EMPLOYMENT TRIBUNALS

Claimant: **Mr P Oldershaw**

Respondents: **Bar Fibre Limited (1)**
Viaduct Leisure Limited (2)
Mission (Leeds) Limited (3)

Heard at: **Leeds**
On: **16-19 July, 8 August and (deliberations only) 5 September 2019**

Before: **Employment Judge Maidment**
Members: **Mr T Downes**
Ms GM Fleming

Representation
Claimant: **Mr A Johnston,Counsel**
Respondents: **Mrs H Rothwell, lay representative and (8 August only) Mr J French, Counsel**

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed pursuant to Section 98(4) of the Employment Rights Act 1996. His basic and compensatory award shall be reduced by a factor of 25% to reflect his conduct prior to dismissal.

2. The Claimant was dismissed in breach of contract and is entitled to damages assessed on the basis of a 3 week period of notice lawfully required to bring his employment to an end.

3. The Claimant suffered an unauthorised deduction from his wages (non-payment of bonus) and the Respondents are ordered to pay to him the gross sum of £16,821.30.

4. The Claimant's complaints of having been subjected to a detriment because of a protected disclosure and having been automatically unfairly dismissed pursuant to Section 103A of the 1996 Act fail and are dismissed.

5. Pursuant to Section 38 of the Employment Act 2002 (failure to provide a statement of particulars of employment) the Second and Third Respondent are each ordered to pay to the Claimant compensation in the sum of 2 weeks' pay.

6. This case shall be listed for a hearing to determine remedy with a time estimate of 1 day.

REASONS

Issues

1. The Claimant brings a complaint of ordinary unfair dismissal where the Respondents put forward conduct as the reason for dismissal, in particular a failure to ensure the carrying out of safety checks in licensed entertainment venues for which the Claimant was responsible. The Claimant puts forward that in fact the real and principal reason for his dismissal was that he had made a protected disclosure. He says that he had raised health and safety concerns regarding an employee, Mr Luke Howells, which was held against him, particularly by Mr Michael Rothwell. Alternatively, the Respondents' reliance upon alleged acts of misconduct is said to be a sham to disguise an alternative reason for dismissal which arose out of the Claimant's refusal to accept new terms and conditions, in particular the introduction of a discretion in determining a contractual bonus entitlement.

2. The Claimant separately maintains that he suffered a detriment because of his protected disclosure in him being subjected to an unwarranted disciplinary process, the process which led to his dismissal.

3. The Claimant also alleges that his dismissal (without notice) was in breach of contract. He further seeks the payment to him of what he says was his bonus entitlement based on the profitability of the venues he managed, the withholding of which he says amounts to an unauthorised deduction from his wages.

4. Finally, if successful in his complaints, the Claimant seeks compensation for a failure to provide him with a statement of terms and conditions of employment in accordance with Section 1 of the Employment Rights Act 1996 and to provide him with written notification of any changes to his terms of employment.

Evidence

5. The Tribunal had before it an agreed bundle of documents in 4 volumes and in excess of 1500 pages. Various documents were disclosed during the progress of the hearing and ultimately accepted in evidence by agreement between the parties. As referred to below, management accounts had been provided which the Claimant's bonus was to be based on, but, upon the Respondent being challenged and provided by the Claimant with management accounts in a different form, there was agreement between the parties as to which version ought to be used in a calculation of the Claimant's bonus entitlement (if any).

6. The Tribunal heard firstly on behalf the Respondent from Heather Rothwell who had previously been employed by the Respondent and who undertook the Claimant's final disciplinary hearing, effectively as an external HR

consultant. It next heard from Mr Shaun Wilson, director, Mr Terry George, shareholder in the Respondent's holding company and from Mr Michael Rothwell, director and major shareholder. The Claimant called his union representative, Mr Kelvin Mawer and gave evidence on his own behalf.

7. Having considered all of the evidence the Tribunal makes the following findings of fact.

Facts

8. The Claimant was employed jointly by the three Respondents as Group Operations Director. The Respondents are operating companies for three entertainment venues/bars in Leeds, namely Bar Fibre, Mission and the Viaduct Showbar. The venues cater for a predominantly gay clientele. The first and third Respondent are owned by APN Holdings Limited which is in turn owned with equal shareholdings by Mr Michael Rothwell and Mr Terry George. The second Respondent is owned in equal shares by Mr Rothwell, Mr George and Mr Shaun Wilson. Mr Rothwell and Mr George are civil partners. Mr Rothwell is a director of APN Holdings Limited and acts effectively as managing director of a wider group of companies which includes the aforementioned three venues but also corporate bodies set up as vehicles for publications and the ownership and management of various properties. Mr George's evidence to the Tribunal was that he had never desired the responsibility attached to being an officeholder of any of the group companies. In these reasons, the term "Respondent" is used to denote the three separate Respondent companies, but where material the Respondent companies and/or the individual venues operated by them are referred to so as to differentiate between them.

