



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Pyatt

**Respondent:** Bentinck Miners Welfare Social Club Limited

**Heard at:** Tribunals Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG

**On:** 31 January 2022, 1 February 2022

**Before:** Employment Judge Adkinson sitting alone

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Ms A Gumbs, Counsel

## **JUDGMENT**

After hearing from the Claimant in person and Ms A Gumbs, Counsel for the Respondent, and after considering the evidence and submissions, and for the reasons set out below THE TRIBUNAL ORDERS THAT

1. The Respondent employed the Claimant
  - 1.1. as a caretaker and to provide security from 8 June 2020 to 5 July 2020,
  - 1.2. as Steward from 6 July 2020 to 1 December 2020;
2. The Respondent did not unfairly dismiss the Claimant and therefore that claim is dismissed;
3. The Respondent has made unauthorised deductions from the Claimant's wages because it did not pay him any wages for the period 6 July 2020 to 1 December 2020;
4. The Respondent has breached the Claimant's contract of employment because it did not pay him any wages for the period 6 July 2020 to 1 December 2020;
5. The Respondent has failed to pay the Claimant's outstanding holiday pay for holiday to which he was entitled but had not taken when it terminated his employment. The Respondent therefore owes the Claimant holiday pay equal to a sum of 13.5 days' pay.

6. On dismissal the Claimant was entitled to 1 weeks' notice, which the Respondents failed to give or pay for. The Respondent therefore owes the Claimant 1 week's pay
7. The amounts will be determined at a further hearing.

## **REASONS**

1. In a claim presented to the Tribunal on 16 March 2021, Mr Pyatt brings a claim for automatic unfair dismissal because he asserted a statutory right, notice pay, holiday pay and for unauthorised deduction from wages. He alleges that he was employed by the Respondent as a steward. It is not clear when his employment would have begun. The Claimant himself presents several possible dates.
2. The Respondent denies that the Claimant was ever an employee. If he were an employee, they deny that he was unfairly dismissed for asserting a statutory right.
3. It is common ground that the relationship between the parties ended on 1 December 2020.

### **The hearing**

4. At the hearing the Claimant represented himself and Miss A Gumbs, Counsel, represented the Respondent. I am grateful to both for the help that they have given to the Tribunal and the efficiency with which they have presented their cases.
5. The following people gave oral evidence to the Tribunal and I have taken that into account the decision that I have made:
  - 5.1. Mr S Pyatt, on his own behalf,
  - 5.2. Ms A Hugill, the Claimant's wife and witness on his behalf,
  - 5.3. Mr S Duncombe, a trustee of the Respondent and witness on the Claimant's behalf
  - 5.4. Mr J Taylor, a trustee of the Respondent and witness on the Respondent's behalf.
6. There was a bundle of documents of approximately 330 pages. The Claimant had prepared a supplementary bundle of approximately 62 pages. During the hearing one or two extra documents were added to the bundle by agreement. I have taken into account those documents to which I have been referred.
7. At the conclusion of the evidence, each party made submissions as to why they should succeed. I have taken those submissions into account.
8. The hearing took place in person. The Claimant's evidence was presented on the first day. The Respondent evidence and the parties' submissions were presented on the second day.
9. We took breaks during the course the hearing. No party requested a particular reasonable adjustment to enable them to take part in the hearing

effectively. Because the Claimant represented himself, I explained the procedure at various stages and helped him formulate some of the questions he wanted to ask into those that both addressed the issues and allowed the witness to be able to answer. Neither the Claimant nor Respondent complained about me doing this or how I did it. Neither party alleged the hearing was unfair. I am satisfied it was a fair hearing.

10. There are in the County Court that simultaneous possession proceedings that relate to the property in which the Claimant and Ms Hugill are living and which the Respondent owns. I understand that the County Court is awaiting the outcome of these proceedings before making a decision in those possession proceedings. At the conclusion of the hearing the Respondent indicated that it would be asking for written reasons in any event because they may be potentially relevant to those proceedings. Therefore, I reserved my decision. This is that decision.

### **The issues**

11. The issues remain those identified at the earlier case management hearing. I repeat then below:

### ***Employment status***

- 11.1. Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?
- 11.2. If so, what date did the employment start?

### ***Unfair dismissal***

- 11.3. Was the Claimant dismissed?
- 11.4. Was the reason or principal reason for dismissal that the Claimant asserted a “relevant statutory right” within the meaning of the **Employment Rights Act 1996 section 104(4)(a)**? If so, the Claimant will be regarded as unfairly dismissed.
- 11.5. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

There was no argument that the Claimant was guilty of culpable and blameworthy conduct, and I cannot see any basis for arguing that in fact he was guilty of such conduct, and so the issue of contributory fault does not arise.

### ***Wrongful dismissal / Notice pay***

- 11.6. What was the Claimant’s notice period?
- 11.7. Was the Claimant paid for that notice period?

There is no allegation the Claimant was guilty of gross misconduct so that issue does not arise.

### ***Holiday Pay (Working Time Regulations 1998)***

- 11.8. How much leave had accrued?

- 11.9. How much paid leave had the Claimant taken in the year?
- 11.10. Were any days carried over from previous holiday years?
- 11.11. How many days remain unpaid?
- 11.12. What is the relevant daily rate of pay?

***Unauthorised deductions from wages***

- 11.13. Were the wages paid to the Claimant less than the wages he should have been paid?
- 11.14. How much is the Claimant owed?

There is no suggestion any deductions were authorised by e.g. statute, contract, prior written agreement, rather he was not entitled wages in the first place.

***Breach of Contract***

- 11.15. Did the Respondent do the following:
  - 11.15.1. Fail to pay the Claimant his wages?
- 11.16. Was that a breach of contract?
- 11.17. How much should the Claimant be awarded as damages?

