EMPLOYMENT TRIBUNALS

Claimants: 1. Mr M Iceton
2. Mr E Maswaya

Respondent: 5th Leisure Limited

HELD AT: Manchester **ON:** 7- 9 February 2018
9 May 2018
(in Chambers)

BEFORE: Employment Judge Sherratt
Ms D Doughty
Mr C S Williams

REPRESENTATION:

Claimants: Litigants in person
Respondent: Mr S Lewinski, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimants did not make protected disclosures.

2. The claimants were unfairly dismissed for the purposes of section 98 of the Employment Rights Act 1996.

3. Questions of remedy will be considered at a remedy hearing if the parties are unable to resolve matters between themselves.

REASONS

Introduction

1. The respondent operates a nightclub in Manchester. The first claimant was employed from October 2007 until June 2017 having started work as a bartender. By the time of his resignation he had risen to the position of Assistant Manager.

2. The second claimant was employed from June 2001 to 23 June 2017. He also started as a bartender and his various promotions took him to the position of General Manager.

3. The respondent had another General Manager, Keith Ifield, who was senior to Mr Maswaya. Mr Ifield was the designated premises supervisor and therefore principally responsible for running the nightclub but he did not usually work in the evening and he delegated the designated premises supervisor role to the two claimants who each held personal licences enabling them to be responsible for the sale of alcohol in the premises.

4. Nigel Johnston is the principal shareholder in and director of the respondent. Although he did not hold any of the licences he took the view that he would have been the person charged with corporate manslaughter had a disaster occurred within the premises.

The Evidence

5. The claimants each gave evidence and were cross examined. Nigel Johnston gave evidence on behalf of the respondent and called Sami Alfarhan who had been employed by the respondent since 2007 and who had been head doorman for in excess of ten years.

6. There was a bundle of documents containing in the region of 400 pages.

The Issues

7. At a preliminary hearing held before Employment Judge Porter on 27 September 2017 the following issues were identified:-

7.1 Did the claimants make one or more qualifying disclosures within the meaning of section 43B Employment Rights Act 1996 ("ERA")?

7.2 Were any of the qualifying disclosures protected disclosures within the meaning of section 43A?

7.3 Were the claimants subjected to detriment on the grounds that they had made protected disclosures?

7.4 Was the claim of detrimental treatment under section 47B ERA, or part thereof, out of time? If so, should time be extended to allow that part of the claim to proceed?

7.5 Had the respondent committed a fundamental breach of contract entitling the claimants to resign?

7.6 Was the reason for that fundamental breach the claimants' protected disclosures?

7.7 Were the claimants unfairly dismissed within the meaning of section 103A ERA 196?

7.8 Were the claimants unfairly dismissed within the meaning of section 98 ERA 1996?

8. The claimants were ordered to provide further information in relation to their alleged disclosures. The first disclosure was said to relate to concerns over the safe operation of some of the venue's emergency exits with information being disclosed to Nigel Johnston in September 2016 regarding concerns over construction work that had been carried out in some of the venue's emergency exits which the claimants believed heavily compromised the safe operation of the exits in question, something which they believed amounted to a criminal offence as the company was failing to comply with its legal obligation to ensure the safe operation of emergency exits and as a result the safety of members of the public had been or was being endangered. The disclosure was said to have been made verbally in person on more than one occasion by both claimants.

9. The second alleged protected disclosure was made regarding concerns that the respondent was in breach of its legal obligations under the Licensing Act 2003 to protect children from harm as a direct result of the appointment of Ashley Johnston (son of Nigel Johnston) to a new operational management role. The disclosure was made on 1 November 2016 to Nigel Johnston and it was to the effect that Ashley Johnston's responsibilities included managing the queue, the outside of the venue, admissions and overseeing who was suitable to enter the premises based on either their level of intoxication or their age. The first claimant disclosed that on more than one occasion since the appointment of Ashley Johnston in September 2016 the first claimant had had to intervene and overrule a decision made by Ashley Johnston in order to prevent customers under the legal age of 18 from entering the venue. It is alleged this meant that the company was failing to implement adequate safeguards which amounted to a criminal offence under the Licensing Act 2003.

10. The respondent's premises licence was introduced into the hearing and one of the conditions was that:

> "Persons under 18 shall not be allowed entry to the premises unless they are attending a private pre-arranged function or event."

11. Each claimant raised a written grievance on 8 March 2017. The first claimant as Assistant Manager raised his grievance with Keith Ifield and the second claimant as General Manager raised his grievance with Nigel Johnston, with the matters raised including a reiteration of the protected disclosures allegedly made in September 2016 regarding concerns over the safe operation of some of the emergency exits and on 1 November 2016 concerning Ashley Johnston.

12. The alleged detriment involved the diminution of their managerial roles following the appointment of Mr Ashley Johnston and the systematic steps allegedly taken by the respondent to manage the first and second claimants' exits from the business involving a reallocation of some of their duties and responsibilities, undermining their job roles, a sham redundancy exercise, and an attempt unilaterally to change the terms of their contracts of employment by imposing different shift patterns, a breach of the implied duty of trust and confidence and a failure to investigate their grievances within a reasonable time.

The Evidence – Mr Iceton

13. Matthew Iceton provided a witness statement and was cross examined.

14. In his witness statement he said that in September 2016 building work began which heavily compromised the safe operation of some of the emergency exits. In addition to the danger posed to members of the public through failing to maintain fully functioning emergency exits the venue was frequently left in an unserviceable state due to waste, debris and tools left in the venue by builders for him and his night time staff to clear away. They were forced to carry out the task on a regular basis multiple times a week from September 2016. He produced various photographs depicting the unsafe emergency exits and frequent poor condition in which the premises were found. Despite him and his colleagues raising concerns with Nigel Johnston on more then one occasion regarding this nothing was done to rectify the problem. He raised his concerns regarding the emergency exits and the frequent unserviceable state the venue was left in at night time in September 2016 verbally in person, and since issuing the claim he had reiterated the details of his protected disclosure in response to a request for further information and in line with the policies set out in the staff handbook.

15. He referred to September 2016 when Mr Ashley Johnston, Nigel's son, was taken out of his position as a bar manager and posted in a newly created managerial position working closely with him and Mr Maswaya whilst operating the venue at night. Neither he nor Mr Maswaya had any prior warning of the appointment which was not discussed with them. In his view duties and responsibilities previously lying with him and Mr Maswaya were stripped from them and given to Ashley Johnston, which threatened his position as Assistant Manager as it diminished his responsibilities and undermined his authority. He had serious concerns but was fortunately able to intervene and overrule the decision made by Ashley Johnston in order to prevent customers under the age of 18 from entering the venue.

16. He had a meeting with Nigel Johnston in a coffee shop on 1 November 2016. He produced his typed notes of that meeting in the bundle. They had not previously been disclosed. According to the note he told Nigel he was not happy with the recent appointment of Ashley and that on more than one occasion he had been in a position where he was able to intervene and overrule a decision made by Ashley to prevent customers under 18 from entering. He believed the company was in breach of its licence and its legal obligations by failing to implement adequate safeguards to protect children from harm as a result of Ashley's appointment. According to the note he referred to having concerns over Ashley's ability to undertake the responsibilities and for the future of his role as responsibilities taken on by Ashley had previously been carried out by him when managing the venue. He felt his role had been diminished and he had much less work to do. He had always had control of decisions on who should enter. As the holder of a personal licence in connection with the sale of alcohol he had responsibility to determine who was fit to enter due to the level of intoxication. He went on to deal with concerns regarding the building and construction work and the safe operation of some of the emergency exits. Other matters were discussed. In his concluding paragraph he wrote:

> "I asked Nigel what my role now entailed as from my perspective many of my duties have been reallocated to other people. I suggested to Nigel that where I used to manage the queue, the outside of the venue, admissions to the venue, drunkenness and who was suitable to enter the premises, the inside of the venue including the glass collecting staff and the stewards, all of these jobs were now the responsibility of other people. Nigel told me that he did not want me to be busy, that as a manager I was there for when the shit hit the fan and I need to spring into action. He went on to say that I was there to speak with any licensing officers from the council or from the police and to generally be there if I am needed for anything. Whilst I am fine with this position it does strike me that it is unusual especially considering that he had just informed me that he needed to reduce costs, increase turnover and make the business run more efficiently, that he would actively want his most experienced managers to do less in their roles. I did not however question this at this time."

17. In his witness statement Mr Iceton went on to describe how in January 2017 the company began redundancy proceedings against him and Mr Emmanuel Maswaya citing a significant downturn in business over the last two years and that it had been necessary for members of the management team to take a more hands on approach. The redundancy consultation letter referred to:

> "…a significant downturn in business over the last two years. This has meant that over time, it has been necessary for members of the management team to take a more hands on approach when it comes to the operation of the business…reduction in business… for example the decrease in customer numbers and opening nights has meant that the work some employees carry out on a day-to-day basis has also decreased…The business can no longer continue (in) this manner and as a result we have been forced to consider where we can save costs and have identified a number of roles as at risk or redundancy. Based on current and foreseeable business projections for the club we have identified a need for only one General Manager. We therefore propose to make redundant one General Manager position. We currently employ two General Managers (including you). It is therefore with regret that I must inform you that your position has been identified as at risk of redundancy."

18. The claimant attended a redundancy consultation meeting with Keith Ifield on 18 January and he set out various views on the figures provided as to the numbers of people attending the club and whether or not there has been a decline. In his view the only significant decline in business took place after the respondent began redundancy proceedings against him and Mr Maswaya.