9. The Claimant first commenced employment with Bar Fibre Limited on 16 June 2015 as its PR and Communications Manager. He was approached to fill that position by Michael Rothwell who he had known for in excess of 25 years having been introduced to him by Terry George. Mr George and the Claimant had become involved in joint business activities whilst the Claimant was living in Birmingham and managing a substantial nightclub there. The Claimant was issued with a statement of main terms of employment for this position dated 19 June 2015 which provided for a salary of £29,000 per annum and a notice entitlement of one week for each complete year of service up to a maximum of 12. The Claimant also enjoyed a bonus based on 1% of the venue's profit.

10. The Claimant was subsequently promoted to the position of Brand Director for Bar Fibre Limited and Viaduct Leisure Ltd, but with no new written contract issued. The Claimant then became Group Operations Director for all 3 Respondents (and therefore looking after their 3 venues) from November 2016. A letter was issued to the Claimant dated 7 November referring (inaccurately in fact) to the offer of the role as Operations Director at another company, All Points North Publications Limited. This described the Claimant's role as being responsible for driving the businesses (the 3 venues) forward in a positive and profitable manner with a list of responsibilities set out which included overseeing health and safety and human resources, insurance claims, fire risk assessments and electrical tests as required by law. It was noted that the Claimant would become a director "*of all three venues*". The Claimant countersigned the letter on 10 November 2016.

11. The Claimant took over this role from Mr Darren Rothwell, Michael Rothwell's brother who was struggling in the Operations Director role, partly due to personal health issues. However, split off from Darren Rothwell's previous responsibilities was responsibility for properties and a new role of Property Director was created which Mr Darren Rothwell continued in. This covered the 3 venues for which the Claimant had operational responsibility, as well as the property portfolio of the wider group of companies. Darren Rothwell was never provided with a job description for this new role.

12. Michael Rothwell invited the Claimant and Darren Rothwell to a meeting on 7 November to discuss the handover from Darren Rothwell to the Claimant. At the meeting the Claimant was given the aforementioned employment letter and went through it with Michael and Darren Rothwell. The Claimant highlighted some of the acronyms referencing the Claimant's duties within the letter which he did not understand and, in fact, which he says Michael and Darren Rothwell themselves were unsure of.

13. On 9 November Darren Rothwell emailed the Claimant attaching a copy of the health and safety compliance certificate and giving him the contact details of Bob Thompson who was said to work for their insurance company, Romero, but who was also providing health and safety advice free of charge. The Claimant was referred to 3 files on the shelves which were to be utilised for each venue and it was said that Darren Rothwell had requested that Steffi Mustard, who worked effectively as the Claimant's administrative assistant, organise a meeting with Mr Thompson so that he could deliver training to management. Darren Rothwell went on that all venues would need a fire risk assessment review which was done annually in November and was therefore now due. He suggested that the Claimant speak to Bob Thompson as he was sure this was something he could do. It was further noted that fire extinguishers were also due to be serviced annually in November. It was said that those in the Bar Fibre venue had been recently serviced, with the contact details of the company who had provided that service again given to the Claimant.

14. The Claimant performed well in his new role, certainly in terms of increasing takings. On the back of these achievements he put together a written proposal for a salary review package dated 28 September 2017. Within this he put forward a proposal for an increase in salary to £60,000 per annum together with a bonus calculated at the rate of 12% of overall net profit. The Claimant's existing package was in fact by now set at a basic salary of £45,000 and a 4% bonus based on net profits. This was considered by Michael Rothwell with agreement reached, incorporated into a pay review letter of 30 October 2017 countersigned by the Claimant, for an increase in annual salary to £55,000 and an increase in bonus to 7% from the net profits of each of the 3 venues for which the Claimant was responsible. The increase was to be frozen for two years, with the next review date no sooner than 18 October 2019.

15. Michael Rothwell accepted that net profit was calculated on the management profit and loss accounts and bonus paid on a quarterly basis. He accepted that with the net profits of the 3 venues likely to be in the region of £1 million, the Claimant's bonus entitlement was likely to outstrip his basic salary. Mr Rothwell confirmed that indeed the Claimant was going to get 7%

on such a sum. When put to him that there was no element of discretion, he agreed that it was a simple mathematical calculation.

