



# EMPLOYMENT TRIBUNALS

**Claimant:** Kelly Pizzey  
**Respondent:** Hornchurch Royal British Legion Club Limited  
**Heard at:** East London (by CVP)  
**On:** 25 & 26 January 2024  
**Before:** Employment Judge Rhodes

## Representation

**Claimant:** In person  
**Respondent:** Mr A Lawson (counsel)

# RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is well-founded and succeeds.

# REASONS

## Introduction and Issues

1. The claimant complains of unfair constructive dismissal. The issues for the Tribunal were:
2. Did the respondent do the following things:
  - a. demote the claimant;
  - b. fail to give the claimant a proper opportunity to respond to allegations of misconduct made against her?
3. Did those things breach the implied term of trust and confidence? The Tribunal will need to decide:
  - a. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
  - b. whether it had reasonable and proper cause for doing so.

4. 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.
5. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
6. If the claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract? The respondent relies on misconduct.
7. Was it a potentially fair reason?
8. Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant?
9. The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.
10. I heard oral evidence from the claimant and from Jeff Letch (the respondent's Chair). Each party had produced written statements from several other people but none of them attended the hearing to give evidence in person. I was able to determine the issues in the case without reference to those other statements.
11. I was referred to a 134-page bundle (138 pages including the index). The page references in this judgment refer to the printed page numbers in the bundle. At my direction, the respondent also disclosed a copy of its disciplinary policy.

## Law

12. Section 95 Employment Rights Act 1996 ("the Act") provides:

*"(1) For the purposes of this Part an employee is dismissed by his employer 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."*

13. Section 98 of the Act provides:

*"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it—...*

*(b) relates to the conduct of the employee...*

*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case."*

14. In the leading case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**, it was held that in order to claim constructive dismissal, the employee must establish (1) that there was a fundamental breach of contract on the part of the employer (2) that the employer's breach caused the employee to resign (3) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
15. In the case of **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 EAT** it was held that: "*It is clearly established that there is implied in a contract of employment that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*".
16. It is therefore irrelevant that the employer does not intend to damage his relationship provided the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it. It is the impact of the employer's behaviour on the employee that is significant - not the intention of the employer (***Malik***). The impact on the employee must be assessed objectively. In **Niblett v Nationwide Building Society UKEAT/0524/08** His Honour Judge Richardson said, in the context of an employer's conduct of a grievance procedure and whether the implied term of trust and confidence had thereby been broken, that "*the implied term of trust and confidence is a reciprocal obligation owed by employer to employee and employee to employer. In employment relationships both employer and employee may from time to time behave unreasonably*

*without being in breach of the implied term. It has never been the law that an employer could summarily terminate the contract of an employee merely because the employee behaved unreasonably in some way. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. In the context of the implied term of trust and confidence, the employer's conduct must be without proper and reasonable cause and must be calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

17. In **BG plc v O'Brien [2001] IRLR 496** Langstaff P said "*The question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. If the conduct has that effect, then the question of whether there has been a reasonable and proper cause for the behaviour must be considered.*" As was observed by Lindsay P in **Croft v Consignia plc [2002] IRLR 851 EAT**: "*It is an unusual term in that it is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows.*"
18. As was said in **Cantor Fitzgerald International v Bird and Others [2002] IRLR 867 HC** "*loss of confidence in management is not the same as conduct by the employer calculated to destroy or seriously damage trust and confidence between employer and employee in the sense of the implied term relied upon.*"
19. In **Wright v North Ayrshire Council [2014] IRLR 4** it was pointed out that the test to be applied is not what is the principal or effective cause of a resignation, but whether the claimant resigned at least in part by reason of some or all of the conduct which is said to amount to a repudiatory breach.

## Findings of Fact

20. The respondent is a Royal British Legion branch club. It is a private members' club and employs 12 members of staff. The claimant began her employment with the respondent as Assistant Steward on 15<sup>th</sup> August 2018. She entered into a written employment contract (pages 40ff). At this time, Debbie White was employed as the Steward and was the claimant's line manager.
21. The respondent has written capability and disciplinary procedures, each of which contains one informal stage and three formal stages, as well as detailed steps to be taken to investigate and give opportunities for performance or conduct (as the case may be) to improve before escalating to the next stage.
22. Stage three of the capability procedure states:

### **"Stage 3 hearing: dismissal or redeployment**

*11.34 We may decide to hold a Stage 3 capability hearing if we have reason to believe:*