There has been no jurisdictional argument that any alleged breach was not outstanding at what would be the date of termination of the alleged employment.

- 12. In their response, the Respondent had argued that any contract of employment would have ended due to frustration although they had not identified a date on which the contract would have ended. It was not identified at the case management hearing as an issue to be resolved. However, I let the Respondent pursue the argument before the Tribunal because it was pleaded and there appeared to be no record that they had conceded it. However, at the point of closing submissions, the Respondent indicated it no longer relied upon the argument of frustration of contract. Therefore, I do not consider that matter any further.

**Findings of fact**

***Witnesses***

- 13. I am satisfied that every person who attended to give evidence to the Tribunal has been truthful, honest and has done their best to assist the Tribunal in ascertaining what has happened. All witnesses have accepted that their knowledge of events is somewhat limited because of the passage of time and because not all of them were witnesses to every part of what happened. There has been no attempt by witnesses to try and fill in the gaps.
- 14. There are a couple of points that I need to deal with because the parties have argued they are relevant to believability.
  - 14.1. The Respondent has said that the Claimant has shown he is unreliable or capable of dishonesty because

- 14.1.1. in his schedule of monies received from Universal Credit, he has stated a figure lower than that which was disclosed by his bank statements; and
  - 14.1.2. because in an email that he sent to the Respondent on 12 May 2020, he said of his current circumstances that he and his wife do not qualify for any form of Government income replacement schemes and that their savings disqualified them from Universal Credit. In fact, the Claimant at that time was in receipt of Universal Credit.
- 14.2. Having seen and heard him give evidence, and taking into account his explanation that the bank statements disclose an error made by the Department for Work and Pensions (which I accept because the bank statements show the correction because the monthly amount is lowered for no obvious reason), and his ready acceptance that the statement to the Respondent may appear misleading (his claim it seems was based on contribution not means so he could be both eligible for contribution-based benefits but not income-based benefits), and taking into account the general consistency in other evidence he gave with both other witnesses and the documents, I do not accept he is dishonest, though I accept they may suggest he is perhaps a little slacker with the precision in language that might be desirable.
- 14.3. The Claimant makes allegations that the Respondent has been dishonest. In particular, he relies upon two matters:
- 14.3.1. The Respondent multiple disclosures were made after the deadline for disclosure in which new documents were produced each time, and
  - 14.3.2. The minutes of meetings that took place on 25 and 29 November 2020 appear not to have been created at the time, or around the time, that the meetings took place. He has extracted what is described as the metadata. These are the properties of the files that can be extracted to show when files were created or modified for example. Although these have not been formally analysed, there has been no suggestion that the data that he has extracted is incorrect. I am prepared to accept the metadata as accurate. So far as the minutes of that meeting on 25 November are concerned, the data records the file was created on 18 January 2019 and was last modified on 22 March 2019. So far as the meeting minutes of 29 November 2020 are concerned, it shows again they were created on 18 January 2019 and last modified on 22 March 2019.

- 14.4. Whilst the Respondent deserves criticism of the dribs and drabs of disclosure process that they appear to have undertaken, the fact is that they did disclose, eventually, all documents upon which the Claimant relies to show that he was an employee. The disclosure, therefore, was done in his favour and it was done without the need for an order from the Tribunal.
- 14.5. As for the metadata, in my view these do not go anywhere near showing that the minutes of 25 and 29 November 2020 have been fabricated. They were typed up by Mr Taylor and Mr Taylor explained that they may not necessarily have been typed up immediately after the meeting. It is quite possible for example that both the 25 and 29 November minutes were typed up after the meeting on 29 November on one particular day. That seems to me to be inherently plausible and entirely credible. Whilst there is no explanation for the “created” dates and the “last modified” dates, it is apparent they cannot be right: The minutes of the meeting could not have been created over a year before the meeting itself. However, it does not provide compelling support or persuade me that the minute of the meetings have been fabricated after the event to justify the Respondent’s case. There are obvious, more likely explanations such as something has simply gone wrong with the computer dates and it is no more than an innocent, albeit inexplicable, error; or it is a hangover from the reuse of previous minutes as a template. As Mr Taylor himself explained, he often would start with the same document, which he would open, delete the contents and then use that to create the new set of minutes. If they were fabricated, then it would require sophistication of a level that was not apparent in the Tribunal to alter the metadata, and even then, it would require some explanation as to why a fraudster would alter it to 2019. There is no credible explanation. I also bear in mind of course that fabrication is a serious allegation and whilst this is to be decided on the balance of probabilities, it would require some cogent coherent evidence, which I do not have.

### **Facts**

15. Therefore, with the above observations in place and on the balance of probabilities I make the following findings of fact.
16. The Respondent is a social and welfare Club. Its structure is as follows.
- 16.1. At the head of the Club is a Chairman. He oversees two parallel strands.
- 16.2. One strand below the Chairman is the charity and welfare part. This is made up and managed by Trustees who are responsible for ensuring that the money spent is for charitable purposes in accordance with the terms of the Trust.
- 16.3. The other part is the business or commercial side and is the one that provides the social Club. That is headed up by Directors and

is run as a business with the need to produce accounts and to pay tax, as appropriate. Stretching across the Trustees and the business side there is a Committee of individuals who are responsible for general decisions in relation to the Club. Amongst the employees of the Club are bar staff who work on zero hours contracts and a Steward, who is responsible for the general management of the Club buildings and the bar and social facilities.