16. At the same time, the Claimant was also offered a further incentive to become a 25% partner in a prospective building project Mr Rothwell had in mind, known as the Wellington Hotel.

17. The Claimant was subsequently issued with a revised form of contract which the Claimant says he received only in August 2018. The Respondent's position is that it was provided to him in July. A covering letter refers to a proposal to change the Claimant's contract of employment on 31 October 2018 with reference made to 90 days being a period of consultation the Respondent considered would have been given prior to the implementation of the new contract. The letter included reference to changes to the employment conditions being the introduction of new policy statements and a staged notice period. It was said, however, that there were no changes to "*affect your statutory employment rights*" including the Claimant's rate of pay. It did, however, refer to the payment of bonus as being discretionary. As will be described, the Claimant's employment in fact ended on 17 October 2018. Mr Rothwell, on that basis, accepted that the only contract terms the Claimant had in place at that date in terms of remuneration was what was reflected in the October 2017 agreement. He agreed that any new contract issued in July or August 2018 did not change the Claimant's salary or bonus percentage. He accepted that on the basis of the management accounts provided now to the Tribunal, the Claimant ordinarily would have had an outstanding entitlement as at the termination of his employment to a bonus sum of £16,821.30.

18. When put to Michael Rothwell again that the bonus had never been discretionary, he said that venues' general managers who reported to the Claimant had had bonus entitlements taken off them before and all managers' bonuses were discretionary. He maintained that the Claimant's bonus had always been discretionary as well. He was unable, however, to point to any document which said as such or to any instance during his employment where the Claimant had himself been told that he was not entitled to any bonus amount. In response to subsequent questions, Michael Rothwell said that the Claimant was not going to receive a bonus after he had left his employment. He had been paid his bonus entitlement until he had been dismissed.

19. As alluded to already, the new statement of terms issued for the Claimant by the Respondent had been drawn up by Wayne Beasley who had been engaged as a consultant to put the Respondent's policies and contractual documentation into some sort of order. It did contain a section under the heading of "*bonus scheme*" which read: *"If you are eligible to receive a bonus, the payment of which is entirely at the discretion of the company. If you are eligible for a bonus the details will be provided by your line manager, and outlined in additional documentation.*"

20. It was suggested to Michael Rothwell that he had been told by Wayne Beasley that the Claimant would never accept this change to the bonus arrangement which Mr Rothwell described as *"news to me"*. Indeed, the Tribunal considers it more likely than not that Michael Rothwell had not been informed of any protestations made by the Claimant. On Wednesday 22

August 2018, when the Claimant was facing a disciplinary investigation later that day, he emailed Mr Beasley saying that Mr Beasley had recently informed him that he would be issued with an updated contract for perusal and given a 90 day review period to enable consultation before any changes took place and the document was signed. He said he had looked for this and could not find it requesting a copy if possible. Mr Beasley responded by email saying that he had given the Claimant his contract at the last directors' meeting at the Bells in July 2018. This does not indicate any particular dispute on the Claimant's part at this stage.

21. The evidence in the Claimant's own witness statement was that he did not agree to bonuses for his own management team being discretionary and this was certainly not something he would agree to as a director.

22. Michael Rothwell said that there was no issue that the Claimant would continue to receive his bonus and the more he generated in profit the more he, Mr Rothwell would receive as an owner. He considered that the Claimant had received the contract in July and, if he had had any issue with it, he would have put that in an email. Mr Rothwell did not see any change being made to the bonus arrangements and thought that the new contract simply formalised the existing arrangement such that he did not consider that the Claimant might not agree to sign up to the new contractual terms.

23. It was the Claimant's case (and put to Michael Rothwell) that there was considerable friction between him and the Claimant regarding Luke Howells, General Manager of the Viaduct Showbar reporting to the Claimant and Luke Horsfield who was engaged as a DJ at that venue and also had a separate employment in one of the group companies. Mr Rothwell did not accept that there had been friction, but did recall discussions about these two members of staff.

24. On 21 December 2017 Michael Rothwell had emailed the Claimant expressing a number of concerns regarding Mr Howells' performance as manager. Michael Rothwell described the state of cleanliness at the Viaduct as shocking and questioned Mr Howells' staffing arrangements and lack of forward planning. He went on: *"I understand you've got a soft spot for him but if you look very closely its sloppy and not managed the places*." The Claimant responded thanking Michael Rothwell for his email and then stating: "*I like it when we're in tune*." He said that he had sent Mr Howells the email, a number of the issues had already been discussed, but that he would sit down with him on the Friday to run through things, as well as the matters which Michael Rothwell had raised. The Claimant indeed forwarded Michael Rothwell's email to Luke Howells asking him for his comments and saying: *"can you jump on this today and start to make action."*

25. Michael Rothwell in cross examination did not accept that he regularly criticised Mr Howells to his face or was unduly harsh towards him in comparison with the managers of Mission and Bar Fibre. Mr Rothwell said that he was constantly moaning at Cameron, the manager of Bar Fibre, and denied that he was particularly sensitive regarding the Viaduct venue, describing all the venues as: "*my babies*".