- (a) *Your performance has not improved sufficiently within the review period set out in a final written warning;*
- (b) *Your performance is unsatisfactory while a final written warning is still active; or*
- (c) *Your performance has been grossly negligent such as to warrant dismissal without the need for a final written warning.*

*We will send you written notification of the hearing as set out in paragraph 11.13 to paragraph 11.14.*

*Following the hearing, if we find your performance is unsatisfactory, we may consider a range of options including:*

*...*

- (b) *Redeploying you into another suitable job at the same or a lower grade.”*

23. The disciplinary procedure includes the following:

***Investigation***

*13.11 The purpose of an investigation is for us to establish a fair and balanced view of the facts relating to any disciplinary allegations against you, before deciding whether to proceed with a disciplinary hearing. The amount of investigation required will depend on the nature of the allegations and will vary from case to case. It may involve interviewing and taking statements from you and any witnesses, and/or reviewing relevant documents.*

*13.12 Investigative interviews are solely for the purpose of fact-finding and no decision on disciplinary action will be taken until after a disciplinary hearing has been held.*

*...*

***Disciplinary penalties***

*13.33 The usual penalties for misconduct are set out below. No penalty should be imposed without a hearing...*

*...*

*13.37 **Alternatives to dismissal.** In some cases we may at our discretion consider alternatives to dismissal. These may be authorised by the Committee and will usually be accompanied by a final written warning. Examples include:*

- (a) *Demotion*
- (b) *...*

- (c) ...
- (d) *Loss of seniority*
- (e) *Reduction in pay*
- ...”

24. In July 2022, Debbie White went on sick leave, before resigning in August 2022. The respondent's then Chair, Jill McClean, and the second key-holder of the club, Bob Robinson, met with the claimant and agreed with her that she should 'act up' as the Steward pending a permanent appointment to replace Debbie White.
25. The respondent increased the claimant's pay to the Steward's salary of £15 per hour in October 2022 and, with the support of Bob Robinson, the claimant ran the club successfully through the winter of 2022/23, including the Christmas/New Year period which is a financially crucial part of the year for keeping the club alive (as Mr Letch put it in evidence).
26. At some point during this period, Jill McClean stood down as Chair and was replaced by Mr Letch. In his evidence, Mr Letch was complimentary of the work that the claimant did during this period: "she did an excellent job at it" and "we had a massive Christmas".
27. On 18<sup>th</sup> April 2023, Mr Letch wrote to the claimant enclosing a new contract of employment for the position of Steward (page 50). In full the letter reads:
- "Dear Kelly*
- Please see attached copy of your new contract as Club Steward.*
- May I take this opportunity in thanking you on behalf of the Club for your efforts in covering the vacant position in a manner satisfying our assurance of your competence and ability in fulfilling the new position. We all look forward to supporting you on your journey.*
- There are two copies attached, one is your copy and the other needs to be signed and returned to the office.*
- Regards*
- Jeff Letch*  
*Chairman"*
28. I do not agree with the respondent's position that this letter constituted an offer which the claimant did not accept by not returning a signed copy of the contract. The letter was not expressed in such terms, nor was it said to be "subject to contract". Whilst it is that case that the claimant had some (unspecified) concerns about some of the terms, she did not say that she was working under protest or give any other indication that she was unwilling to continue working in the role. Indeed, she carried on as she had over the winter.

29. Rather, I find that this letter sought to regularise the claimant's appointment as the permanent Steward and that, as at 18<sup>th</sup> April 2023, the claimant was filling that role on a permanent basis.

30. Notwithstanding the praise which had thus far been given to the claimant, doubts about her suitability for the role were expressed at a Committee meeting on 30<sup>th</sup> April 2023. The minutes of this meeting (which are at pages 70ff) record:

*"This then then brought us onto Kelly and the position of Bar Steward she is currently covering. My concern is Kelly while she is a really good bar person who stepped up over Christmas and paid to date for bar steward activities however, she clearly is not up to the role of bar steward.*

*This suggestion was unanimously agreed except John Gard maybe that we need to change this. Are we going to search for replacements for Bob and Rob which is a huge task in itself only to have them meet the same frustrations that we are hearing? or we have the potential when speaking to Kelly we also lose Jason .... another two key holders going. Personally, I believe this should be a meeting in itself soon to agree a way forward."*

31. The first-person narrator of this section of the minutes was Mr Letch.

32. These doubts appear to have been triggered by the prospect of the impending retirement of Bob Robinson and the apparent frustration of his son, Rob, a member of the bar staff. The Committee was concerned about the prospect of losing them both. Bob played a key role in the operation of the club by overseeing the cleaning of the beer lines (the pipes which convey beer from the barrels to the pumps), an important aspect of health and safety. This was a task which the claimant had not been trained to do.