19. After a period in excess of four weeks Mr Johnston said that the company would not be pursuing the redundancy but they would require him and Mr Maswaya to work more nights as Mr Johnston took the view that the club could not run with only one manager. This was in direct contradiction of the proposed redundancy grounds and led him to believe that the entire redundancy exercise was a sham and was part of the systematic steps being taken to manage his exit from the business. In a conversation on 16 January Mr Johnston told them the proposed new shift

pattern would be a change of contract and that if they did not want to accept it then there may need to be a further discussion on redundancy. Mr Iceton did not accept the proposed unilateral changes to the terms of his contract as he felt they were unreasonable, unnecessary and with a hidden agenda to make their working life unbearable.

20. After that meeting Mr Johnston sent an email to them on 17 February to clarify matters discussed on 16 February. With reference to the admission of people who may have consumed too much alcohol: "The manager and Ash(ley) to make the final decision to refuse entry". With regard to refusing entry to people without ID, "The head doorman is to refer any refusal to the manager or Ash for final decision".

21. As to the redundancy situation Mr Johnston wrote:

> "It is my intention to suspend the current redundancy action regarding the managers and will monitor the situation on how we operate the club, I discussed my thoughts on both Manny and Matt on the three busy nights working together…also improving the supervision of the club generally at night, this is a potential change to your working hours and would like your thoughts on rather than the regular two nights one week, three the next, and the current day hours which I am unsure about, to four nights with the day shifts making up the hours, please give me your individual thoughts on this…"

22. In a formal letter of grievance addressed to Keith Ifield on 8 March 2017 with the heading "FORMAL LETTER OF GRIEVANCE – CONSTRUCTIVE DISMISSAL" Mr Iceton set out various matters over four pages of A4. With regard to the construction projects within the venue he wrote:

> "Throughout this construction work I, and the rest of the venue's management team, were very accommodating. The venue was frequently left in an unsafe and unserviceable state when we arrived to operate the venue at night time. Despite this, we always ensured that all debris was cleared, cleaning was carried out and that all legal obligations associated with the running of a licensed premises (such as the presence of fully operational emergency exits) were observed. Throughout the whole of 2016 this was a weekly occurrence, often with us arriving at the premises at night not knowing what state the venue would have been left in."

23. He then went on to refer to September 2016 and intrusive construction work which heavily compromised the safe operation of some of the emergency exits.

24. He set out the change to the role of Ashley Johnston to "a newly created managerial position working closely with me and my colleague, Emmanuel (Maswaya)" whilst operating the venue at night. He was concerned that Ashley lacked the experience and training to carry out the responsibilities allocated to him to the necessary standard. He was entrusted by the licensee of the venue to operate with a strict and robust admission policy. On more than one occasion since Ashley's appointment he had been in a position where he was able to intervene and overrule a decision made by Ashley to prevent customers under the age of 18 from entering the venue. He went on to refer to the 1 November meeting with Nigel Johnston.

25. Towards the end of his grievance he wrote:

> "In addition to the aforementioned grievances outlined above and in reference to one of my above concerns, I would like to take this opportunity to make a statement in relation to the section of my staff handbook entitled 'whistleblowers', section 1(b) 'failing to comply with a legal obligation'. It is my opinion that placing Ashley Johnston in a position of responsibility to determine who is permitted to enter the venue has put the company at unnecessary risk of breaching our licensing conditions under the Licensing Act 2003, on the grounds of failing to put adequate safeguards in place to protect children from harm. It is my firm belief that due to a lack of experience and adequate training Ashley may have on a number of occasions allowed this to happen, and I have had to personally intervene to prevent this on two occasions. As a licence holder and manager at the company I feel I must bring this to your attention."

26. The claimant attended a grievance meeting on 28 March with Keith Ifield. On 2 May 2017 a letter was sent to the claimant stated to be by way of update following the recent grievance meeting, noting that the grievance letter was very detailed and contained a number of issues which required thorough investigation. Mr Ifield's enquiries were ongoing and he would endeavour to conclude them as soon as possible and Mr Iceton's continued patience at this time would be greatly appreciated but if he wished to discuss matters further or had any questions he should not hesitate to contact Mr Ifield.

27. On 22 May 2017, by which time he had not received a written response to his grievance, the claimant submitted his resignation with a view to working a one month notice period in line with his contract. He set out the reasons. He had submitted a formal grievance in writing on 8 March 2017 and two months had passed since the company received it and as yet nothing productive had been done to resolve any of the issues he raised. He felt that a complaint of this magnitude should be met with appropriate action and seriousness by the company and it was clear to him that it was not the case. He felt the company had no interest in taking his complaint seriously and since submitting his letter the working conditions and stress he found himself under had increased even further. He referred to two impromptu conversations concerning the grievance letter but without notice on 20 February and 3 May. He noted Mr Johnston made clear that he did not agree with any of the grounds of the formal grievance and that he had not acted wrongfully towards him in any way, so he did not feel any grievance investigation conducted now could be done with any integrity and without bias as it was clear to him that the outcome would be a finding of no wrongdoing by the company.

28. He referred to Mr Johnston saying that delays in relation to the grievance were as result of Keith Ifield and the company solicitor. Whilst feeling this may be false Mr Iceton did not feel he could pass on the blame for these failings. He should have been proactive to resolve the issues.

29. He referred to performance issues raised by Mr Johnston in their discussions and a comment that Mr Johnston saw no signs of stress in him. His stress was very real. He referred to the reasons outlined in his formal letter of grievance dated 8

March 2017 as to why he believed the company had been trying to constructively dismiss him and he felt the lack of action taken in response to his grievance demonstrated the company's distinct lack of respect for him and furthered his belief that he was not wanted at the company any longer. Despite the suffering he had endured over the past 18 months which has had significant effect on him inside and outside of the workplace, it was with great sadness that he gave his resignation. He had worked hard for ten years and had endeavoured to run the business to its optimum and had put the interests of the company before his own. By failing and refusing to deal with his legitimate concerns and grievances he was left with no alternative but to resign and pursue the matter through the Employment Tribunal.

30. There was a discussion with Mr Johnston concerning garden leave for the remainder of the notice from 7 June until 23 June, and on 10 June Mr Iceton wrote to terminate his employment with immediate effect because Mr Johnston had not responded to an email sent by Mr Iceton on 8 June asking him to confirm the terms of his garden leave. He found himself struggling to keep his emotions under control since being instructed to take garden leave. He was not prepared to work the balance of his notice whether by way of garden leave or otherwise, and the mere fact that he was still an employee was having a negative impact on his mental health. Continuing any attachment to the company was not worth it.

31. The claimant was cross examined. He accepted that in his statement of main terms of employment it stated that:

> "Your normal hours of work are between Monday and Saturday. Actual hours and days of work are dependent on the needs of the club."

32. He agreed that this meant that he could be asked to come in to cover or do more night hours.

33. The claimant accepted that the respondent's whistle-blowing policy provided that in the first instance concerns should be reported to the General Manager or Deputy Manager and:

> "If you are not satisfied with the explanation or reason given to you, you should raise the matter with the appropriate organisation or body e.g. the police, the Environment Agency, Health and Safety Executive or Social Services Department."

34. The claimant would not say there was an obligation to report to third parties. It was an ongoing issue that they were trying to resolve. He did not want to jeopardise relations. He had raised concerns in an ongoing attempt to resolve matters. He would not accept he should have raised it with the authorities because they never got to the end of the explanation or reason with the respondent. It was an ongoing matter over a period of a few months. He did not raise the issues with the relevant authorities but with the respondent. A grievance was submitted followed by a resignation. They were working in an environment where they did not want to jeopardise the company's relationship with the authorities.

35. The various photographs within the bundle were taken by him and Mr Maswaya. According to him he regularly showed the photos to Nigel Johnston,

sending them by text message. He agreed there were no such texts in the bundle and no reference to them in his witness statement either.

36. Having resigned from his employment he did not take his concerns raised during his employment to the authorities.

37. He accepted that as a personal licence holder he had obligations with regard to health and safety and the admission of minors to the club. He did not believe he had the power not to open the club. He could not have not opened the club – he would have lost his job.

38. When working as duty manager he was responsible for health and safety. They did their best with the resources available. To suggest they had the power to refuse to open the venue – he would have been sent home and the director would not have allowed it.

39. They did all they could to try and resolve matters – to make it safe and serviceable. They made disclosures.

40. The premises were not in a good state of repair. There were cables hanging from the ceiling which may cause a problem. It may be passable if the cables did not obstruct but if they burnt and dropped then they may be a problem. Every night they tidied things up but the photos speak for themselves.

41. His obligation as a manager was to ensure that fire exits were safe. He ensured fire exits were unobstructed and safe to the best of his ability.

42. He was promoted to Assistant Manager in 2012. He did not know, until these proceedings, that Mr Johnston had chosen to promote him over his son, Ashley.

43. When acting as manager he was responsible from opening to locking up for the safety of the customers. Mr Maswaya had a greater responsibility for health and safety than he did. Mr Ifield, the designated premises supervisor, was responsible for the overall running of the club but when he was managing it he was the responsible person.

44. He believed the premises were unsafe after they were tidied up and still admitted members of the public.

45. He accepted that the venue did close during some of the earlier works on some nights. When the dance floor was being replaced, for instance, it was not safe for the club to be open.

46. When the work was being done every night there were tools and debris to be cleared away. It went on over months. He agreed that staff came in early to help with clearing up before they did their evening shift. He and Mr Maswaya were in charge of them. The night staff came in early because the cleaners would not come in at night. They had already cleaned in the day. The staff were paid for doing the hours they worked prior to their normal shifts. They had the choice whether or not to do it. Some of them did not. He accepted that a Mr Dodd was employed by Mr Johnston in 2016 to tidy up after the builders but he worked in the day. Gloves were available for the

staff clearing up at night but there was insufficient PPE to cover everyone. As part of the work they would use cable ties to tie cables away but he did not believe these things should be the responsibility of untrained staff. There was little choice but to make the best of the situation and to open the club.

