbs:

52.1 the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

52.2 that there be no reasonable or proper cause for the conduct.

53 Mr. Hall relied on *United Bank v Akhtar* [1989] IRLR 507, a case about the exercise of a discretionary mobility clause, in which the EAT held:

53.1 reasonable notice must be given before exercising the power to transfer an employee;

53.2 a mobility clause is subject to the general duty that it must not be exercised in such a way that it destroys the necessary mutual trust and confidence between employer and employee.

54 In *Akhtar*, the EAT explained that:

54.1 It is well-established that implications of a term in a contract, which the parties have reduced to writing, can only be made: first, to give business efficacy to their contracts; secondly, where the implication is to give effect to an obvious combined intention of the parties; and, thirdly, where it is a necessary addition to the expression of the particular relationship between the parties and an implication which completes their contractual arrangements. The touchstone is always necessity and not merely reasonableness.

54.2 There is no conflict between a limit on the way in which a discretion can be exercised, on the one hand, and the existence of the discretion on the other.

54.3 There are circumstances in which, although there is a term conferring a broad discretion on an employer, the exercise of the discretion may be limited by an implied term:

"It seems to us that there is a clear distinction between implying a term which negatives a provision which is expressly stated in the contract and implying a term which controls the exercise of a discretion which is expressly conferred in a contract. The first is, of course, impermissible. We were referred to authority for that proposition but authority is hardly needed for it. The second, in our judgment,

> is not impermissible because there may well be circumstances where discretions are conferred but, nevertheless, they are not unfettered discretions, which can be exercised in a capricious way."

55 The requirements of fair consultation in the Employment context are summarised in *R v British Coal ex p. Price* [1994] IRLR 72 at para 24:

> "fair consultation means
> "(a) Consultation when the proposals are still at a formative stage.
> (b) Adequate information on which to respond.
> (c) Adequate time in which to respond.
> (d) Conscientious consideration by an authority of the response to consultation."

Submissions

56 Mr. Grant made written and oral submissions. He did not suggest that the term "consultation" in the Accommodation clause of the Claimant's contract had a different meaning to that attributed to it in Price. He did not dispute that it should be given this meaning.

57 Mr. Hall made oral submissions, rehearsing key evidence.

58 I mean no discourtesy to either representative by not summarizing their submissions. Each and every submission was taken into account even if I do not refer to it in these conclusions.

Conclusions

59 Applying the above law and findings of fact to the issues agreed between the parties, I have reached the following conclusions.

Was there a breach of the implied term of mutual trust and confidence?

60 In my judgment, the Respondent breached the implied term of trust and confidence by its conduct over the period from November 2019 until March 2020 for the following reasons.

61 Mr. Duffy treated the discretion conferred by the Accommodation clause to withdraw accommodation from staff as being exercisable by the Respondent without any qualification or limit. This was a mistake, albeit unintentional. The clause included express qualification; accommodation may be withdrawn at any state but "only after a period of consultation".

62 There was no consultation in this case, at a formative or any stage of decision-making. In particular, there was no consultation before three key decisions: the decision to withdraw accommodation made on 14 November 2019; the decision not to allocate one of the two units permitted to the Claimant; and the decision on about 31 January 2020 that the Claimant and his family could not return to live on site.

63 Mr. Grant argued that the Claimant's case was based on breach of the implied term of trust and confidence; but I see no reason in law, nor in principle, why the breach of

the express term cannot form part of the series of events which leads to a later breach of the implied term. On the contrary, an earlier breach of an express term, which (using reasonableness as a tool rather than a test) was very unreasonable, is good evidence in support of the cumulative effect of the series of events in this case amounting to a breach of the implied term.

64 Mr. Grant argued that the failure to consult made no difference to the outcome. As I pointed out, this was not relevant (because a failure to consult was a breach of the contract) and, in any event, I did not hear evidence that consultation would have made no difference. Mr. Duffy explained why the two employees had been selected to be allowed to remain living on site over the closed period; he did not say that consultation could not, for example, have led to the Claimant remaining on site for that forthcoming closed season, and the Summer season 2020, to give him a chance to manage a move back to his home in Clacton with his family and make all necessary arrangements for his daughter prior to that move. I concluded that the failure to consult in this case was a serious breach of contract.

65 Moreover, the decision-making of the Respondent in November 2019 and January 2020 involved either a breach of the implied term of mutual trust and confidence in themselves, or included acts which formed part of a series of events leading to a breach of the implied term. In particular:

65.1 By analogy with the mobility clause in *Akhtar*, it was necessary to imply into the Accommodation clause an implied obligation that reasonable notice would be given, or else a family could be moved each week, or even each day, at the whim of the park manager. The parties could not have intended such an agreement, not least because the Claimant was told before the took the job that the role at Steeple Bay Park came with accommodation and the Respondent knew that the Claimant moved in with his family, and it was aware of the learning disability of his daughter.