33. Although it is not explicitly recorded in the 30<sup>th</sup> April minutes, "this suggestion" (quoted in the extract at paragraph 30 above) was for the claimant to revert to her original role (albeit that there was a dispute – addressed below – as to what reverting to her original role would mean). This fact is made clear in the minutes of the subsequent committee meeting (4<sup>th</sup> June 2023) where it is recorded (page 73) that the Committee had "*already identified the committees [sic] belief in the capability of Kelly quite negatively and the suggestion to remove her back to her original role as bar staff*". It is important to note, bearing in mind what follows, that the minutes mistakenly record that the claimant's original role was as a member of the bar staff. She was not a member of the bar staff originally; rather, her original role was Assistant Steward. She had never been employed by the respondent as a member of the bar staff.

34. In evidence, Mr Letch referred to other concerns which the Committee had about the claimant's performance, including an issue with ordering new uniform but I was not referred to any contemporaneous documentary evidence of where any such concerns were raised with the claimant and I find that they were not.

35. By the time of the 4<sup>th</sup> June meeting, allegations had come to light that the claimant had been bullying female bar staff into handing over a share of their tips and that she had been overcharging customers. These allegations were made to Rob Robinson and appear to have been at least one source of his frustration referred to above.
36. Although it was not made clear when or by whom he was appointed to do so, Rob Robinson investigated those allegations by speaking to female bar staff. He did not speak to the claimant as part of that investigation. Indeed, she was unaware of the existence of the allegations. I was not referred to any documents created as a result of that investigation or any of its findings. However, at the 4<sup>th</sup> June 2023 meeting, the allegations were discussed in a way that pre-supposed the claimant's guilt without ever having made her aware of them.
37. The 4<sup>th</sup> June 2023 meeting was recorded and a transcript of the recording appears at pages 77ff. The transcript makes it abundantly clear that the claimant's guilt was assumed and that she would be relieved of the Steward's role, as per the following illustrative comments:

[from page 84]:

*(JL) Right she's gone.*

*(BT) Yeah she's gone.*

*(JL) Thats then, this is now, we've asked Kelly to step up, she stepped up and covered us, burned herself completely out over Christmas.*

*Now we've got to say is this right going forward my view is no but that's purely from a business sense. Sometimes you pick a general manager, you pick a director and they just can't cope and she can just drop back into her role if she so wants to.*

*And then Rob comes in Bob comes back.*

*(BT) But is Rob happy to stay with that. Is it what he wants to do bar work.*

*(JL) Yeah it is. He came back to me with organograms [sic] erm of how ...*

[In his evidence, Mr Letch explained the references to organograms by saying that he had asked Rob to come to him with proposals about what he would do if he were to take on the Steward role in place of the claimant, with support from his father.]

[from page 86]:

*(JL) I just think we should kill it off now, we have a great set of girls so let's give it to Bob and Rob as we've discussed. This is my opinion and then you know aint got to worry about it anymore. Kelly loves a £1 you know.*

*(BT) Obviously yeah.*

*(JT) Hmmm.*



*(JL) The times Colin has said to me Cor she's bloody greedy, Im not trying to dig her out here Im just trying to tell you what I feel we should do.*

[from page 89]:

*(JL.) We have to be very careful this isn't constructive, currently it isn't, at the minute its not, because we have asked her so many times if you don't like what's in your contract. I heard you have it (Barbara T).*

*(BT) No, I haven't got it now, she's got it back. She asked me and I politely said yes I would have a look at it. There was a few discrepancies and pointed them out and left it as that.*

*(JL) Then when I said to her have you given it to you she went No, why would I do that.*

*(BT) (Gasp) She told me something completely different.*

*(JL) Swear to God. I swear to God.*

*(BT) Well she told me something completely the opposite to that, because she said that Jeff said you've given the contract to Barbara, I said how did he know that, (KP) I don't know, (BT) I thought that was strange but I said Oh well, if he knows he knows, Ive got nothing to hide, Ive done nothing wrong.*