47. He worked closely with Sami Alfarhan, the head doorman. He trusted him. They had barely spoken since he left the club.

48. Mr Iceton accepted that there were good relationships with all of the relevant authorities with whom the respondent cooperated. He accepted he could report anything he felt needed to be reported to the authorities but never did so.

49. He denied asking for voluntary redundancy at any stage.

50. He accepted that all of the photographs in the bundle were taken before the club opened to the public, with the pictures showing what they had to tidy away. They never said the exits were locked at night but you can see the fire exits with e.g. cables hanging down. With reference to another picture he said that the obstructions would have been moved. He accepted that he could not show pictures of fire exits that were obstructed when the club was open to the public but he could show emergency lights hanging down.

51. As to the disclosure set out in his witness statement where he said he had raised his concerns regarding the emergency exits and the frequent unserviceable state the venue was left in at night time in September 2016 verbally in person, he confirmed that he did make the disclosure. On numerous occasions in the club and around the venue it was discussed. He did not have the exact date when the fire exits were blocked. He was not saying one was blocked but it was a risk if one was blocked. The risk, if they were blocked, was one of the risks he was elaborating on now. The situation changed each night. There was no satisfactory response to the issues raised.

52. Mr Iceton dealt with the police but never with the Health and Safety Executive or the fire officer.

53. When a police constable carried out an unannounced licensing inspection on 15 October 2016 when the club was open Mr Iceton took him around all of the emergency exits. He accepted that the email sent by the police constable following the visit had no mention of blocked emergency exits. He agreed Mr Johnston was clear on wanting obstructions moved. He and Mr Johnston were both keenly interested in fire exits not being obstructed. He agreed there was no benefit to Mr Johnston for fire exits being obstructed or not working. He agreed it would have been a serious thing if the police constable had found fire exits blocked. He agreed that Mr Johnston came down on people if the fire exits were not open. He accepted Mr Johnston was hot on fire exits being made available i.e. the bars on the doors that keep them shut when the club was closed being removed prior to the club opening.

54. He was aware there had been a visit by the fire officer but not aware that no issues had been found with the fire exits.

55. At the meeting on 1 November 2016 with Mr Johnston he had not asked for voluntary redundancy. He had not told Mr Alfarhan that he was going to ask for voluntary redundancy nor that voluntary redundancy was not going to happen. Mr Alfarhan must have made this up as it was not a conversation they ever had.

56. In his meeting with Mr Johnston off site on 1 November there was a reference to fire exits and building materials. After the meeting he carried on as normal with Mr Johnston. Mr Johnston was engaging with the authorities.

57. With regard to his grievance letter nothing was done as far as he was aware. There was the initial grievance meeting with Mr Ifield.

58. There was much discussion on the question of redundancies with counsel putting many figures concerning profit and loss and footfall to Mr Iceton, who accepted there was a declining trend in income, but he thought that at the time of the redundancies the decline was reduced compared with previous years. He agreed it was understandable for Mr Johnston to be concerned at the figures. Mr Johnston had from February 2016 become more involved with the business than previously and then from August 2016 he was hands on for up to six nights a week.

59. As to admissions to the club, for the vast majority of the night the manager would be there at the front door. The manager was responsible for the admissions and for security both inside and outside. He agreed it was legitimate for Mr Johnston to seek to improve the attendance and that his son, Ashley, was asked to work with the door staff to seek to get more people in. Giving the role to Ashley took the responsibility from Mr Iceton. It was always the manager's job before that. Mr Johnston never put Ashley's new role to them as a benefit. They had no choice – it just happened. He did not feel it was a benefit because he was still on the front door for the vast majority of the night. They were told Ashley was in charge of who attended and/or was admitted. They were not told they could overrule Ashley but they did overrule him. They had to although they were not supposed to. They highlighted matters to him and he had to go along with them. Mr Johnston would train Ashley as to who could come in. He was not involved in training Ashley.

60. Looking at Mr Johnston's 17 February 2017 email, this was sent four months after Ashley had been doing the job. The situation described was not the situation as it was when Ashley was appointed four months earlier. This followed his complaint in November 2016 about under age people coming in. There was no significant change about the way things were run since Ashley had come in. Although he had raised the matter in his grievance he did not mention it to the licensing authority. Yes he should have done but did not feel they were in a position to do it.

61. As to attendance figures, they put a figure in each night they were working. The attendance figures were looked at regularly. He knew by November that Nigel Johnston was trying to increase the turnover and reduce the costs.

62. He did not recall sharing the in depth analysis of the attendance figures with the door staff or the bar staff but the door staff might be aware of the target for the night although they did not give door staff targets. They may have told them of the target for the night but not in such a way that they had to hit the target.

63. He accepted that the figures showed in January 2016 79 staff and in December 2016 72 staff. This change over the year did not stand out but there had been over 1000 staff employed over ten years.

64. He accepted that there were three managers, himself, Mr Maswaya and Mr Ifield and that there was a potential saving if there were only two, with Mr Johnston giving more input as an extra pair of hands. He did not believe that Mr Johnston had a genuine motive for the redundancy. He disagreed redundancy was appropriate. He had no reason to doubt the process that was proposed. He was to be given an opportunity to respond. Voluntary redundancy was not offered to him in January.

65. When he met with Mr Ifield it was his chance to say what he wanted to say about the proposed redundancy. His view was that the company needed to maintain all of the managerial roles. If there was genuine concern as to the figures then they should have been told sooner and they could perhaps have done something.

66. He had met with Mr Johnston. He thought he had said that Ashley Johnston should have been included in the pool for selection for redundancy.

67. It was after four weeks or so that having heard nothing they were told they were not going to be made redundant, but at the same time they were told there may need to be a change to the contracts. Mr Iceton agreed this showed Mr Johnston taking account of what had been said in the consultation meeting. He accepted that on 17 February Mr Johnston had proposed that he and Mr Maswaya would work the same shift together. This was the proposal and if they did not want to do it they would have to revert to considering redundancy. Mr Iceton did not give feedback on the proposal for the changed hours. The proposed change did not happen. He believed this was because formal grievances had been submitted. This was an assumption.

68. He and Mr Maswaya sent grievance letters in similar terms. They had taken advice and each proof read each other's letter.

69. He accepted that he had been invited to a grievance meeting and he expected that there would be a full investigation after the grievance meeting. It would take a period but not as long as it did. At the meeting he went into the matters raised in the grievance with Mr Ifield.

70. He accepted that he had received the letter sent on 2 May 2017 to the effect that Mr Ifield's enquiries were ongoing. He agreed it was proper to keep him informed of the delay. He was not aware of what was going on between Mr Ifield and Mr Johnston at the time but accepted that progress seemed to have been made. He did not think they were proactive in investigating his grievance because when he wrote his resignation nothing, to his knowledge, had been done. It was the delay from Mr Ifield that he criticised. He felt that if this amount of time was being taken then Mr Johnston as a company director should have done something about it. In his opinion Mr Ifield had not been pressed hard enough by Mr Johnston.

The Evidence – Mr Maswaya

71. The second claimant, Emmanuel Maswaya, started with the respondent in June 2001 working behind the bar and progressed to General Manager. He provided a witness statement. He believed that the implied term of mutual trust and confidence in his employment contract was steadily breached over the last 18 months of his employment when they began experiencing severe disruption to the running of the business as a result of the substantial and ongoing development work being carried out by Mr Johnston, the director. Before 2016 they would normally hear from Mr Johnston three or four times a year but in early 2016 he became more involved. Mr Johnston's substantial and disruptive constructive projects heavily impacted upon the normal running of the business resulting in considerable stress and disruption to the working environment. He and the staff did their best to try to adapt to the changes from having to open the venue in an unfit and terrible state of repair. It was always left to management and the staff by the builders to clean and ensure the venue was safe to operate with only a limited time before opening.

72. In respect of the first protected disclosure in September 2016 building work began which affected the safe operation of some of the emergency fire exits. This was especially concerning as he knew the failure to maintain safe and effective operating emergency exits put members of the public and staff at great risk should there be a need to evacuate the nightclub in an emergency:

> "Me and my colleagues raised our concerns with the company director, Mr Nigel Johnston, on a couple of occasions. However nothing proactive was done to rectify the issues. I believe the raising of my concerns amounted to a protected disclosure as it contained information that a criminal offence was or was likely to be committed, that offence being corporate manslaughter if there was a fire and the emergency exit were blocked, and furthermore that the respondent was failing to comply with its legal obligations and the health and safety of members of the public were being endangered."

73. Since issuing the claim he had reiterated details of his protected disclosure by way of providing further information and the information referred to above, dealing with Mr Iceton's evidence, concerning the safe operation of the emergency exits related to both claimants. According to Mr Maswaya he raised the issues in line with the policy on whistle-blowing set out in the staff handbook.

74. He was concerned about the health and safety of staff members who were regularly required to undertake the clear up work which they were not trained or equipped to do. The two most senior bar managers resigned and each cited this as one of their reasons for resignation.

75. In early 2017 Mr Maswaya instructed Epoca, the company's external health and safety advisers, to complete an annual work placement risk assessment. They inspected on 16 February and in their report it was stated that:

> "Some significant changes need to be implemented in order to achieve a safe working environment."

76. He said that he made the respondent aware of the findings of the report but nothing was ever done to rectify the problems referred to in it.