17. In early 2020, the Respondent had need to recruit a new Steward after the previous one's employment had come to an end. They put out an advert inviting applications and in the job description it says as follows (page 90):  
"The Club Steward is responsible for managing, planning, monitoring and controlling all aspects of the Club and its facilities. He/she will be responsible for performing the functions which are vital to the smooth day-to-day operation of Bentinck Miners Welfare Club including the planning, delivering, preparation and sale of alcoholic and non-alcoholic beverages in an efficient, effective and friendly manner."
18. Under "Salary & Benefits" it says:  
"Along with an extremely competitive salary, this role also offers 3-bedroom accommodation on-site."
19. Mr Pyatt applied for the job and was one of several candidates who were interviewed. The first round of interviews was chaired by Mr Duncombe with the assistance of Miss H Aldread, who is an HR Consultant and a family member of one of the other Committee members. She had helped formulate the job advert and run the recruitment process. She has had no other involvement in this case.
20. It is not entirely clear when the first meeting took place. It appears to be in late February 2020 based on the dates of the emails inviting to interview, which were all dated around 29 January 2020 and invitation to second interview. The precise date does not matter.
21. At the interview, Mr Pyatt provided a portfolio of documents. These included, amongst other things, a reference and DBS checks.
22. Mr Duncombe explained, and I accept, that during the interview he explained what the package, as he calls it, would be: If appointed, the Steward would receive a salary of £18,000 per annum gross and would be provided with live in accommodation rent-free. I have no doubt there were discussions as well about the job's other terms and conditions.
23. Mr Pyatt told me that there were also discussions about the notice period. Mr Pyatt had previously worked in the pub industry where he told me it is customary for the notice period to be that of 6 months. And he had proposed 3 months. He said this was because it allowed a Respondent time to find a replacement while also reflecting that 6 months was too long a time in general. The Respondent counters that notice would have been the same as that in the contract of the previous Steward (that is similar to the statutory periods of notice). The fact is no draft contract was provided nor was that

- proposal as to notice raised either. There is no reason to accept that the Claimant agreed with it since he would not have seen the previous contract.
24. There is no evidence that notice periods were ever agreed between the parties. The I find as a fact that no such agreement was ever reached on specific notice periods, but I am able to conclude that both parties agreed it would reflect statute because neither party has suggested they would not abide by statutory minima.
  25. On 16 February 2020, Miss Aldread invited Mr Pyatt back to the second interview, explaining it would be conducted by the Chairman of the Directors and a senior member of the Club's Committee and would include a full site tour of both the Club and accommodation.
  26. It is clear that at the first interview Mr Pyatt was not unconditionally and formally offered the job because a second interview was arranged. If the offer were unconditional, a second interview would be otiose.
  27. That second interview took place on 3 March 2020 with the directors of the commercial arm. Mr Duncombe was not one of the interviewers and had no subsequent involvement.
  28. On 10 March 2020, Mr Duncombe contacted the Claimant to say that he had been successful.
  29. On 14 March 2020, Mr Pyatt attended the Club where he met with several members of the Committee, including Mr Crumpton, Mr Taylor and Mr Duncombe. He says that at this point key points of the employment contract were discussed and agreed, namely
    - 29.1. a salary of £18,000 per annum;
    - 29.2. 37½ hours work per week;
    - 29.3. 28 days holiday per year plus days off in lieu of bank holidays;
    - 29.4. 3 months' notice on either side, and
    - 29.5. sole occupancy of a detached house for him and his partner.
  30. It is Mr Pyatt's case that what Mr Duncombe communicated on 10 March 2020 was an unconditional offer, which Mr Pyatt accepted. The Respondent denies this, raising issues about the need for DBS checks and Mr Duncombe lacked authority to make the offer.
  31. In my opinion no offer of employment was made on 10 March 2020. I do not think the need or lack of need for DBS checks sheds any light on the matter, nor does the issue of whether Mr Duncombe had actual or ostensible authority as agent for the Club to make the offer. Rather, the fact that there was a third meeting on 14 March 2020 as which discussion took place and agreement was reached about the key terms of employment shows no contractual offer could have been made on 10 March 2020. There was no certainty at that point as to terms because discussions had not taken place. In my opinion Mr Duncombe would have been doing no more than relating in effect that the Respondent was going to appoint him if terms could be agreed, though I suspect what was said was blunter and less detailed.



32. Despite agreement as to terms, it seems to be common ground that this meeting on 14 March did not result in an agreed start date.
33. On 24 March 2020 (page 138), Mr Duncan emailed Mr Pyatt saying as follows:  
“Hi Steve  
“Hope you and Anita are well  
“Just letting you know out of courtesy that due to having to close Bentinck for the foreseeable future the position of Steward has been placed on hold.  
We will obviously keep in touch and advise you at the earliest possible date when to start. Keep safe and we hope to see you soon.  
“Kind regards, Directors, Trustees & committee”
34. Mr Pyatt replied the same day (page 137):  
“Good afternoon all.  
“Thank you for your e-mail.  
“We too hope you are all well.  
“We are well, we have more sheep for neighbours than people, and we wander to our local shop at 9:50pm every night – they have been very kind to put aside eggs, milk, bread, mushrooms and of course, wagon wheels for us.  
“We totally understand your decision to put the position of Steward on hold – naturally we are disappointed, we were eager to get settled in and start work.  
“If there is anything we can do, or anyway in which we can be of help in the meantime, then please do not hesitate to contact us.  
“Kind regards  
“Steve & Anita”
35. This email was sent on the day that the Government had announced that from 26 March 2020 as a result of the 2020 Covid-19 pandemic resulting from the spread of the SARS-CoV-2 virus that could cause long-term or fatal effects, the public would be required to stay at home and that many facilities of public gathering, including pubs and social venues like the Respondent’s premises, would be required to close to the public.
36. On 12 May 2020 (at page 139) Mr Pyatt wrote to the Respondent’s Committee members saying as follows:  
“We wonder if you have given much thought to the future of the Club, and indeed the position of the Steward – because we have, and we would like to share then with you.  
“The government has recently announced that the furlough scheme will be extended until the end of October 2020. This is a huge indication that they expect lockdown measures and social distancing requirements to still be in place for some businesses even as far as October. We think that it is a

reasonable assumption that the hospitality industry and community centric businesses will be amongst those still affected.