26. In May 2018 postings were made on the Viaduct Facebook site calling Mr Howells a paedophile. This coincided with a time where a number of the Respondent's employees were staying at a villa in Gran Canaria, including Mr Horsfield, connected with a show the Respondent was putting on there. Mr Howells believed that Mr Horsfield was the originator of that Facebook message. Michael Rothwell said that, back in Leeds, the Claimant had referred to Mr Horsfield as misbehaving after which "*all hell let loose*".

27. Certainly, on 23 May 2018 Mr Horsfield emailed Michael Rothwell and the Claimant expressing his annoyance at the finger having been pointed at him over the online abuse of Mr Howells without any investigation and with people assuming he had made the comments because of past issues. He said that he wanted the real culprit to be identified and then an apology from whoever was accusing him. At some point, according to the Claimant, Mr Horsfield had made some comments disparaging of Mr Howells over the DJ microphone at the Viaduct.

28. On 24 May, the Claimant emailed Michael Rothwell saying that he believed it wise to cancel Mr Horsfield's forthcoming DJ slots until the situation had been investigated, saying he felt uncomfortable with contract members of staff creating upset and bullying within the venue based on comments about Mr Howells and other members of the team which had been made in public sometimes on the microphone. He went on: "*We cannot allow our venues to become a place for bullying and hate."* Mr Rothwell responded asking that they not let the situation affect the day-to-day running of the business and that they would step back and let Wayne Beasley carry out an investigation. He said that he didn't understand why Mr Horsfield's DJ sets should be cancelled for him raising a grievance saying: "*I think this is a crazy idea that will only leave him feeling more victimised"*. He said that if the Claimant felt any bullying was happening within the venues, then this needed to be raised in the correct way and investigated independently. Mr Rothwell's position was that there was no evidence or concrete information about any abuse which had occurred over the microphone. He did not see himself as supporting Mr Horsfield in circumstances where the Claimant was defending Mr Howells but simply that he had received a grievance from Mr Horsfield, but not from Mr Howells.

29. The Claimant's evidence before the Tribunal was that he understood Mr Rothwell himself had directed abuse at Mr Howells over the Viaduct club microphone when open to the public. In particular, it was alleged that he had told him that he was going to get the sack and called him "*a cunt*". Mr Rothwell denied this and the Claimant did not have any direct evidence of his own as to what had occurred such that the Tribunal cannot make a positive factual finding in terms of this alleged treatment of Mr Howells by Michael Rothwell.

30. In any event, the issues led to a meeting on 30 May effectively chaired by Mr George acting as a mediator between the Claimant and Mr Rothwell in terms of their contrary views of Mr Howells and Mr Horsfield. Mr George made a voice recording of the meeting at was a common practice of his. Mr George said that the voice recordings were then, as again was not unusual, air-dropped to the Claimant and Mr Rothwell. The Claimant does not accept that this happened or that he was aware that the meeting was being

recorded. The dispute is not, however, material to the Tribunal's conclusions.

31. The tenor of that conversation illustrates that the Claimant was able to engage in robust discussions with Mr Rothwell and it is evident that Mr George did see himself as needing to inject some sort of perspective between both of them, if not bang heads together. He said that the Claimant and Mr Rothwell almost treated Mr Howells and Mr Horsfield respectively "*like pets*".

32. At one point the Claimant described Mr Howells as crying when he was talking to him about different comments he had heard. He said that Mr Howells had said he felt persecuted commenting about things that "*was said over the microphone things that you have said, a conversation has taken place about him getting the sack*." These included the claim that Mr Rothwell had said Mr Howells was going to get the sack and called him "*a cunt*", the Claimant saying to Mr Rothwell that "*he is remembering these things and he is making a note and he's got notes of them*." The Claimant said: *"… What I'm trying to do is protect us. So I don't want to see Luke get the sack and I don't want to see us in any deep quagmire.… Luke has gone and got advice and I know he has gone and got advice."* The Claimant referred to this being advice of a human resources nature. The Claimant asked why Mr Rothwell was so defensive of Mr Horsfield to which Mr Rothwell responded that he was trying to keep a lid on all of it. Mr George pointed out that the Claimant was also very defensive of Luke Howells and he felt the Claimant was too close to him. Mr George also said that he that Mr Howells had been acting inappropriately at work. Mr George referred to Mr Rothwell and the Claimant both playing the same game saying: "*You are protecting Luke Horsfield, you are protecting Howells*."