77. In September 2016 Ashley Johnston was appointed to a newly created role where he was working closely with Mr Maswaya and Mr Iceton. There was no consultation about it. Ashley's responsibilities included managing the queue, admissions to the venue and overseeing who was suitable to enter based on their level of alcohol intoxication or their age. These responsibilities were previously undertaken either by himself or Mr Iceton. Duties previously laid with himself and Mr Iceton were stripped from them and given to Ashley, which was threatening to his position as General Manager as it diminished the responsibilities he had and undermined his authority. Ashley had no training or experience in dealing with the situations he was required to confront nor did he hold a personal alcohol licence or a Security Industry Authority licence which would have provided training when attaining the qualifications. He and Mr Iceton both had the qualifications as did the door staff employed by the respondent. Ashley's lack of experience was apparent to Mr Maswaya on several occasions where he observed him making poor judgment calls on factors such as whether or not a person was too intoxicated to enter or if a customer was of the correct legal age. He was concerned the company was operating unlawfully as a result of allowing persons under the legal age of 18 as well as customers who were drunk into the club. This was in breach of two of the four licensing objectives in the Licensing Act 2003.

78. As result of his serious concerns on two occasions around October 2016 he spoke with Nigel Johnston to make him aware that the company was operating unlawfully, believing this amounted to a protected disclosure related to a criminal offence, being a breach of the Licensing Act and a failure to comply with legal obligations endangering health and safety of members of the public. He reiterated details of this in the further information provided.

79. Looking at the further information provided concerning issues following the appointment of Ashley Johnston there is a reference to the 1 November 2016 meeting involving Mr Iceton and a reference to the belief of the claimants. There is no reference to anything said by Mr Maswaya in October 2016, but there is reference to the written grievance of 8 March 2017.

80. He raised concerns with the police officer who inspected their premises following an incident where Ashley Johnston had overruled the door staff and allowed admission of an extremely intoxicated couple who were later involved in a fight whilst inside. This would have been avoided have Mr Johnston not intervened.

81. He felt that Mr Daniel Johnston, brother of Ashley, started to make frequent visits to the venue at night, appearing to be patrolling and taking notes. He thought that they were keeping an eye on him, potentially to gather evidence to discipline him and have him removed. He felt very uncomfortable.

82. He referred to the redundancy situation and he too had a meeting by way of redundancy consultation with Mr Ifield where he expressed his concerns that he had never been made aware of any downturn in the business and how the appointment of Ashley Johnston reallocated responsibilities he previously held.

83. Shortly after the redundancy consultation meeting Mr Nigel Johnston had a discussion with him about some of the comments he had made in the redundancy consultation meeting. He was caught completely off guard and made to feel extremely uncomfortable. He felt this was inappropriate and unprofessional to discuss such matters with him whilst he was still awaiting feedback from his initial redundancy meeting.

84. He too heard nothing for four weeks until 16 February with the information coming out as described above in the evidence of Mr Iceton. He referred to the proposed new shift pattern rather than redundancy. Mr Maswaya did not accept the proposed change as he felt it was unreasonable, unnecessary and with a hidden agenda to make lives unbearable.

85. He raised his formal grievance which he addressed to Mr Nigel Johnston under the hearing "FORMAL LETTER OF GRIEVANCE". The headings in the grievance letter were "Disruption to the club", "Undermining of my position and reduction in my responsibilities", "Unreasonable monitoring of me", "Proposed redundancy/change in my contract of employment" and "Breach of my contract".

86. He had a grievance meeting with Mr Ifield on 28 March when he raised his concerns contained within the letter, but after that there was no written response and as far as he was aware no investigation, other than a letter sent on 2 May 2017 saying that Mr Ifield's enquiries were ongoing and he was endeavouring to conclude them as soon as possible. Because of this on 22 May he submitted his resignation stating he would work one month's notice in line with his contract. He did this and left on 23 June 2017.

87. In his letter of resignation dated 22 May 2017 he stated there were several reasons across a long period which had led to it. He referred to his 8 March 2017 formal grievance outlining issues of concern over the previous 18 months all of which had led him to believe the company was acting to constructively dismiss him from his position as General Manager. Two months since submitting the grievance letter nothing had been done to resolve any of the issues raised. He had worked for the company for 16 years and the response did not reflect in any way the company's appreciation of the service he had provided. He felt a complaint of that magnitude should have been met with appropriate action. In his view the company had no interest in taking the complaint seriously and since submitting the grievance there had been no improvement to working conditions. Several staff had left due to the stressful working conditions. There had been impromptu meetings with Mr Johnston when he disagreed with the grievance. As Mr Johnston felt the company had done nothing wrong Mr Maswaya did not did not feel any investigation would amount to anything other than finding no wrongdoing on the part of the company. It had been two weeks since he last met with Mr Johnston and he had not come back to him. He felt nothing had been done and he was just left feeling worried and stressed about his job. The lack of action in response to the grievance demonstrated the company's distinct lack of respect for him and furthered his belief that he was not wanted and would never be appreciated at the company. By failing to deal with legitimate concerns and grievances he was left with no alternative than to resign and pursue the matter through the Employment Tribunal.

88. Mr Maswaya confirmed that he did not disagree with the answers given by Mr Iceton to counsel for the respondent in his cross examination. It was agreed that counsel would not therefore go over the same issues with Mr Maswaya.

89. Mr Maswaya confirmed that he was particularly responsible for health and safety as part of his duties as General Manager and he could call upon Epoca to assist and prepare reports. He had to ensure proper training of staff. He had to ensure the premises were safe and if not safe it was his duty to do something about it and if necessary bring it to the attention of the authorities. He agreed that his hours of work were specified the same as Mr Iceton's and the same whistle-blowing policy applied. He could report to a line manager above him, Mr Ifield, or raise matters direct with the authorities.

90. The bar staff were employed as bar staff and were brought in to do the clear up job they were not supposed to be doing but he agreed they were there to do the clear up before starting their bar work. The people had a choice whether or not to come in to do the work and the system had worked for years. PPE was available to day staff not night staff. He managed both day and night staff and would get PPE for the day staff. He accepted it was his job to ensure the staff got PPE if they needed it.

91. It was his job to ensure the club was safe to open to the public. He would ensure materials needing to be moved were moved to the best of his ability. He would ensure that the jobs were done. If the club was not safe it was his obligation not to open it. There was no time when he did not open it.

92. He had worked with Sami Alfarhan for ten years and they had a good relationship.

93. He and the club were fully cooperative with the licensing and other authorities. Scheduled and unscheduled visits were made by the authorities and Mr Maswaya would walk round with them. He could have said something if he felt something was wrong and he could have contacted them himself if he needed to, but he never did contact the authorities about health and safety and/or the exit doors.

94. He might have sent some of the photographs to Mr Johnston – he did, but could not say which ones. He did not provide any copy photographs to the authorities. He did not agree it was done to gather evidence in support of his claim before the Tribunal.

95. He was aware that Nigel Johnston was talking to people from he Fire Authority and nothing negative was brought to his attention.

96. He commissioned the Epoca report prepared on 16 February 2017. It was his duty to deal with things they flagged up. He emailed a copy of the report to Nigel Johnston and Keith Ifield so they both had it. It was in his work email and he had not retained it.

97. He commissioned the report because it was due to be done. He disagreed that he obtained it for his own purposes. The inspection was during the day not during opening hours.

98. He agreed that the report was detailed and that there was no reference to non-operable fire exits or to obstructed fire exits.

99. With regard to his grievance he agreed that nothing had been raised by the authorities in respect of the emergency exits. He agreed it was his obligation to raise this matter with the authorities and he did not. He trusted Nigel Johnston to do it. He did believe safety was compromised.

100. He thought his grievance would be dealt with by Mr Johnston although it was passed to Keith Ifield.

101. He saw the attendance figures but not the financial figures. He knew footfall was down year on year. Mr Johnston became more involved. He put Ashley on the door. It was rational for Mr Johnston to take certain steps and to look at the door policy, but Mr Maswaya would have appreciated him sitting down with him and explaining what was going on. He could have done things better.

102. Ashley Johnston took over some of his responsibilities. Ashley was previously in charge of the bar staff at night. Ashley had not taken over his health and safety responsibilities and was not managing the club. Before he was set to work outside Ashley was the bar manager and so responsible for the bar staff. He carried on as bar manager and also worked on the door, but he was not in charge of all the staff. He did not become a licence holder. Mr Maswaya remained as General Manager subject to Keith Ifield. He had not been told he was free to discipline Ashley. He felt the final decision on entry was not with him when Ashley was with him. It should have been him responsible but it was Ashley:

> "We had no choice – we had to overrule him sometimes. At the time I did not know what my position was. No-one told me what was going on in September 2016 but I knew I could and I did overrule Ashley.
>
> I was told by Nigel Johnston that he would train Ashley but I was responsible for every employee in the club."

103. He agreed Mr Johnston did not tell the door staff to ignore him in favour of Ashley. He had received Mr Johnston's 17 February 2017 email to the effect that the manager and Ashley were to make the final decision to refuse entry where people had consumed alcohol. This was done after concerns had been raised in February. From 17 February 2017 the situation on the ground was the same.

104. He agreed that as licensee he should have been maintaining an effective door policy.

105. He accepted he had the attendance figures but not the financial figures. He agreed it was legitimate for Mr Johnston to want to make savings and there was potentially a saving to be made on managers.

106. He now knew (following the disclosure process) that the figures showed a downturn.

107. He did not feel his job was redundant. He did have his opportunity to say his piece at the redundancy consultation meeting. It was appropriate for Mr Johnston to say there would be no redundancy and he was looking at different ideas as an alternative.

108. In the 16 February 2017 meeting he was told by Mr Johnston his job was not at risk but this was done casually. The new shift option was a proposal to consider it. He did not accept it.