“ ...

“For the sake of clarity we are still confirming our interest in the appointment as Steward, even if we have to wait until October or beyond. However, we have a proposal.

“The Proposal

“We commence position as Steward forthwith, and move into the property as soon as logistically possible.

“You register us for the furlough scheme and the government will pay us 80% just so you keep the position open for us.

“In the unlikely event we would be ineligible for furlough we can afford to remain unpaid.

“We would be able to act as an interim caretaker, decorator, dogsbody etc, during the remainder of the lockdown.

“When the restrictions are ultimately lifted we will already be in place and raring to go.

“ ...

“In a nutshell, we are asking if we can move into the Stewards house in preparation for the Steward’s role previously offered. We are not expecting to be paid anytime soon, although the furlough scheme would be a bonus. We can see no negatives for you, save for a ‘sitting tenant’ should the Bentinck not survive this pandemic. However, the positives are too numerous to mention, particularly in preparation of a Grand Re-opening....”

37. In my view these emails show that either the parties had not by 12 May 2020 entered a contract of employment. I have come to the conclusion based on the following, both separately and taken together:

37.1. The Respondents placing the position on hold and the Claimant’s ready acceptance of that (rather than raising the issue that he was already an employee) is inconsistent with an already subsisting employment relationship;

37.2. Mr Pyatt’s use of the words:

“our interest in the appointment as Steward, even if we have to wait until October or beyond.”

“We commence position as Steward forthwith, and move into the property as soon as logistically possible.” and

“we are asking if we can move into the Stewards house in preparation for the Steward’s role previously offered.”

strongly imply in my view that even he understood he had not been appointed or commenced employment. If he believed he were employed as Steward at that time then he would not describe it as “our interest in the appointment” nor would he be suggesting commencement. Mr Pyatt struck me as someone

who says what he means. These contemporaneous emails in my opinion shed the best light on what the real situation was at the time. I also prefer them to Mr Pyatt's own evidence before me since in oral evidence and submissions he was not able to identify a start date. This is inconsistent with him asserting he was certainly an employee by 12 May 2020.

38. The Respondent responded on 13 May indicating that the Committee was very interested in the comments and that they expected to be able to agree with most of the suggestions.
39. There then followed a discussion between the Committee members excluding Mr Pyatt. This is evidenced to some extent by emails. The emails feature in-line replies. I do not think they help to shed any light on matters except to this extent: On 4 June 2021 the emails show the Respondent wondered if they asked him to be caretaker or provide security cover for the building, could the cost of the rent could be considered as his wage?
40. Thus, this gave rise to internal discussion about the need for a short tenancy in case either the Club reopened – and Mr Pyatt could start as Steward – or the closure continued for longer than expected – in which case his services would never be required.
41. The matter was discussed with Mr Pyatt. He visited the property. It is apparent that it required a fair amount of work.
42. The parties agreed Mr Pyatt would do some of the work to the property, the Respondent would do the rest. There is a dispute about who was to do what and who did what in the end. Its resolution would shed no light on the issues in this case so I put it to one side. It was also agreed that Mr Pyatt and Ms Hines would enter into a shorthold tenancy agreement with the Respondent for a peppercorn rent and a duration of 3 months commencing from 8 June 2020 and ending on 7 September 2020. (I understand that the County Court in separate possession proceedings has determined that as a matter of law, it is not an assured shorthold tenancy because of its duration and rent).
43. A Mr N Carnell was instructed to prepare a tenancy agreement and he did so in accordance with the instructions the Respondent provided (there is no suggestion he was asked to advise on its efficacy in law). In instructions to Mr Carnall, Mr Taylor confirmed that when Mr Pyatt was in position as Steward the house would be part of his wage but clarified that in the meantime Mr Pyatt and his wife had agreed with the Respondent that
  - 43.1. they could move into the house and
  - 43.2. they would cover security of the Club until the Club reopened.
44. The parties agreed a peppercorn rent because it was less than the market rent and the difference between the market rent and the peppercorn rent was the compensation for the role of acting as caretaker and security whilst the Club was closed. I do not know the market rent but am satisfied I can readily accept it was more than a peppercorn rent. No-one has suggested otherwise.
45. As part of the tenancy agreement, Mr Pyatt paid a deposit of £500 recorded on the agreement as

“Received tenant £500 deposit”

signed by Mr Taylor.

Mr Pyatt takes issue with the fact that the tenancy itself says that the deposit is zero. He argues it was instead the deposit he would be expected to pay as Steward to cover his obligation to perform his duties.