65.2 Given the representation made to the Claimant prior to accepting the offer of employment with the Respondent, and given that he acted on it by moving in with his family, the Respondent was required to give reasonable notice that the representation no longer applied. Giving the Claimant and his family two weeks' notice to quit their home fell some distance short of what was required.

65.3 The Claimant had lived on site with his family for 8 years. Reasonable notice would have been substantially longer than 2 weeks. The Respondent knew that it was not urgent for the Claimant and his family to leave; despite the claim that Mr. Duffy believed that Planning took priority over Housing law, the fact was that the Respondent knew that MDC would not take enforcement action at the end of November 2019: see the email from Ms. Greengrass at p.55-56. Moreover, those who have an assured shorthold tenancy (the least secure form of tenancy agreement), who have not received the representations that the Claimant received prior to moving his family to Steeple Bay Park, are entitled to a notice seeking possession giving 2 months' notice, and even licensees with no security of tenure are entitled to 28 days of notice to quit under the Protection from Eviction Act 1977.

65.4 On 31 January 2020, the Claimant was given about 4 weeks of notice that he would not be allowed to return to live on the Park. This was an exercise of the discretion by the Respondent which amounted to a breach of the implied term of trust and confidence, or part of a series of acts amounting to such a breach. This was going back on a representation made to the Claimant when he moved out of the site in November 2019. He had left possessions in the caravan that his family had occupied, because he believed that they would be returning to it.

66 I accept Mr. Grant's submission that on 16 February 2020, the Claimant agreed to move to a site in Clacton. I accept that his decision to move to Clacton could not be either a breach of the implied term, nor part of a series of events amounting to one.

67 However, the Claimant agreed to transfer to Clacton to take up a role as Siting Manager. It was represented to him by a senior manager that this was the role; but Mr. Bush went back on that promise made by the Respondent. This was sufficient to form part of a series of events amounting to breach of the implied term of trust and confidence.

68 The treatment of the Claimant at the meeting with Mr. Bush, and when he started work at the site in Clacton, were more than sufficient to amount to the last straw. Using reasonableness as a tool, not a legal test, and viewing events objectively, the treatment of the Claimant by Mr. Bush was wholly unreasonable. It was high-handed and demonstrated a failure to take into account the representation made to him about his new role, the Claimant's length of service with the Respondent and his experience.

69 The Claimant had complained about what Mr. Bush had told him on 28 February 2020. Mr. Duffy and Mr. Garland did not go back to re-assure him, such as by provision of a job description or amended terms and conditions. The work that the Claimant found that he was doing at the Clacton site tended to show that Mr. Bush meant what he said at the meeting.

70 In the above circumstances, the repudiatory breach of contract – the breach of the implied term of mutual trust and confidence - had crystallised on or about 2 or 3 March 2020.

Affirmation?

71 The Claimant did not affirm the contract of employment after the breach crystallised. After the meeting with Mr. Bush, the Claimant complained by email to Mr. Duffy. He expected that something would be said or done about his position as Siting Manager. In fact, as far as he knew and experienced during the two days that he worked at the Clacton site, no change had been made to Mr. Bush's decision about his role being basically that of a team member, whatever the label attached to it.

Causation

72 The breach of the implied term of trust and confidence identified was a substantial reason for the Claimant's decision to resign. I repeat the findings of fact at paragraph 45-47 above.

Breach of Contract: Notice Pay

73 The Claimant was wrongfully dismissed. The extent to which he is entitled to damages for breach of contract (i.e. how much notice pay he is entitled to) shall be determined at the remedy hearing, unless the parties can agree this figure.

Award under Section 38 Employment Act 2002

74 At the remedy hearing, the Tribunal will also consider whether an award should be made under section 38 Employment Act 2002. The findings of fact made indicate a breach of section 4 ERA 1996 in respect of (at least) the requirement in section 1(4)(f) ERA 1996. To assist the parties ahead of the remedy hearing, my provisional view, on the evidence that I have heard to date, was that there was no mitigation for that breach. I have noted already that the Respondent is a relatively large employer.

Summary

75 The complaint of unfair dismissal is upheld. A declaration to this effect shall be made. The remedy hearing listed for 16 November 2020 is now confirmed.

76 I invite the parties to resolve any remedy issues without the need for a hearing. This should not be a complex task, albeit one requiring compromise by both parties.

Employment Judge A. Ross
Date: 26 October 2020