109. He submitted his grievance. There was a grievance meeting. He agreed it would take some time thereafter to do the minutes and to open the investigation. He indicated to Mr Ifield the people he thought Mr Ifield should talk to. There were 20 or more people and it was going to take quite a time to meet with them.

110. He remembered Mr Johnston making an alternative proposal to him and telling him he did not want him to leave. He rejected this proposal.

111. The later letter sent as to the investigation continuing was such that he could conclude that something was being done. His resignation referred to the lack of action in relation to the grievance.

The Evidence – Mr Sami Alfarhan

112. Mr Sami Alfarhan was called on behalf of the respondent. He had worked there since 2007 and had been appointed head doorman after working for three months as a door supervisor. He had a full-time day job elsewhere.

113. As head doorman he was in charge of the team involved with security, bag checks, ID, intoxicated customers, complaints and queries. His instructions came from Mr Maswaya, Mr Iceton and sometimes Mr Ifield. Before spring 2016 he only saw Mr Johnston about twice a year but then he started to attend on an ongoing basis. According to him all staff members were aware takings and footfall were down and there were staff meetings when management shared this with the door staff who used to give targets each night for the number of customers they needed to attract.

114. The claimants told him they felt unhappy when Nigel became hands on in 2016. They felt he was seeking to undermine them. They resented that Daniel and Ashley Johnston were involved.

115. In a conversation in October 2016 Mr Iceton told him he was going to ask Nigel Johnston for voluntary redundancy. Shortly afterwards Mr Iceton told him that it was not going to happen.

116. In January 2017 he became aware of the redundancy consultation exercise.

117. Health and safety was always treated very seriously. The management team would not and should not have opened the venue had they believed it be unsafe.

118. Mr Alfarhan was cross examined by Mr Iceton on behalf of both claimants. Mr Alfarhan considered both claimants to be trustworthy and he felt he could bring his concerns to them. He felt the decline in figures was noticeable in 2016 if not before.

The target would be the admission figure for the equivalent date in the previous year. He knew the takings on the door but was not aware of the takings in the bar.

119. In April or May 2016 Nigel Johnston had given them a directive to be more relaxed, more lenient, with some who was tipsy.

120. When Ashley joined them on the door it was his role to deal with any individual who was tipsy or required some assistance. He would take them and assess them and if appropriate get them inside. If someone was arguing about being refused admission Ashley would take the person away and allow the door team to continue their work.

121. He was an experienced doorman having gained his experience over a number of years. He would only ask Ashley if he wanted a second opinion. Ashley had worked behind the bar for many years as a bar manager and knew not to sell to someone who was drunk.

122. He confirmed that he had discussed voluntary redundancy with Mr Iceton outside the front door in October 2016. He was told later than voluntary redundancy was not going to happen.

123. Keith Ifield had started to hold meetings with the staff about the issues raised in the grievances. Mr Alfarhan was not willing to get involved in this to give evidence against an individual. He thought there might be a witch-hunt against Ashley. The witch-hunt was by the three managers. He did not want to fall out with any of them.

124. With reference to the photograph showing wires hanging down, in his opinion the site manager would not open the venue if it was left like it was in the photograph.

The Evidence – Nigel Johnston

125. Nigel Johnston in his witness statement confirmed he had spent his entire working life in the leisure industry having operated a number of licensed premises, but he now concentrated on this one. Various works were done through Johnston Developments Limited, a contracting company where he owned the shares and was able to control what they did. The construction works allowed an increase in the capacity of the club from 300 to 1,000.

126. The General Manager was Keith Ifield who was the designated premises supervisor. He did not work nights but delegated the role to the claimants who were the assistant manager and manager respectively. The claimants held personal alcohol licenses and were in control of the premises when on duty. Mr Johnston did not hold a license and could not have opened the premises without either of the claimants being present.

127. If a licence holder regards a venue as unfit to admit members of the public then it is their statutory duty to refuse to open the doors. He could not insist upon any of his managers opening the club unless they were satisfied that it was compliant. No-one had ever refused to open the nightclub on health and safety or any other grounds.

128. He became concerned about the falling profitability from February 2015 onwards and by February 2016 he got more involved, taking a more hands on role to try and relieve the situation.

129. One of the reasons for the reduction in attendance was in his view the way in which a party of six might be turned away if one of them was slightly intoxicated. They should have allowed five in and supervised the one for a short period until that person appeared fit enough to be admitted to the club to join the rest of the party. It is not unlawful to admit intoxicated customers but unlawful to serve them or allow them to consume more alcohol even if purchased by someone else.

130. He remained worried about the finances of the company in late 2016. The profit and loss account showed a downturn in entry, revenue and till receipts.

131. He considered selling the club in November 2016 but decided to retain it with a view to his sons taking the business on in due course. Mr Ifield might have been interested in buying the business or another nightclub. He felt the performance of Mr Ifield in conducting the redundancy consultation meetings with the claimants was lackadaisical, and his failure to make progress in investigating the grievances was unexplained:

> "It is almost as though Keith were seeking to assist both of them in their claims by failing to discharge his own contractual responsibilities."

132. Keith Ifield resigned in June 2017 having purchased a nightclub.

133. Entry is controlled by the manager or assistant manager on duty; they had the final decision on admission. In June/July 2016 he appointed Ashley to monitor the door staff, believing that the application of the entry policy was incorrect and over restrictive and was costing £50,000-£75,000 a year in lost revenue. Ashley was not promoted to the position of assistant manager or manager and did not have the responsibilities of a manager as he did not hold a personal alcohol licence. According to him both claimants were instructed to discipline or even dismiss Ashley if he was not performing his role. Ashley was never on a par with the two claimants in terms of seniority or responsibility and the final decision remained with the two claimants. If Ashley was incapable of performing the monitoring role it was the responsibility of the claimants to train him appropriately and, if required, to performance manage him.

134. He met with Matthew Iceton in a coffee shop in November 2016 when Mr Iceton asked if he could apply for voluntary redundancy. Mr Johnston immediately declined this request as he was still assessing why the club was underperforming and it was too early to consider voluntary redundancies.

135. In January 2017 he was looking at restructuring leaving Keith Ifield to do it so that he would be able to deal with any appeals.

136. He had not previously seen the Epoca report.

137. Keith Ifield reported back to him following redundancy consultation meetings with the claimants. He reported they had stated their belief that Ashley should have

been included in the pool at risk of redundancy and he put the consultation process on hold.

138. They met on 17 February when he suggested that the claimants might work together on the same shift which would have meant them having to work an increased number of shifts and which would have a material variation to their contracts if they were prepared to accept, but the proposal was advanced as a possible alternative to redundancy. Neither claimant fed back on his proposal.

139. Having received grievances he delegated them to Keith Ifield who set the agenda, the timetable for the investigation and the hearing of the grievances as Mr Johnston excluded himself so that he could deal with any appeal. He could not explain why Keith Ifield took so long to deal with the grievances. He was pressing Mr Ifield to get on with dealing with the grievances. When Mr Ifield asked him some questions he promptly responded.

140. He spoke to Mr Maswaya and put forward a proposition as to how he might stay on with a pay rise. There was no response to this.

141. He received the letters of resignation and they were accepted. Neither claimant had been replaced nor had Keith Ifield when he left. His son Daniel was now general manager and DPS with his other son Ashley as manager.

142. As to the protected disclosures:

> "Both Matt and Manny state in their claim forms that in September 2016 the emergency exits at the nightclub were not in a safe operational state and that despite raising their concerns with me nothing was done to rectify the matter. This is a misrepresentation of the true facts."

143. The statement goes on to discuss the visit by the police constable in October 2016. According to Mr Johnston when the police constable visited one of the fire exits they would usually use was the subject of incomplete construction works and did not look particularly pleasant or safe. The constable could have closed the nightclub had he felt there was a risk to public safety; instead he took photographs and said he would ask the fire officer to visit. Thereafter there were visits from the fire service and the City Council but no action was required by any regulatory agency:

> "How Matt and Manny could have held any reasonable belief to the contrary is difficult to understand given that the nightclub remained open as scheduled throughout September 2016 and ever since."

144. In the view of Mr Johnston had the claimants' concerns been genuine and if, as they maintained, the respondent was unwilling to rectify the situation then the whistle-blowing policy directs them to the appropriate regulatory agency but the claimants did not make contact with them.

145. When he met with Mr Iceton on 1 November there were a few general complaints but nothing more. He does not accept the accuracy of the notes made by Mr Iceton. The main topic of discussion was his request for voluntary redundancy

which is not in the notes. He thought the claimants were carefully choreographing their formal grievances to include a recycling of issues to their advantage, but on their own case they had acted in fundamental breach of their statutory duties as licensees by allowing the nightclub to open whilst unsafe. The photographs taken by them show how unfit they were to hold their licences.

146. As to the other alleged protected disclosure concerning Ashley, it was not unlawful to allow minors into the nightclub provided that no alcohol was served to them, but if this was not the case it was the claimants' job to overrule Ashley if they disagreed with his judgment. The only breach of any legal obligation would be if the claimants failed to discharge their own contractual obligations to the respondent and their statutory duty as licensees, which would lead to the absurd conclusion of them having to rely on their own default in order to contrive any breach of a legal obligation.

147. The redundancy procedure was not a sham. There was evidence of a downward trend which needed to be arrested. He referred to documents within the bundle showing reduced bar takings and attendance.

148. As to redundancy, the claimants were in the pool for selection but Ashley was not because of his junior status. He suspended the redundancy process and tried to find an alternative way forward which involved retaining both claimants. In his view this shows a willingness to explore ways of preserving their employment rather than showing a determination to terminate it. Given the terms of their contracts of employment the alternative proposal did not amount to a unilateral variation of a contract.