33. Before the Tribunal Mr Rothwell denied that he had been responsible for bullying Mr Howells or that it was ever said to him (by the Claimant) that that was what was upsetting Mr Howells. He referred to Mr Howells recently having had a disciplinary hearing regarding sexual misconduct at work saying that Mr Howells was stressed and also in debt to the Claimant and with loads of other issues to deal with. Mr George's position before the Tribunal was that the Respondent did not in fact sack Mr Howells and Mr Howells had not himself felt bullied. If things had been said to Mr Howells it was "*banter*". However, he did not know what had been said, but rather that within the Viaduct there was banter over the mic, for instance involving drag queens on stage and members of the management team.

34. A further meeting took place on 2 July 2018 which Mr George again recorded. Mr George considered that the main topic was concerns about cleaning checks being carried out and documented. He thought that Mr Howells was failing to keep on top of these and Mr George knew how crucial they were, he having attended a court hearing following someone slipping on the stairs. The Claimant referred to his concerns about the effect of matters on Mr Howells' health. Mr Rothwell again repeated that Mr Howells had a lot of issues at this time. He denied to the Tribunal that he had ever tried to get Mr Howells sacked. He said his view was in fact that Mr Howells was not capable of doing his current job as General Manager, but that he wanted to help him, even if that meant that he had to take a lower position, for instance, as a supervisor.

35. The Tribunal has been taken to email correspondence from Mr Rothwell around the time that the Claimant had an inpatient hospital appointment for an investigation into potential bowel cancer on 12 July 2018. Mr Rothwell in an email sent at 7:53am appeared to be displeased that the Claimant had not attended a meeting, albeit in evidence he said that he had not recalled the exact date the Claimant was going into hospital. Mr Rothwell said that he had woken up with some issues going round in his mind and had emailed the Claimant with his concerns. The Claimant responded shortly afterwards at 10:37am referring to himself as having just woken up in hospital after his treatment. The Claimant replied further at 3:30pm answering Mr Rothwell's earlier concerns and Mr Rothwell responded at 4:15pm with his comments on the Claimant's responses. When put to Mr Rothwell that it was noteworthy that he uttered not a single word regarding the hospital procedure or illustrated any concern for the Claimant, Mr Rothwell said that this was just an everyday email.

36. On 15 July 2018 Mr Rothwell sent to the Claimant an email with the subject heading *"Luke Howells Times Up*". In error this was at the same time copied into Mr Howells.

37. Mr Rothwell described himself in the email as really dismayed and queried: *"Why are we even entertaining Luke Howells. His ability to manage anything is zero, no ability to follow things through, works as little as possible… No care for company, or staff, no clue with cabaret no clue or forward planning. It's very frustrating but it seems I'm the only one that can see this. He is at very best assistant manager."* He then listed a number of perceived failings or conduct issues which included an alleged sexual encounter with one of the club's employees in the disabled toilets after being told to stop such behaviour with staff. Mr Rothwell concluded that Mr Howells needed disciplining and was showing a complete lack of commitment and respect for his job. He felt it was time to have the right person in place. The Claimant responded to this message quickly, saying that he had spoken to Wayne Beasley on the Friday and was seeing Mr Howells that week with Mr Beasley present too. He said that not all of the details within Mr Rothwell's email were quite factual, but sought to assure Mr Rothwell that the issues were being addressed.

38. The Claimant telephoned Mr Wilson shortly after receiving the email and then met him for breakfast. Mr Wilson accepted that the Claimant saw this email as unpleasant agreeing that he too would not wish to receive such an email. If the Claimant laughed, as was suggested by Mr Wilson, he accepted that this was not because the Claimant found it funny, but out of a sense of embarrassment.

39. On Wednesday 18 July Mr Beasley sent Mr Rothwell a lengthy email about the Claimant and himself meeting with Mr Howells the day before. He described Mr Howells as unsurprisingly upset and that the subject of the email he received the previous Sunday came up quickly. Mr Beasley advised Mr Rothwell that discussions of the type set out in the email should never have been put in an email, but instead kept for meetings or views expressed over the phone. Whilst he appreciated that Mr Howells was not supposed to have received the email, the comments, he said, could very easily put the company and Mr Rothwell personally in a precarious position.

40. Mr Beasley then went on to summarise the pre-planned meeting with Mr Howells to conduct a performance review. This set out all of the issues of concern, Mr Howells' comments and a summary of the current situation.