*(JL) But that's not what she said to me. I said oh I hear you're letting Barbara, you've given that to Barbara to read (KP) No why on earth would I do that. I went you need to talk to me, there's no point talking to anyone else, if you've got discrepancies you talk to me and we talk it through.*

*(BT) Honestly, she told me.*

*(JL) I'll tell you we have a Tom Pepper<sup>1</sup>.*

*(BT) Well there you go, I'm seeing things in a different light here.*

*(JL) I do not lie, I do not lie, not over stuff like this.*

*(BT) There's no point in lying is there.*

*(JG) To be a good liar you have to have a good memory.*

*(JL) Thats it, that's it and I haven't.*

*(BT) Well I have.*

[from page 90]:

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<sup>1</sup> According to *The Cassell's Dictionary of Slang*, Tom Pepper is nautical slang for a mythological sailor who was ejected from Hell for lying; hence, a 'Tom Pepper' is a liar.

*(JL) This was the vote that we ask Kelly to step down to bring in Bob and Rob to step back. We can't split it because of the salaries. The salary that's going to keep Rob here is the salary Kelly is currently getting. Kelly will then drop back to what she was contracted for to do, the hours she wants to do.*

...

*(JL) Take the person out of it but for the benefit of the club. Have we got someone with more faces than a town hall clock who could actually cause trouble. She's caused trouble with the four staff we have and Rob came to me and said he want's now going to work because he found out she was taking money off them so that was how this all started. He came to me and said the can't work with it like this. Wow, wow, what and that was it. See you gotta try take the person out.*

*(JG) Well, I'm thinking going forward. I should think er Rob would be a good bet. I don't like to say it but that is.*

*(JL) Supported by his Dad to do what he does, Bob steps back and he's in charge of doing the bar work and everything else, I think is definitely the way forward and I'm just backing that on what every single person round here said at the last meeting, that, and I was shocked, absolutely shocked that every said she's not right for the job and you heard that did't [sic] you. you heard everyone else say that apart from you.*

38. By the end of the 4<sup>th</sup> June 2023 meeting, the Committee had decided to replace the claimant as Steward with Rob Robinson, whose father would train him up on the cleaning of the beer lines. The consequent increase in Rob's salary would be enough to retain him. The claimant would revert to her original role. It was a fait accompli, as evidenced by the minutes of that meeting which refer to Rob Robinson as 'the stand in bar steward' (page 73).
39. The claimant was completely unaware of any of this until a meeting with Mr Letch later on 4<sup>th</sup> June 2023. The claimant and Mr Letch disagreed about certain key elements of that meeting (which I address below) but both their accounts agree that the meeting opened with Mr Letch informing the claimant that she was to revert to her original role.
40. The claimant's evidence was that Mr Letch had referred to her original role as being a member of the bar staff, which was incorrect and which would have been a demotion below not only her Steward role but also her original Assistant Steward position. Mr Letch denied this but I prefer the claimant's evidence for the following reasons.
41. As noted at paragraph 33 above, the minutes of the 4<sup>th</sup> June 2023 meeting record (page 73) "*the suggestion to remove her back to her original role as bar staff*". Further, Mr Letch accepted in his evidence that he was unsure what her original role had been and that he recalled her as someone who worked in the bar. I therefore find that Mr Letch believed that the claimant had previously been a member of the bar staff and that he had referred to her original role as such on 4<sup>th</sup> June 2023.

42. The claimant reacted angrily but this was understandable. She asked Mr Letch for an explanation and he referred to her struggling in the role and brought up, for the first time, the allegations made by the female bar staff. This infuriated the claimant further and she flung her keys across the table to Mr Letch. She resigned on the spot and did not return to work.
43. The respondent sought to portray the purpose of this meeting as the start of an investigative process but I do not accept that. Mr Letch said that, if the claimant had given him the opportunity to do so, he would have asked for her response to the allegations but his evidence was that he would have asked her why she was making the team unhappy. The very framing of this proposed question assumes that she was making the team unhappy. It is clear that Mr Letch's mind was already made up (as confirmed by the transcript of the 4<sup>th</sup> June 2023 meeting).
44. This was not the start of a process. It was the end of it. Rob Robinson was all set to replace the claimant as Steward. Insofar as the respondent did genuinely want to hear the claimant's response to the allegations, it had decided to shoot first and ask questions later.