149. Before cross examination Mr Johnston answered some supplementary questions. He confirmed that the premises licence included a condition that:

> "Persons under 18 shall not be allowed entry unless attending a private pre-arranged function or event."

150. As to staff employed, there were at the time of the claimants' grievances some 36 bar staff and three supervisors, 15 members of the door staff, three collectors; and of the other persons who might potentially be asked questions by Mr Ifield when investigating the grievances there was the police constable and someone from the Health and Safety Executive, making possibly 70 people to interview.

151. The door policy was applied at the front door. The head doorman was always present. A manager should spend 90% of their time at the door. The bar staff would not necessarily check the ages inside, relying on the entrance policy, but they would not serve someone who was intoxicated.

152. Mr Iceton asked questions of Mr Johnston on behalf of both claimants. There had been major construction works with over £2million spent on improvements. The increase in capacity was negative for local residents. In 2014/15 works to create the bunker took six months from start to finish. He did not deny that the bunker may have been closed under a notice for 28 days. The club would only close on a profitable night if there was a need for construction work.

153. The staff were to come in early to clean. They were generally happy. It was cheaper for them to clear up than the builders. He was not aware of people being unhappy at this. His managers did not tell him the staff were unhappy. Around September 2016 both claimants had said there was too much debris at the end of the construction. From then on he had employed Adrian Dodd whose sole job was to work alongside the construction workers to ensure no materials were left out and things were swept up. When the night shift came in there was dust but there should not have been tools and materials.

154. There was no protected disclosure in 2016. Nothing was brought to his attention after 2016 when Adrian Dodd was employed. Mr Dodd was on the payroll five days a week and the claimants should have managed him to make sure health and safety was correct. He had provided the resource and it was for them to manage it.

155. As a company director he took his responsibility for corporate manslaughter very seriously.

156. He did not accept the fire exits were not 100% usable. He accepted it was a regular occurrence for staff to clean up. Mr Maswaya was the health and safety officer who should have made things safe. He had put Mr Johnston at risk. If Mr Maswaya did not think it was safe he should have done something, or he had the authority not to open the club to the public. He did not agree there would be repercussions if the club was not opened. The claimants were trained and responsible for safety and they had to fulfil their roles with full authority to make decisions. They were in a position of trust and responsible to the City Council.

157. He could not recollect any call about emergency lighting not working and not being able to open the venue, but then he did remember coming with a box of candles. According to Mr Johnston such things happened all over the city centre in licensed premises. He made an assessment and deemed it safe to open.

158. Questions were asked on the financial accounts and the footfall figures. It was a declining business. Some people left and/or were made redundant.

159. The redundancy process regarding the claimants was delegated to Keith Ifield so that Mr Johnston could deal with the appeal. He agreed it would be stressful for an employee to go through a redundancy process, that it was not in the interests of the company to prolong it and it needed to be done swiftly for the benefit of both parties but “you could not make a decision before you had followed a redundancy process”. He did not have to make redundancies only if a company was not profitable. He could decide, for instance, if he wanted to make more profit.

160. He had not offered Mr Iceton voluntary redundancy. He had a further discussion with Mr Iceton on the subject in January 2017:

> “You said you wanted £20,000. I’m under oath…”

161. He totally disagreed that it was a sham redundancy and confirmed that he had no knowledge of the protected disclosures.

162. He did not accept Mr Iceton's notes of their meeting on 2 November were accurate or complete. The main thing he remembered was voluntary redundancy and then other things were discussed briefly. The other matters he recalled were not as stated in the notes but he thought they did discuss an offer for sale of the club to someone called Beech, but his wife had advised him to turn down the offer as there was a possible interest in the sons inheriting it.

163. He did not think either of the claimants had plans to leave the business. He had a desire for his sons to step up to inherit the business.

164. He had considered voluntary redundancy for Mr Iceton making a quick assessment after he asked, but as he had not finished his review he did not offer voluntary redundancy.

165. He did not accept that on 1 November a public interest disclosure had been made regarding Ashley potentially allowing people who were drunk to enter the premises.

166. The grievances were received. Keith Ifield was asked to conduct an investigation. Mr Johnston was only to be involved when Keith Ifield asked him to be. He did not know Keith Ifield was not performing. He did remind him. There were nearly 70 people to be interviewed. If Keith was doing it properly in terms of a full and thorough investigation he should have interviewed 70 people.

167. The photographs may have been provided to Keith but they were not provided to him.

168. He took responsibility for having appointed Keith to deal with things. He did not think it necessary for Keith to attend the Tribunal.

Respondent's Grievance Procedure

169. Each claimant was provided with a statement of main terms of employment. The grievance procedure provides that:

> "Should you feel aggrieved at any matter relating to your employment, you should raise the grievance with the General Manager or nominated deputy, either verbally or in writing. Further information can be found in the employee handbook."

170. Although neither party referred us to it the respondent's grievance procedure as set out in the company handbook notes that it is important that if the employee feels dissatisfied with any matter relating to their employment they should have an effective means by which such a grievance can be aired and, where appropriate, resolved. Whilst informal discussion can frequently solve problems a formal grievance should be raised in writing from the outset. At any stage of the procedure there is the right to be accompanied by a fellow employee.

171. At paragraph 4:

> "If you feel aggrieved at any matter relating to your work…you should first raise the matter with the person specified in your statement of main terms of employment, explaining fully the nature and extent of your grievance. You will then be invited to a meeting at a reasonable time and location at which your grievance will be investigated fully. You must take all reasonable steps to attend this meeting. You will be notified of the decision, in writing, normally within ten working days of the meeting, including your right of appeal."

172. There is then an appeal process with the employee notifying the General Manager within five working days and at the appeal meeting the company will be represented by a more senior manager than attended the first meeting, and an appeal decision will normally be provided within ten working days in writing.

Submissions

173. The claimants provided brief written closing submissions to the effect that they had made the protected disclosures as pleaded, and that Mr Johnston's and Mr Alfarhan's evidence concerning admissions of persons under 18 was incorrect. There was a fundamental breach of contract, being the detrimental treatment they received as a direct result of the protected disclosures, being subjected to a sham redundancy exercise, the undermining of their job roles by the reallocation of some of their duties to Ashley Johnston which diminished the importance of their position and then seeking to impose a unilateral change to the terms of their employment by imposing different shift patterns. There was a breach of the implied duty of trust and confidence, failure to investigate legitimate grievances within a reasonable time, inconsistency in dealing with them, having been threatened with redundancy only to withdraw it and then the attempt to increase the working hours on the basis of there being insufficient managers. Finally the actions from September 2016 onwards taken by the respondent had a cumulative effect, with the final straw being the failure to address legitimate grievances and the claimants realising that the respondent was attempting to engineer them out of the business.

174. For the respondent counsel produced a 14 page skeleton argument.

175. In his submission whilst there may have been discussions of building works between the claimants and Mr Johnston there was no disclosure of information in respect of fire exits tending to show the endangerment of health and safety or a criminal offence. By the time the club opened debris had been cleared away, wires tied up and the club had been made safe for use. Mr Maswaya confirmed the club was always made safe prior to opening. The claimants accepted Mr Johnston was strict on maintaining proper fire exits. Visits from the authorities never found problems with the fire exits. The evidence from the claimants was vague and unconvincing. They could not identify any specific occasion when they say a relevant disclosure was made in September 2016. The photographs show "before" the clearing and making good exercise but never "after" the exercise had been undertaken showing the state of affairs when the club was open.

176. As to the second alleged disclosure concerning Ashley, the respondent disputes that a disclosure of fact was ever made at the meeting on 1 November. Although Mr Iceton in his witness statement said he met with Mr Johnston on 1 November to air his concerns regarding Ashley Johnston's appointment and the

premises operating unlawfully, his letter of grievance dated 8 March 2017 included reference to that meeting saying that:

> "I was primarily motivated to do all this by the feeling that my job security was undermined."

177. This was confirmed in the grievance meeting.

178. In the submission of counsel there is a simple dispute of facts on this point. Did Mr Iceton raise the question of redundancy? Mr Johnston says he did and Mr Alfarhan confirms it. Mr Iceton denies it. In his submission the claimant's note of that meeting is flawed and unreliable. Further, the claimant's note of the meeting falls short of providing information amounting to a qualifying disclosure. The account of Mr Iceton overruling Ashley indicates not that there was a breach of any legal obligation but on the contrary: that the legal obligations were being met by Mr Iceton and Ashley. The claimant expressing the belief that the company was in breach of its licence and its legal obligation was a simple allegation or expression of opinion rather than a statement of fact or the provision of information and did not amount to a qualifying disclosure.

179. In the submission of the respondent the claimants have failed to establish the second disclosure.

180. In the grievance letter there is a reference to work heavily compromising the safe operation of some of the venue's emergency exits, but in his submission this is so lacking in factual detail as to amount to an allegation or a statement of opinion not any information as to how any duty was breached.

181. In respect of Ashley the grievance letter does not appear to set out facts tending to show a breach of the obligation. In fact it suggests the legal obligations had not been breached owing to the actions of the claimants.

182. The second claimant's letter of grievance, in his submission, adds nothing in respect of emergency exits, and with regard to Ashley he referred to Ashley having "a role where he would be working with me more closely front of house while operating the venue at night time" which does not suggest Mr Maswaya being replaced in his role. There is a later reference to responsibilities being taken away from Mr Maswaya and he refers to poor judgment calls being made and a concern that the venue was at risk of operating unlawfully as a result. In the submission of counsel this comes closer to being a protected disclosure but is not one.

183. As to detriment, in his submission the claimants were not subjected to any detriment whether or not protected disclosures had been made.

184. Mr Johnston appointing Ashley to a new role was nothing to do with the raising of any relevant disclosure. By the time Ashley was appointed the business was in decline for three years as shown by the figures. Moving Ashley to the door was a response to this and an attempt to try to improve the fortunes of the business.