46. It is not the Tribunal’s role to decide the rights and obligations between the parties in the context of a landlord and tenant dispute. However, experience shows that what is initially written and added later are often contradictory. From an employment perspective, nothing turns on this in my view. It is quite clear that the £500 that has been paid was paid in his capacity as tenant and not in his capacity as Steward. That is what it says. Otherwise, it would have been recorded as “received from Steward” or “Steward’s deposit” or similar. If it had been a Steward’s deposit, it might have been evidence of the commencement of his employment as a Steward; it is not a Steward’s deposit and so it is not evidence of employment.
47. On 7 June 2020, Mr Pyatt was invited to attend a till training session as Steward. It is important of course that he knew how the new tills worked.
48. On 8 June 2020 Mr Pyatt became the tenant of the house and commenced security and caretaking duties.
49. He was also provided at around this time with keys and fobs to the Club to allow him entry and exit. The Respondent says this was simply because his belongings were stored in the Club rather than in his house whilst some of the works were being done. I reject that suggestion: They were provided because he was providing caretaking and security roles. I have come to that conclusion because:
  - 49.1. There were about him providing a security and caretaking role while living in the house;
  - 49.2. The tenancy agreement was at a peppercorn rent because the difference between market rent and peppercorn rent was to reflect the compensation for doing the caretaking and security role; and
  - 49.3. one would expect a caretaker or someone responsible for security to have keys to the property.
  - 49.4. If the Respondent were correct, he would be performing these duties but without access to the Club building, which is highly implausible
50. On 23 June 2020, the Government announced that the places like the Respondent Club would be permitted to open again on 4 July 2020 provided they made adequate adjustments to protect against the transmission of SARS-CoV-2. These involved, amongst other things, implementing social distancing and implementing restrictions on the times when such places could open.
51. There was a meeting on 30 June 2020, of the Committee. Also in attendance was Mr Pyatt and Ms Hugill. Ms Hugill acted as a minute taker. The Respondent has suggested that he was invited purely as a guest to

provide input as to how they could implement opening in a Covid-safe way and that he was not there because he was already an employee or because it was intended that he would become an employee. They say they often invited guests who would be able to provide advice or input and bring their expertise to meetings to enable them to better manage the Club's affairs.

52. I do not accept he was there as a guest only because he might have useful input. I conclude he was there as a guest because it was intended that he would become the Steward in due course. Previous documents show it was a settled intention that Mr Pyatt would become Steward when the Club eventually reopened. Because he was expected to become Steward, it makes sense for him to be there to discuss the Club's reopening. However, I am satisfied he was there as guest rather than as an employee. He was not performing any of the Steward's duties before during or in the time after that meeting and before the Club reopened. Ms Hugill was there as a guest which evidences the Respondent's suggestion they did invite guests from time to time. He would have been able to provide useful input. There is nothing inconsistent in my opinion with attending a meeting with a future employer before the employment commences: Indeed, it seems from other cases the Tribunal has heard it is a common practice for positions of responsibility.

53. On 1 July 2020, Mr Taylor had a dispute with some other committee members. The details of the dispute do not matter or shed light on the issues I must decide. Therefore, I put them to one side. However, it triggered an email from Mr Pyatt to Mr Taylor. Mr Pyatt expressed his disappointment about what had happened. Mr Taylor replied on the same day (page 186) as follows:

"Thank you both I am sure from our brief discussions you are what The Club needs I have been very impressed with ideas and thoughts remember keep your friends at harms length and your enemies even closers I need time to think so may see you around but I hope they will work with you it a bit lime a manager knowing they have the right players but they do need good player around them!!!"

I accept Mr Pyatt's suggestion that this evidences that the Respondent understood that Mr Pyatt was going to start as the Steward and that it was still the case that it was expected that Mr Pyatt would be the Steward from when the Club reopened.

54. On 1 July 2020, someone called Sam, who is the daughter of Duncombe, sent a text message to Mr Pyatt saying that she was unable to attend a meeting of the staff on Sunday at 3 pm. The meeting was in preparation for explaining the new social distancing rules that would be in place when the Club reopened. This suggested that Sam was under the impression that Mr Pyatt is going to be her line manager from when the business reopened. I infer that therefore someone in authority in the Club had confirmed this to her. It fits with the other evidence that there was an intention Mr Pyatt would become the Steward on reopening.

55. Around 2 July 2020, the pool team contacted the Club's Committee to ask if they could resume their pool playing and practicing at the Club. The

Committee involved Mr Pyatt by seeking his opinion about whether it was permitted in accordance with the Government's guidelines. He was included in emails when the Committee had made its decision. In my view, the fact that he was included in this correspondence emphasises the intention that Mr Pyatt was to start as Steward when the Club reopened.

56. The Club reopened on 6 July 2020. The Claimant was not rostered for any work on that day or indeed on any other day up to his dismissal. He was available for work and I am satisfied from his evidence he was willing to work. The Claimant makes the point that as a salaried member of staff he would not himself have been rostered to work. The Respondent says that of course he would have been rostered to work if it were the case that he was actually there as Steward.
57. In my opinion on 6 July 2020 the Claimant started work as Steward. I come to that conclusion for the following reasons:
  - 57.1. There had been discussions between the parties as to the wage, holiday, working hours etc.
  - 57.2. It was quite clear that the Respondent intended that he would become Steward and be Steward when the Club reopened.
  - 57.3. He had already been doing the caretaking and security roles which formed part of the Steward's functions, and would continue performing them;
  - 57.4. He was doing those roles and had been provided with the house at peppercorn rent because he was going to start as Steward when the club reopened;
  - 57.5. He had been involved in a preparatory meeting ready for the reopening and in consultation relating to the use by the pool team and he had keys to the property, because it was intended when the Club reopened, he would begin as Steward;
  - 57.6. He was ready and willing to do the work. However, he did not do any because the Respondent failed to allocate him any work.
58. Specifically, I reject the Respondent's suggestion he was there merely in a social capacity. The totality of the evidence shows that is highly implausible.
59. The fact the Respondent did not allocate him any work in my view is their own default and does not suggest a contrary conclusion is justified. It is in my opinion significant that what they did not do was raise the question as to why he was there or query why there was someone living in the Steward's house who was not doing the functions. I have not seen any satisfactory explanation as to why he was being invited to the meeting on 30 June or to the till training or involved in the consultations about the pool team, if indeed he were not going to be the Steward when it reopened.
60. On 7 August 2020, Mr Pyatt asked Mr Taylor why he had not been paid any wages. Mr Taylor explained that business had been exceptionally slow and, simply put, the Club did not have the money. No further action was taken in relation to that by the Claimant until November and no further action was

taken in relation to the Claimant raising the query by the Respondent. I am satisfied the enquiry was made from genuine concern he had not been paid.