### Discussion and Conclusions

45. Turning to the specific issues in the claim.

*Did the respondent do the following things:*

- a. *demote the claimant;*
- b. *fail to give the claimant a proper opportunity to respond to allegations of misconduct made against her?*

46. The respondent removed the claimant from the Steward role and appointed Rob Robinson as stand in Steward. By doing so, it demoted the claimant with a consequent loss of seniority and reduction in pay. To compound matters, in doing so, it was under the misapprehension that her previous role was a member of the bar staff and that is how Mr Letch communicated the decision to the claimant. Viewed objectively, it was reasonable of the claimant to regard that as a humiliation.
47. Mr Letch was also under the misapprehension that he could take this step because the claimant had not signed the contract: *"we have to be very careful this isn't constructive, currently it isn't, at the minute its not, because we have asked her so many times if you don't like what's in your contract"* (page 89).
48. The respondent did not give the claimant a proper opportunity to respond to the allegations against her. Although it was the respondent's case that Mr Letch's intention was to seek the claimant's response to the allegations, the transcript makes it clear that the claimant could not have had a fair and proper opportunity to do so. Mr Letch had branded her as a 'Tom Pepper' and described her as *"someone with more faces than a town hall clock"* who

has “*caused trouble with the four staff*” before she was even aware of the allegations against her.

49. Further, the person who had conducted the investigation was the same person (Rob Robinson) who was about to replace her as Steward. Everyone who could potentially have played a part in subsequent decision-making had already been tainted.

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

- a. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and*
- b. whether it had reasonable and proper cause for doing so*

50. The respondent’s conduct was calculated and/or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. To tell the claimant that she was to be demoted into the ranks of the bar staff, without giving her the opportunity to defend herself, went to the very root of the employment contract. To adopt the language of **Woods**, it was conduct, the cumulative effect of which, judged reasonably and sensibly, was such that the claimant could not be expected to put up with it.

51. There was no reasonable and proper cause for the respondent’s conduct. The respondent’s case was that the fact of the allegations against the claimant and the concerns it had about her capability gave it reasonable and proper cause. However, I disagree. Such concerns gave reasonable and proper cause for taking steps to address them but the reasonable and proper response would have been to follow the relevant processes in its capability and disciplinary procedures. They did not give the respondent reasonable and proper cause to assume the claimant’s guilt and move straight to imposing the sanction of demotion without following due process and without giving her any opportunity to respond.

*Did the claimant resign in response to the breach?*

52. Yes, the claimant resigned in direct response.

*Did the claimant affirm the contract before resigning?*

53. No, the claimant’s response to the breach was immediate. There was no affirmation of the contract.

*What was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract? The respondent relies on misconduct.*

54. I do not accept that the claimant’s misconduct was the reason for the breach. It is clear from the minutes of the 30<sup>th</sup> April and 4<sup>th</sup> June Committee meetings that a decision had been taken to remove the claimant from the role of Steward before the allegations by the bar staff had come to light. The

misconduct allegations may have accelerated the process of formally replacing the claimant, but they were not the reason (or principal) reason behind that. The real reason appears to have been a conclusion reached by the Committee that Rob Robinson, supported by his father, was a better fit for the Steward role than the claimant and that, in order to retain him, the respondent would need to pay him the Steward's salary.

*Was it a potentially fair reason?*

55. No, this was not a potentially fair reason. It follows from this that the claimant's dismissal was unfair.
56. Even if I am wrong about this and misconduct was the reason, the respondent did not have a reasonable belief that the claimant had committed misconduct, in the absence of a reasonable investigation into the allegations against her.
57. Further, the respondent did not act reasonably in deciding to demote the claimant. Even taking into account the respondent's small size and its administrative resources, a reasonable employer, acting reasonably, would have interviewed the claimant as part of its investigation into the allegations against and, if further disciplinary action was warranted, it would have held a Stage 3 disciplinary hearing before imposing any penalty.
58. Similar principles would have applied to any genuine concerns the respondent had about the claimant's capability. A reasonable employer acting reasonably would have instigated the capability procedure and only taken a decision about demotion after a Stage 3 capability hearing.
59. The claimant was therefore unfairly dismissed.

**Directions as to remedy**

60. The findings above go to liability only. I do not make any findings that might impact on remedy and there will need to be a remedy hearing, at which it will be open to the respondent to make any case it wishes to make on **Polkey** or any other matter affecting compensation.
61. In anticipation of a remedy hearing a Case Management Order is made.

**Employment Judge Rhodes**  
**Dated: 19<sup>th</sup> February 2024**