185. The respondent denies that the roles or responsibilities of the claimants were being undermined. Ashley was there to assist. He was there in addition to rather

than to replace the claimants who retained the final decision on who should be permitted to enter. From the evidence both claimants had overruled Ashley on admission questions, demonstrating that they had not been removed from the process. They carried on with their door duty in the usual way. The alleged detriment predated most or all of the alleged disclosures.

186. As to the redundancy process the suggestion that it was a sham is unsustainable based on the figures. The alleged detriment predated the claimants' alleged disclosures by way of written grievance.

187. Attempting unilaterally to change the terms of the contracts was in his submission nothing to do with the disclosures but the result of a properly conducted redundancy process following initial consultation. The contracts allowed for actual hours and days of work being dependent on the needs of the club so Mr Johnston was at liberty to make the suggestion. There was no unilateral imposition of new shift patterns. It was just a proposal with the claimants continuing with their usual working hours and with no changes imposed. This was also before the written grievances.

188. The construction projects were not related to the alleged disclosures.

189. As to the grievances, the delay was not as a result of disclosures. The delay was on the part of Mr Ifield against whom the claimants make no allegations. Mr Johnston engaged as far as Mr Ifield requested it.

190. As to fundamental breach of contract, Ashley's new role did not involve removing responsibility or status from the claimants. It was an additional resource.

191. It was not a sham redundancy for the reasons stated. There were no attempts unilaterally to change the terms of the contracts. It was simply a proposal. The construction projects were undertaken to achieve legitimate building objectives. It was not breach of contract for the claimants to be asked to manage staff who were hired for additional hours to undertake clearing and cleaning duties.

192. The health and safety assessment was never provided to the respondent. It cannot be criticised for not acting upon a report it had not seen, although the second claimant might be criticised for not having provided it.

193. As to failure to investigate grievances within a reasonable time, contrary to the apparent belief of the claimants the grievances were in fact in the process of being dealt with. Some time had elapsed since the grievance meetings but it was plain (and was made plain) upon the conclusion of both meetings that there were a lot of investigations to be undertaken in the context of relatively complex grievances and that these would take some time. Although the claimants did not know what investigations were underway they were informed that they were underway by the 2 May 2017 letter, so the respondent had not given the claimants cause to believe that nothing was being done in relation to their grievances.

194. Notwithstanding that that appeared to be the primary factual issue relied upon by the claimants in terminating their employment, or at least the final breach or act relied on, the fact of the matter was that they relied in resigning upon a factual state

of affairs that did not actually exist so they cannot make out the factual breach of contract that they allege.

195. In terms of the length of time elapsed, two months was not excessive or unreasonable given the complexity of the issues raised and the large number of investigations to be undertaken.

196. In counsel's submission this is an objective issue and the Tribunal can rely on its own experience as to how long a delay would have to be for there to be a repudiatory breach of contract or an act capable of contributing to such a breach.

197. Mr Johnston may have made approaches to Mr Maswaya with offers of continued or varied employment but this meant it was made clear to him that the respondent wished to retain him as an employee. In the circumstances there was no repudiatory breach of contract on the part of the respondent capable of being accepted by the claimants, thus they were not dismissed and there was no dismissal, nor was any dismissal that might be found to have occurred unfair.

The Relevant Law – Employment Rights Act 1996

198. Section 43A – meaning of protected disclosure, provides:

> "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

199. Section 43B – disclosures qualifying for protection, provides:

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).”

200. Section 43C – disclosure to employer or other responsible person, provides:

“(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.”

201. Section 47B relating to protected disclosures provides:

“(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, but his employer done on the ground that the worker has made a protected disclosure.

[(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done –

(a) by another worker of W’s employer in the course of that other worker’s employment , or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subjection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer."

202. Section 95 – circumstances in which an employee is dismissed, provides:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) –

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) ….

(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."

203. Section 98 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 –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of

his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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."

204. Section 103A relating to protected disclosure provides:

"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 made a protected disclosure."

205. Mr Lewinski referred the Tribunal to **Cavendish Munro Professional Risks Management Limited v Geduld [2010] IRLR 38 (EAT)** which concerns protected disclosures. This case holds that:

"In order to fall within the statutory definition of protected disclosure, there must be a disclosure of information. There is a distinction between 'information' and an 'allegation' for the purposes of the Act. The ordinary meaning of giving 'information' is conveying facts. For example, communicating information about the state of a hospital would be stating that: 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. However, an allegation about the same subject matter would be, 'you are not complying with health and safety requirements'.

An employee may be dissatisfied with the way he has been treated. He or his solicitor may complain to the employer that if he is not going to be treated better, he will resign and claim constructive dismissal. If the employer then dismissed the employee, the dismissal does not follow from any disclosure of information for the purposes of section 43B of the Act. It follows from a

> statement of the employee's position. It would not fall within the scope of section 43B."

206. Mr Lewinski then referred us to the case of **WA Goold (Pearmak) Limited v McConnell [1995] IRLR 516 (EAT)** which relates to grievances. According to Mr Justice Morrison, as he then was:

> "That it is an implied term in a contract of employment that the employers will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. The written statement which employers have to provide to their employees in compliance with statutory requirements must include a note specifying to whom and in what manner the employee may apply for the purpose of seeking redress of any grievance relating to his employment. It is clear therefore that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. Moreover, the right to obtain redress against a grievance is fundamental and, in the present case, the Industrial Tribunal was entitled to find that in failing to provide a procedure for dealing promptly with the employee's grievances and instead allowing them to fester in an atmosphere of prevarication and indecision the employers were in breach of an implied contractual term which was sufficiently serious to justify the employees terminating their employment."

207. Following the Tribunal hearing but before the Tribunal had concluded its deliberations, there was a judgment of the Court of Appeal in the case of **Harpreet Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**, a decision of Lord Justice Underhill and Lord Justice Singh handed down on 1 May 2018.

208. The case involved a review of the law on constructive dismissal and at paragraph 55 in the judgment of Lord Justice Underhill he said:

> "I am concerned that the foregoing paragraph may make the law in this area seem complicated and full of traps for the unwary. I do not believe that this is so. In the normal cases where an employee claims to have been constrictively dismissed it is sufficient for a Tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If no, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of a conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible affirmation for the reason given above).

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

Conclusions

209. Going back to the List of Issues set out at paragraph 7 above, the first question for our consideration is: did the claimants make one or more qualifying disclosures within the meaning of section 43B of the Employment Rights Act 1996?

210. We have set out above at paragraph 14 the contents of the witness statement of Mr Iceton in which he described the situation as he found it in September 2016 and that he and his colleagues raised their concerns with Nigel Johnston on more than one occasion. In stating this Mr Iceton has not given any evidence to the Tribunal as to what in specific terms he said to Mr Johnston. We know that around this time Mr Johnston employed Mr Dodd to clear up after the builders, but all this confirms is that there was a discussion concerning the state in which the club was left after the builders had done their work and before it was cleared up by the bar staff starting their shifts early. From the evidence we cannot be satisfied that Mr Iceton or indeed Mr Maswaya made the first alleged protected disclosure in September 2016.

211. The second alleged protected disclosure relates to November 2016 with Mr Iceton allegedly disclosing information over the appointment of Ashley Johnston with the disclosure saying that on more than one occasion since his appointment he had been in a position where he had had to intervene and overrule a decision made to prevent customers under the legal age of 18 from entering the venue. The claimants believed that through the appointment of Ashley Johnston, who lacked the necessary experience and expertise, the company was in direct breach of its legal obligation under the Licensing Act 2003.

212. Again looking at the evidence of Mr Iceton he says that he told Mr Johnston of his serious concerns but was able to intervene and overrule a decision made by Ashley Johnston. The conversation allegedly took place in a coffee shop on 1 November 2016 following which Mr Iceton produced his note, the content of which is disputed by Mr Johnston, to the effect that he told Mr Johnston that:

"On more than occasion since Ashley's appointment in September 2016 he had been in a position where he was fortunately able to intervene and overrule a decision made by Ashley to prevent customers under the legal age of 18 from entering the venue."

213. On considering these words we conclude that they do not disclose information that tends to show that a criminal offence has been committed or was likely to be committed because they show that Mr Iceton, the holder of a personal licence with the associated responsibilities, was there to ensure that the law was complied with. In the absence of Mr Iceton Mr Maswaya would have been there. The door team members were also there. They all had relevant experience and/or training in their roles.

214. The claimants refer to their formal written grievances as protected disclosures reiterating the protected disclosures they say they made in September and November 2016.

215. In Mr Iceton's formal letter of grievance dated 8 March 2017 he refers to the venue being left un an unsafe and unserviceable state but that they always ensured that all debris was cleared, cleaning was carried out and all legal obligations associated with the running of a licensed premises (such as the presence of fully operational emergency exists) were observed. This does not give information as to the health and safety of visitors to the club being endangered. It confirms that the emergency exists were fully operational.

216. As to Ashley Johnston, he refers to him being "in a newly created managerial post working closely with me and my colleague, Emmanuel, whilst operating the venue at night". He was concerned at the risk of operating unlawfully and reiterated that on more than one occasion he had been in apposition where he was able to intervene and overrule a decision made by Ashley to prevent customers under the legal age of 18 from entering the venue. He does not say that such customers ever did enter the venue with permission from Ashley.

217. Mr Iceton goes on in his grievance letter to state that as a result of Ashley's appointment he is "concerned that the club and company are at risk of operating unlawfully. In that regard I reiterate that on more than one occasion since Ashley's appointment to his new role I have been in a position where I was able to intervene and overrule a decision he had made in order to prevent customers under the legal age of 18 from entering the venue. Allowing persons under the age of 18 to enter a licensed premises due to unsuitable or insufficient safeguards is in direct breach of one of the four licensing objectives outlined in the Licensing Act 2003".