41. Then, under the heading of "*potential outcomes*", Mr Beasley repeated that Mr Howells was distressed regarding the comments made and it was apparent that he had sought advice, Mr Howells having used words such as bullying and harassment. He said that Mr Howells had been advised that he was in a good position for constructive dismissal. Mr Beasley referred to having asked Mr Howells if he had a figure in mind in terms of possible compensation and in the email advised Mr Rothwell regarding the possible use of a compromise agreement. He noted that Mr Howells was away for a few days with some time off and two days compassionate leave but that it would be good to have a conference call to discuss the issue of his continuing employment further.

42. Mr Rothwell replied to Mr Beasley thanking him for his long email which he noted could have been much shorter if the matter had been dealt months ago. He expressed himself as bitterly disappointed that Mr Howells thought he could go for constructive dismissal. He said there was no other option than for him to be disciplined and dismissed at the earliest convenience. He felt that all his points were relevant and he could be sacked for any of those. He went on: *"I would not entertain giving him any compassionate leave, he needs disciplining and his employment terminating*". He continued: *"There is no need for conference call with Terry. I'm the MD of the company, and Terry is supportive of my decision."*

43. A meeting also took place at the Bells attended by the Claimant, Michael Rothwell and Wayne Beasley during which the Claimant and Mr Beasley said that they had a concern regarding the email which had been mistakenly copied into Mr Howells. Mr Rothwell accepted that he shouldn't have sent it – he had indeed had a coffee with Mr Howells prior to this meeting at which he had apologised to him. The Claimant's position before the Tribunal was that they had referred to the issue of Mr Howells being bullied by Mr Rothwell. Mr Rothwell accepted that they raised that Mr Howells felt bullied, but not by him. The Tribunal cannot accept that Mr Rothwell did not understand that this was being said. Mr Rothwell considered that a number of issues of a lack of support given to Mr Howells had been discussed, as well as aspects of misconduct and poor performance by Mr Howells. Mr Howells had, for instance, failed to bank some cash. Mr Rothwell's position was that he couldn't recall saying at the meeting that Mr Howells ought to be dismissed, but he considered that he may have said that he needed to be disciplined.

44. A letter was prepared by Mr Beasley (and it appears issued on or around 1 August 2018) which notified Mr Howells that he was receiving a first written disciplinary warning arising out of the banking failure. Subsequently, Mr Howells faced a potential disciplinary hearing regarding the completion of the cleaning checklist sheets, failing to follow procedures, putting the Respondent at risk of insurance claims and potentially misleading directors. The allegations led to an investigation meeting held by Mr George on 15 August at the end of which he decided there was no further action

necessary. Mr Rothwell's evidence was that this was Mr George's own independent decision in which he had no involvement himself. It was put to Mr Rothwell in cross examination that Mr George's decision had been made because Mr Rothwell had transferred his sights (his target) from Mr Howells to the Claimant. That suggestion was not, however, put to Mr George himself. The complexity and shifting dynamics of the relationships between the main protagonists in this case makes it impossible for the Tribunal to reach that conclusion in the absence of a clear evidential basis.

45. The landlord's agents, SES, visited the Mission club to check on aspects of health and safety compliance on 9 August 2018. The Claimant was not there at the time, albeit he did not depart on a period of annual leave until 13/14 August. Darren Webster, a manager at Mission had spoken to the representatives from SES and had rung the General Manager of Mission to see if he knew where the safety/compliance certificates were. Next on site was Jeremy Wainwright, part of Darren Rothwell's property team. Mr Michael Rothwell thought that Wayne Beasley had first alerted him to the issue. It was subsequently reported to Mr Michael Rothwell that whilst they had been able to gain access to the premises, SES had not been able to view the health and safety certification, understanding that such documents were kept in head office. Mr Michael Rothwell's evidence is that the documents were then checked and the certification was found to be out of date in circumstances where it was considered that the Claimant had failed to carry out his responsibilities to ensure that the required periodical checks had been carried out.

46. Documentation from Leeds City Council, the body responsible for licensing the premises, in the Respondents' possession at the time read as follows: *"Electrical installations will be inspected on a periodic basis (at least every 3 years or at a frequency specified in writing) by a suitably qualified and competent person".* It went on: *"The frequency of the inspection should be determined by the competent electrician, the next inspection is usually recorded by them on the inspection certificate."* Mrs Heather Rothwell, who, as will be explained, chaired a final disciplinary hearing of the Claimant, was made aware of that document but not of any other advice regarding safety or regulatory compliance.