61. On 25 November 2020 or thereabouts, the accountants informed the Respondent that they were in dire financial straits. This is evidenced by the accountants for the year ending 31 December 2020. They show, for example, that the Respondent's reserves at the end of 2020 were £20,715 in deficit. This was an improvement on the 2019 position when they had been £42,337 deficit. They also show that the net profit for the year for 2020 was £25,738 as against £1,796 for the year ending 2019. However, the accounts show that £54,000 of that income for the year ending 2020 was from the Government's Job Retention Scheme (JRS) and from Covid related business grants arranged through various Government schemes.
62. Taking those grants and JRS payments out, the club would in fact have made a loss of £29,000 and its reserves would have been in the order of £75,000 in deficit, a significantly worse financial position.
63. The Club's financial circumstances were obviously precarious and it seems therefore it is highly plausible that an accountant highlighted to the Respondent the serious difficulties that it faced. It was also quite apparent and common knowledge to anyone who lived through the time that in November 2020, the pandemic was far from over and things were far from certain. On 5 November 2020 for example the second national lockdown had come into force for England and on 24 November 2020, the Prime Minister had made announcements on restricting the number of households that would be able to meet up during five day Christmas period between 23 and 27 December 2020. Therefore, the Respondent faced an uncertain future.
64. On 25 November 2020, there was a meeting of the Committee at which Mr Crumpton was present. The meeting minutes record as follows (page 194):  
"Treasurer report  
"There was a general discussion around the Business and Charity accounts and it was excepted (sic) by the Committee.  
"  
The Chairman then ask for the meeting to discuss Business needs and staffing levels in the coming months.  
"It was agreed by all that the business activity is going to be unknown when the Welfare finally gets back to normal pre COVID 19 out break.  
"Discussions then took place regarding plans to allow re/opening problem that may be uncounted.  
"A motion to restructure the staffing levels in an effort to allow the viability of the business to be judged over the comings. ALL AGREED.  
"To safe guard the present staff one post would be deleted.  
"As there as been no one in the post of Steward, it was agreed.  
"That. The removal of the Stewards position be deleted, ALL AGREED."
65. Mr Taylor explained that the logic of defeating the Steward's post was that it was a salaried position that was fixed, whereas the bar staff were on zero

hours contracts and so they not undertaking work was of no financial consequence to the Club whereas the Steward would have to be paid regardless. It was a fixed expense in other words. I accept this was their reasoning.

66. Mr Taylor also explained, and I accept, that after the Club had reopened attendance had been more limited than it was prior to the covid-19 pandemic and lockdown. They were only open for 4 hours a day and several people had kept away from the Club, either because they were shielding, or they simply felt uncomfortable about going out and risking the contraction of the virus.
67. On 28 November 2020, Mr Pyatt alleges that he spoke to Mr Crumpton and, in the discussion, he asked about when he was going to be paid his wages and complained that he had not been paid. I make my finding below on this.
68. On 29 November 2020, another meeting took place at the Respondent (page 195) and records as follows:  
“The Chairman (Mr Crumpton) told the committee that he had called the meeting after he was approached by Mr Pyatt for any update on the operations at Bentinck. He had also received updates from J-T regarding solicitor that was looking into the lease and giving advice for 20 Sutton Rd,  
“It was again agreed by all that the business activity is going to be unknown when the Welfare finally gets back to normal pre COVID 19 outbreak.”  
“A motion to send a letter to My (sic) Pyatt asking for a meeting Saturday 5th of December was put forward.”
69. “This was to inform Mr Pyatt of the new staffing structure at the Bentinck....”
70. On 1 December 2020, Mr Crumpton delivered to Mr Pyatt a letter that is undated but it is agreed between all parties was received by Mr Pyatt on that date. The letter (page 196) reads, so far as relevant, as follows:
71. “Following a discussion between yourself and Kelvin Crumpton, recently regarding the future of Bentinck Miners welfare.  
“At an emergency Committee meeting of Bentinck Miners Welfare.  
“The committee, looked at the future business needs and staff requirements to keep both the Charity and Business of Bentinck Miners Welfare at a sustainable and viable level after lock-down.  
“There was unanimous agreement that the position and role of the Steward will no longer exists for the foreseeable future.  
“The Committee have therefore deleted (removed) the position of Stewards from the Club employee’s structure.  
“The committee would like to invite yourself and Anita to a meeting on Saturday 5th December 2020 at 11 AM at Bentincks Miners Welfare,  
“At this meeting it is hoped to clarify the reasoning behind the above decision....”
72. It is common ground that this was a letter of dismissal.



73. He was not paid any notice pay or given notice. There is no suggestion grounds existed that might justify a summary dismissal.
74. Mr Crumpton did not give evidence to the Tribunal, although Mr Taylor had been at those meetings and was able to confirm that the minutes accurately recorded what was discussed and how the meetings came about.
75. It is common ground that Mr Crumpton has been and continues to be very ill, the details of which do not matter. The Claimant made the point that Mr Crumpton had not attended to give evidence. However, I do not conclude that this is a case where Mr Crumpton's non-attendance is something that can be held against the Respondent.
- 75.1. Firstly, the reason for Mr Crumpton's non-attendance and the reason there is no evidence from him is a good reason.
- 75.2. Secondly, what Mr Crumpton has written in the letter of 1 December 2020 (or thereabouts) is supported by what is in the minutes (to which Mr Taylor can speak)
- 75.3. Thirdly, I have other evidence from which I can draw conclusions about the impact of the meeting between the Claimant and Mr Crumpton on 28 November 2020.
76. I find as a fact and accept that the Claimant did ask Mr Crumpton on 28 November why he was not being paid. He had already asked in August 2020 and nothing had changed. It therefore seems entirely sensible that he would have raised the issue again. The fact that a discussion took place is supported by the minutes of 29 November 2020 and by Mr Crumpton's own letter of 1 December 2020. It seems highly likely he would have discussed the future of the Club given the uncertainty caused by the pandemic. There is no evidence of malice or bad faith on Mr Pyatt's part. It would seem inherently plausible he would be concerned he had not been paid. I find as a fact the enquiry was made in good faith.
77. I accept, given that the dates and what is said in the minutes and the letter, that when Mr Pyatt raised the issue about the fact he had not been paid, that prompted the convening of the meeting on 29 November and the letter of 1 December.
78. However, I find as a fact that had no bearing on why he was dismissed. It may have prompted the meetings, but his fate was already sealed and the decision made. As a fact,
- 78.1. on 25 November 2020 the issue of staffing changes had already been discussed.
- 78.2. the Club was in dire financial straits, depending significantly on Government funding.
- 78.3. the Steward's business was a fixed cost, the removal of which would go somewhat to alleviating the costs that the Respondent was facing.