218. If we take it that the word "likely" should be taken as something that is "probable or more probable than not", we cannot be satisfied that the appointment of Ashley made it probable or more probable than not that Ashley Johnston, who worked together with the experienced door staff and the claimants with their licences and responsibilities, would allow under age people to enter the club premises.

219. Mr Maswaya in his formal letter of grievance makes reference to the disruption to the club and how it was left to himself and Mr Iceton and their staff to clean and ensure the venue was safe to operate with only limited time before opening up for the business. This confirms that the venue was safe before it was opened to the public. There is reference to him feeling that there might have been danger to the bar staff, but this is not one of the alleged protected disclosures.

220. As to Ashley Johnston working more closely with him front of house, he had observed Ashley making poor judgment calls on factors such as whether or not a person is too intoxicated to enter the premises or if a customer is of the correct age to be allowed admission. He felt that he no longer had total control over the venue and was deeply concerned that the venue was at a risk of operating unlawfully. He did not go beyond this in his letter. Accordingly we do not find that the contents of his letter of grievance amounted to the making of a protected disclosure.

221. We therefore conclude that the claimants did not make one or more disclosures qualifying for protection for the purposes of section 43B of the Employment Rights Act 1996. Having answered this question in the negative we do not need to answer the questions set out at 7.2, 7.3 and 7.4 because they relate to alleged protected disclosures and detriment arising therefrom.

222. Question 7.5 asks "had the respondent committed a fundamental breach of contract entitling the claimants to resign?".

223. Going back to the case of **Kaur v Leeds Teaching Hospitals NHS Trust** the first question we ask ourselves is: what was the most recent act on the part of the employer which the employee says caused, or triggered, his resignation? Looking at the letter from Mr Iceton sent on Monday 22 May it is that as of that date more than two months had passed since the company received his formal grievance and as yet nothing productive had been done to resolve any of the issues he had raised. He felt that a complaint of this magnitude should be met with appropriate action and seriousness by the company and it was clear to him that this was not the case.

224. Mr Maswaya in his letter refers to his formal grievance submitted on 8 March 2017 and over two months thereafter nothing had been done to resolve any of the issues that he raised. After 16 years with the company he felt this did not reflect the company's appreciation of the service he had provided. His complaint should have been met with appropriate action and he believed the company had no interest in taking his complaint seriously. He felt that the lack of any action taken in response to receiving his grievances demonstrated the company's distinct lack of respect for him and furthered his belief that he was not wanted and would not be appreciated at the company any longer.

225. We therefore find that the most recent act or omission causing the resignations was in each case the apparent failure on the part of the company to deal with the claimants' grievances.

226. The second **Kaur** question - Has either claimant affirmed the contract since that act? The claimants continued to work whilst awaiting the outcome of their grievances but in our judgment merely carrying on working as normal pending the response to the grievances does not amount to an affirmation of the contract.

227. Having concluded that by continuing to work the claimants had not affirmed the contract, we ask the third **Kaur** question was the company's act or omission by itself a repudiatory breach of contract?

228. We have made reference to the company's grievance procedure which provides for a meeting at a reasonable time and location at which the grievance will be investigated fully. The employee will be notified of the decision "in writing, normally within ten working days of the meeting".

229. These grievances emanated from the people who were second and third in command in the company's management structure, excluding directors. The grievances were themselves quite long and raised a number of issues. For any employer to receive such lengthy grievances from two such high ranking employees at the same time would be unusual, and therefore we have to consider whether the

failure on the part of the respondent to reply to the grievances by the date of the resignations amounts to a repudiation by the company of the contracts of employment.

230. We remind ourselves of the timetable. The grievances themselves were put in on 8 March. The claimants were invited to grievance meetings on 28 March. On 2 May letters were sent to each claimant by Mr Ifield telling them that their grievances were very detailed and contained a number of issues which required thorough investigation. His enquiries were ongoing and whilst endeavouring to conclude them as soon as possible the continued patience of the claimants would be greatly appreciated. They were invited to contact him if they wished to discuss matters.

231. In cross examination Mr Iceton accepted that he expected there would be a full investigation after the grievance meeting and that it would take a period but not as long as it did. He accepted he had received the letter of 2 May to the effect that enquiries were ongoing. He agreed it was proper to keep him informed of the delay and that he was not aware of what was going on between Mr Ifield and Mr Johnston. He did not think they were proactive in investigating his grievance because when he wrote his resignation nothing to his knowledge had been done. It was the delay from Mr Ifield that he criticised. He felt that if this amount of time was being taken then Mr Johnston as a company director should have done something about it. In his opinion Mr Ifield had not been pressed hard enough by Mr Johnson.

232. As to Mr Maswaya's cross examination, there was a grievance meeting. He agreed it would take some time thereafter to do the minutes and to open the investigation. He indicated to Mr Ifield the people he thought Mr Ifield should talk to. There were 20 or more people and it was going to take quite a time to meet with them. The letter sent as the investigation was continuing was such that he could conclude that something was being done. His resignation referred to the lack of action in relation to the grievance.

233. From the evidence of Mr Johnston he could not explain why Keith Ifield took so long to deal with the grievances. He was pressing him to get on with dealing with them and he responded promptly to Mr Ifield's questions. In cross examination Mr Johnston stated he would only be involved in the grievances when Keith Ifield asked him to be. He did not know Keith Ifield was not performing. He did not remind him. There were nearly 70 people to be interviewed. If Keith was doing it properly in terms of a full and thorough investigation he should have interviewed 70 people. He took responsibility for having appointed Keith to deal with things but did not think it necessary for Keith to attend the Tribunal.

234. In his skeleton argument on this point Mr Lewinski submitted that in terms of the length of time to have elapsed some two months was not excessive or unreasonable given the complexity of the issues raised and the very large number of investigations to be undertaken. This, he submits, is an objective issue and the Tribunal can rely upon its own experience as to how long a delay (without action) would have to be for there to be a repudiatory breach of contract or act capable of contributing to such a breach.

235. The case of **Goold** is referred to above at paragraph 206 with reference to the implied term in a contract of employment that employers will reasonably and

promptly afford a reasonable opportunity to their employees to obtain redress of any grievance that they may have. The right to obtain redress against a grievance is fundamental. In the case of **Goold** the Tribunal was entitled to find that in failing to provide a procedure for dealing promptly with the employees' grievances and instead allowing them to fester in an atmosphere of prevarication and indecision the employers were in breach of an implied contractual term which was sufficiently serious to justify the employees terminating their employment.

236. In this case there is no doubt that the respondent employer did provide a process by which their employees could seek to obtain redress of any grievances that they may have. The procedure was followed by the claimants in that they submitted their grievances to the appropriate person. They attended the meetings that they were invited to and cooperated by answering the questions put to them.

237. The respondent did not respond within ten working days of the meeting. We can understand why they did not respond within this time given, as stated above, the existence of two lengthy grievances from very senior employees, but by 22 May was the delay sufficiently lengthy for this to amount to a repudiatory breach of contract?

238. We are asked by Mr Lewinski to deal with this as an objective issue relying upon our own experience as to how long a delay would have to be for there to be a repudiatory breach of contract or act capable of contributing to such a breach.

239. In the view of the members of the Employment Tribunal the respondent took too long to deal with the claimants' grievances. Whilst they might reasonably not have complied with their own timetable and given results to each claimant in ten days in the particular circumstances, the apparent failure to investigate matters by Mr Ifield and the lack of anything to update the claimants other than the letters sent on 2 May that did not give any indication of when they might receive an outcome, confirms our view that the delay in each case was too long and of itself amounted to a repudiatory breach of contract.

240. Having found that this was a repudiatory breach of contract we do not need to consider the fourth question from **Kaur**, but we must move on to the fifth – did the employee resign in response (or partly in response) to that breach? In our judgment there is no doubt that the employees resigned in response to the particular breach as clearly set out in their resignation letters.

241. We now revert to the List of Issues and find that we have answered in the affirmative question 7.5: had the respondent committed a fundamental breach of contract entitling the claimants to resign?

242. At 7.6 we are asked: was the reason for that fundamental breach the protected disclosures? As we have not found that the claimants made any such disclosures then our answer is that it was not.

243. For the same reason a negative answer must be given to question 7.7: were the claimants unfairly dismissed within the meaning of section 103A of the Employment Rights Act 1996, because this is only applicable where disclosures have been found.

244. The final question is: were the claimants unfairly dismissed within the meaning of section 98 of the Employment Rights Act 1996?

245. In its grounds of resistance the respondent states that:

> "If it is found that the claimants were entitled to terminate their contracts without notice by reason of the respondent's conduct, the respondent will argue that their dismissals were fair having regard to section 98(4) of the Employment Rights Act 1996, and that the reason for the dismissal was redundancy and/or some other substantial reason and that the respondent acted reasonably in all the circumstances."

246. On the basis of the evidence before the Tribunal we reject the contention of the respondent. We have no doubt that the reason for the dismissal was the failure on the part of the respondent to deal with the grievances within a reasonable time as set out in the resignation letters. The questions raised by the respondent it seems to us may well have more relevance to the question of remedy than to liability.

247. We therefore find that both the claimants were unfairly dismissed.

248. We invite the claimants to seek to agree upon the question of remedy with the respondent, but if this cannot be done the claimants should write to the Tribunal requesting a remedy hearing whereupon Case Management Orders will be given leading to the remedy hearing.

Employment Judge Sherratt

14 May 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

12 June 2018

FOR THE TRIBUNAL OFFICE