47. Mr Michael Rothwell's evidence was that the required documents for Mission were either missing or out of date. As regards Bar Fibre, he said he then discovered *"to his horror"* that the documents for that venue were also out of date and in fact some had expired two years previously. The only venue that was "*in date"* was the Viaduct Showbar, but that that was due to it recently having reopened after a refit during which the contractors made sure that everything was in order.

48. The Tribunal has been shown the relevant certification. As regards the Mission, the fire detection and alarm system certification appears to have been issued on 15 September 2016 but renewed/updated in fact on 10 July 2018, shortly before, therefore, the SES visit. Similarly, the emergency lighting certificate had been issued on 11 July 2018 with the previous certificate being dated 15 August 2016. Both of the 2016 certificates recommended that the next inspection occur in a year. Any July 2018 inspection had not been carried out at the Claimant's initiation or with his knowledge. The Claimant's position throughout was that he had no

involvement in any safety certification for any of the 3 venues. The Respondent had no electrical installation condition report before it in respect of this venue.

49. Mr Michael Rothwell said that having discovered that the certification for Mission was out of date, arrangements had been made for the certificates to be updated, but only after the SES visit. He thought that Jeremy Wainwright had instructed the contractor, Brian Walker, in August. The SES visit was obviously in August, whereas the certification appears on the face of the documents to have occurred in early July. Mr Rothwell's suggestion was that perhaps the certificates had been mis-dated by the contractor with an earlier date in error. The Tribunal considers that to be unlikely and there is no evidence that these were anything other than genuine documents completed by the third-party contractor. Mr Rothwell conceded that he did not realise at the time he investigated the matter that there were these, he would maintain, *"incorrect dates"* on the certificates.

50. As regards Bar Fibre, the Respondent had a fire detection and alarm system report dated 30 April 2016 (but information regarding any recommended subsequent inspection does not appear to have been before the Respondent at the time the Claimant was dismissed). The Respondent evidenced that a further one had been carried out on 15 August 2018 after the non-compliance issues had been discovered following the SES visit. The Respondent evidenced an emergency lighting certificate recording an inspection/testing on 18 August 2018 (after the SES visit) with a recommended next inspection to take place in 12 months. It did not have any earlier test certificate. A declaration of conformity had been issued in respect of a new emergency lighting installation dated 3 April 2016. There was no reference to the date of any recommended next inspection. An electrical installation condition report had been completed on 3 April 2015 with a recommended next inspection in 3 years. That next inspection had not occurred.

51. Mr Michael Rothwell denied that by the week beginning 12 August he had made up his mind that he wanted the Claimant out of the business. He said that he still would have preferred him to be with the company, but he could not have maintained the Claimant's employment given the failings discovered. He thought the decision was a difficult one, which he himself couldn't have made, but was the right decision based on the evidence. It was suggested to Mr Rothwell that the most obvious thing to do would have been to contact the Claimant, including when he was on holiday, to see if he might quickly be able to explain the issue regarding the certificates and the other issues of concern, which Mr Rothwell accepted were of a lower level of seriousness. He said that he was reluctant to contact the Claimant whilst he was on holiday and also that Mr Beasley had said that the matters in issue were serious and the Claimant had to be more formally invited to a meeting.

52. Mr Michael Rothwell arranged for Darren Rothwell to go into the premises to take photographs as potential evidence. This suggests a desire on Mr Michael Rothwell's part to widen the scope of the investigation. Mr Michael Rothwell, who thought that he was in Ibiza at the time, said that he had only decided that he would be the investigator into the issues once he got back and when Mr Beasley explained to him the process they needed to follow.

He said he had taken on this responsibility as the only other director was Ian Ellis, Finance Director, and he was described as not having the necessary people skills to have the ability to carry out such a task. Mr Rothwell accepted however that Shaun Wilson was also a director and part owner of Mission and could have carried out the investigation.

53. The Claimant thought that Mr George had been asking staff questions about him during his holiday absence. Mr George said that these related to ongoing issues with Luke Howells and his desire to ensure that the cleaning sheets were being completed and to have sight of them. That fits indeed with the timing of the hearing Mr George conducted into allegations of Mr Howells' misconduct (as described above).

54. It was put to Mr Michael Rothwell that there was no need to ask anyone for their own version of events regarding the safety documentation beyond the Claimant and Darren Rothwell. It was suggested, therefore, that he had asked other staff for their views in an attempt to gather additional information to be used as a pretext for the Claimant's dismissal. Mr Rothwell denied that there had been any form of general fishing expedition.

55. He said that he had decided, together with Shaun Wilson, which allegations would go forward to a disciplinary hearing. As far as he was concerned there had never been thereafter any change in the nature of the allegations and Mr Rothwell had had no further involvement beyond an investigation meeting he held with the Claimant on 22 August. He knew that Mr George went on to hold disciplinary meetings and that then that the matter was taken over by Mrs Heather Rothwell.