I also take into account that if it were the case that his complaints about not being paid were relevant, then action would have been taken in August when he first raised it.

79. Therefore, factually I conclude that there is no causative link between him raising the query and what happened.
80. Finally, I deal with holiday pay. He was entitled to 28 days per year in line with the statutory amount. He did not take any holiday at any material time. He was not paid for any untaken leave when his employment ended.

## Law

### ***Employee status***

#### Statute and regulations

81. The **Employment Rights Act 1996 section 230** provides so far as relevant:
- “(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- “(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- “ ...
- “(4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
- “(5) In this Act “employment”—
- “(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and ...
- “and “employed” shall be construed accordingly....”
82. The definition above is mirrored in the **Working Time Regulations 1998 regulation 2** for the purposes of those regulations.

#### *Meaning of employee*

83. There is no complete and unchanging list of criteria to determine if a contract is one of employment or one for services. Each case must be considered on its own facts.: **Warner Holidays Ltd v Secretary of State for Social Services [1983] ICR 440 QB.**
84. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433 QBD**, McKenna J provided this guidance:
- “A contract of service exists if these three conditions are fulfilled.
- “(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
- “(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master.

“(iii) The other provisions of the contract are consistent with its being a contract of service.”

85. The passage was approved in **Autoclenz Ltd v Belcher and others [2011] ICR 1157 UKSC**.
86. It seems that there is no requirement that the consideration need be money. It could be something else of value: see obiter comments in **Secretary of State for Business, Innovation and Skills v Knight [2014] IRLR 605 EAT**
87. The obligation on one party to provide work and on the other to accept work are the irreducible minimum of mutual obligation necessary to create a contract of employment: **Carmichael and another v National Power plc [1999] ICR 1226 UKHL**.
88. When looking at the facts, a Tribunal should ask itself if history of the relationship showed that it had been agreed there was an obligation on the Claimant to do at least some work and a correlative obligation on the employer to pay for it: **Dakin v Brighton Marina Residential Management Co Ltd UKEAT/0380/12 EAT**.
89. The mere fact a putative employee can arrange their own hours, holidays and amounts of work does not prevent a contract from being one of employment: **Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 CA**.

#### ***Unauthorised deduction of wages***

90. The **Employment Rights Act 1996 Part II** regulates the right of an employer to deduct from an employee’s wages. If wages are not paid, then that is an unauthorised deduction absent some justification for non-payment.
91. A sum can be recovered under the ERA 1996 if it is properly payable. That means there must have arisen a legal entitlement to the money: **New Century Cleaning Co v Church [2000] IRLR 27 CA**.

#### ***Right to interpret the contract***

92. A Tribunal is entitled to interpret a contract of employment to determine what sums are properly and lawfully due from the employer to the employee: **Agarwal v Cardiff University [2019] ICR 433 CA**.
93. The approach to interpretation of an employment contract is the same as that used in the civil courts: **CF & C Greg May Ltd v Dring [1990] ICR 188 EAT**.
94. Determining what wages are properly payable requires consideration of all the relevant terms of the contract, including any implied terms: **Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714 CA**.

#### ***Failure to pay holiday pay***

95. The **Working Time Regulations 1998 regulation 30** entitles a worker to bring a claim for a failure to pay holiday pay in respect of holiday to which they were entitled but had not taken at the end of their employment, as required by **regulation 14**.
96. **Regulation 14** (as in force at the time) provides as relevant:

“...(2) where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

“(3) the payment due under paragraph (2) shall be—

“(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

“(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

“(a × b) – c

“where—

“a is the period of leave to which the worker is entitled under regulation 13 and regulation 13a;

“b is the proportion of the worker's leave year which expired before the termination date, and

“c is the period of leave taken by the worker between the start of the leave year and the termination date....”

97. **Regulation 14** does not provide for the rounding up or down of leave entitlement.

98. The **Employment Rights Act 1996 section 104** provides

“104. — Assertion of statutory right.

“(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

“... (b) alleged that the employer had infringed a right of his which is a relevant statutory right.

“(2) It is immaterial for the purposes of subsection (1)—

“(a) whether or not the employee has the right, or

“(b) whether or not the right has been infringed;

“but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

“(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

“(4) The following are relevant statutory rights for the purposes of this section—

“(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment Tribunal,...”

99. It is for the Claimant to prove that the assertion of the right was the reason or principle reason for his dismissal. Where different reasons are advanced, the Tribunal must decide for itself what the evidence shows the reason to

be, and may draw inferences if appropriate: **Derbyshire v Malcolm B. Davis and A Adenle t/a Samuel Davis UKEAT/0099/03.**

### **Conclusions**

100. Applying the law to the findings of fact I come to the following conclusions.

#### ***Employment status***

*Was the Claimant an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996? If so, what date did the employment start?*

101. The Respondent employed the Claimant from 8 June 2020 to provide caretaking and security duties; and from 6 July 2020 the Claimant commenced his employment with the Respondent as the Steward. This reflected the common understanding between the parties and by that time all the key terms had been agreed. Mr Pyatt was present, ready and willing to undertake work. I do not consider the Respondent's failure to provide him with work should detract from that conclusion, given all the other facts that show the agreement as to terms etc. and common intention he would become Steward when the Club (re-)opened. Their failure to provide work was their own default and not reflective of there being no employment agreement.

102. I have considered whether 30 June could be a start date of his employment as Steward. In my view, it could not. It seems to me that is as consistent as with someone who is going to become an employee attending a meeting with a new employer as anything else and of course, other than being at the meeting, he was not doing any of the tasks that one would expect of a Steward since the place was still closed to members of the public.

103. I have considered if the fact that my conclusion means he became Steward while having to pay rent for the house is undermined by the fact that the house is supposed to be provided free to the Steward. In my view it does not. The amount of rent is negligible. This adequately and credibly explains why no-one raised it. I do not accept that such a small matter that neither party considered undermines my conclusions above.

#### ***Unfair dismissal***

*Was the Claimant dismissed?*

104. Yes.

*Was the reason or principal reason for dismissal that the Claimant asserted a "relevant statutory right" within the meaning of **section 104(4)(a)**?*

105. It was not a reason for his dismissal. He was going to be dismissed because the Respondent needed to save money because it was in dire financial circumstances. It does not matter whether it is strictly a redundancy situation or a business-restructuring situation. The fact he mentioned his wages did not affect the decision to dismiss him. This is demonstrated by the fact he had earlier raised the matter and no consequences arose and by the fact at an earlier meeting the Respondent had decided to "delete" the position of Steward. The reasons for the deletion of the post of Steward are credible and reasonable.

106. While not relevant, I make it clear I am satisfied the Claimant raised issues of pay in good faith.

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

107. This is strictly irrelevant. However because of the Respondent's financial circumstances and the ongoing uncertainty and effects of the pandemic, and that he was a fixed cost (as opposed to the other staff who were on zero-hour contracts), I would have concluded that there is a 80% chance this employer would have fairly dismissed the Claimant. The reduction is to reflect the fact the employer may have elected to use the furlough scheme to continue employment for a while but reflects that the scheme covered at most only 80% of wages. The Respondent was in difficult financial circumstances and even that shortfall would have proven difficult to maintain for any lengthy period.

***Wrongful dismissal / Notice pay***

*What was the Claimant's notice period?*

108. In my opinion the contract of employment incorporated the minimum statutory notice periods provided for in the **Employment Rights Act 1996 section 86**. There is no evidence that any other agreement was reached on notice, so it is reasonable to presume the parties agreed the statutory minima. He was employed for less than 2 years so is entitled to 1 weeks' notice.

*Was the Claimant paid for that notice period?*

109. It is common ground he was not. Therefore, the Respondent owes the Claimant 1 week's pay.
110. I have not heard submissions on the amount but note that at the point of dismissal his salary was £18,000.

***Unauthorised deductions from wages***

*Were the wages paid to the Claimant less than the wages he should have been paid?*

111. He was not an employee or worker before 8 June 2020 based on my findings of fact. Therefore, there are no unauthorised deductions for this period.
112. For the period 8 June 2020 to 5 July 2020 inclusive he received a rent reduction that, while not money, was certainly of money's worth. The financial benefit was the difference between the unknown market rent and the peppercorn rent. This was in return for undertaking caretaking and security. He was not the Steward at this time. This is what the parties agreed. Therefore, he received what he was owed, no more and no less. There are therefore no deductions for this period either.
113. The Claimant did not allege any payment for this period was in breach of the **National Minimum Wage Act 1998** and so I do not consider that further except to presume there was no breach. I do not see any reason that the existence of that Act or its provisions would invalidate my conclusion.

114. For the period 6 July 2020 to 1 December 2020 inclusive he was employed as a Steward. His salary was fixed at the amount of £18,000 per annum during this time
115. He was paid nothing for that period. The Respondent had no authority to withhold payment. Therefore, this amounts to an unauthorised deduction.

*How much is the Claimant owed?*

116. I have not heard submissions on the amount but the time for which he was not paid is 149 days during which his salary was £18,000.

**Breach of Contract**

117. For the same reasons that the Respondent is liable for an unauthorised deduction of wages, so the failure to pay wages is a breach of contract. The amount recoverable will be determined at a future hearing, but I note that the Claimant will not be entitled to 2 lots' of back-pay. Any pay received for unauthorised deduction of wages would reduce and extinguish any award for back-pay that might be awarded as a breach of contract.

**Holiday Pay (Working Time Regulations 1998)**

*How much leave had accrued?*

118. His employment began on 8 June 2020 as caretaker/security and on 6 July 2020 became Steward and ended on 1 December 2020. The number of days between the start and end of his employment was 177 days. He is entitled to 28 days leave and therefore  $\frac{177}{365} \times 28$  gives him an entitlement of 13.6 days.

*How much paid leave had the Claimant taken in the year?*

119. He did not take any leave and there was no carry over from previous years.

*How many days remain unpaid?*

120. 13.6 days remain unpaid. Therefore, he is entitled to 13.6 days of pay for leave to which he was entitled but has not taken.

**Consequences**

121. There will be a remedy hearing to determine the amounts owed. Directions will follow separately.

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Employment Judge Adkinson

Date: 16 February 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

**Notes**

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Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-Tribunal-decisions](http://www.gov.uk/employment-Tribunal-decisions) shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.