56. He said that the Claimant had been suspended when he came into work after his holiday on the Tuesday because he had caused upset in Mr Horsfield's office and at Bar Fibre and it was felt appropriate that he remain away from the workplace given his feelings.

57. The Claimant's investigatory meeting took place at the Bells with Sam Wilson in attendance to take note of the meeting. Mr Michael Rothwell commenced by asking the Claimant about his responsibilities which the Claimant appeared to accept included matters of health and safety. At the end of the meeting the Claimant was handed a letter confirming his suspension from work with immediate effect.

58. On 24 August 2018 Mr Rothwell conducted a number of interviews with Steffi Mustard, Mark Hawkins, James McCloy, Darren Rothwell, Tom Williams, Joe Rendell, Ian Ellis, Nick Johnson, Cameron Mosley, Mitch Crenshaw, Aidan Bulham, Jack Campbell and Luke Horsfield. The meetings involved Mr Rothwell putting questions to them regarding the Claimant's performance and behaviour at work. Mr Darren Rothwell said that he had relinquished responsibility for the safety certification on relinquishing his previous role as Operations Director. He said that whilst the Claimant had asked him to assist with completing property maintenance work, the Claimant did not raise any questions with him regarding safety certification and renewal dates. He said that it was *"100% not my job, it's the Ops Directors job…"* He maintained that the certificates ought to have been kept within the health and safety files which were located where Steffi Mustard sat. He said they were not his files and he was not liable as they were not

in his office. Darren Rothwell's interview statement was not ever provided to the Claimant in the internal process.

59. On 30 August the Claimant received a letter from Terry George inviting him to a disciplinary hearing to take place on 4 September. This was said to be to discuss a number of allegations described as: *"serious breaches of health and safety rules, serious breaches of licensing law, failure to apply appropriate senior management control to the licensed venues and failure to apply appropriate management control around the planning, organisation and communication of Made in Leeds and Leeds Pride.*" The letter confirmed that the meeting could result in the Claimant's summary dismissal. The Claimant felt that the allegations were broadly drawn making it difficult for him to adequately prepare for the hearing. The Claimant was also sent various supporting documentation. Mr George considered the Claimant to be fully competent in all operational matters relating to the venues. The Claimant had lobbied for his promotion pointing out what he could do, what Darren Rothwell had been failing to do and telling Mr Michael Rothwell and Mr George things that even they did not know about. The Claimant had a great personality and got the best out of people and they had been willing to overlook certain failings such as him frequently not attending meetings and going missing for days on end. However, the discovery that the venues did not have safety certificates put people at risk and the business in danger of closing down. It was the straw which broke the camel's back.

60. Prior to the hearing the Claimant formulated the points he wished to put across at the disciplinary hearing including his view that the decision had already been made, that individuals had fabricated documents including the cleaning check sheets, that he was being punished for sticking up for Luke Howells, that staff members had already been told that the Claimant had been dismissed, that the allegations have been used as an excuse to get rid of him due to his refusal to agree to less beneficial bonus terms and finally that Mr Beasley was taking on a larger role which was likely to reduce the Claimant's own responsibilities. The Claimant also formulated arguments as to what responsibilities fell upon him as opposed to other individuals such as Darren Rothwell as Property Director. The Claimant maintained that there had been a lack of training of him and an insufficient handover of responsibilities from Darren Rothwell.

61. The Claimant also asked for more time in order to prepare for the disciplinary hearing and for the provision of additional information, for example the premises' licenses and health and safety documents.

62. The Claimant then received a further letter from Mr George dated 4 September confirming that the disciplinary hearing would now go ahead on 11 September. The Claimant considered that the allegations remained vague and lacked supporting documentation. By this stage he had engaged the services of a solicitor who wrote to Mr Beasley on 4 September referring to this lack of information. The Respondent's position was that the Claimant had sufficient information to answer the allegations. The Claimant's solicitor subsequently had a telephone conversation with Michael Rothwell and made an attendance note of it contents. Mr Rothwell is recorded as saying that the Claimant knew the full allegations against him and that he had "*put people's lives at risk*". He is also recorded as saying that: "*Phil is guilty of*

some serious gross misconduct and needs to accept the consequences". The Claimant's solicitor records himself as saying that it already sounded like Mr Rothwell had made his mind up with Mr Rothwell then explaining that he would keep an open mind about this.

63. On 7 September the Claimant wrote again to Mr Beasley requesting more detail of the allegations against him. He replied on 9 September with an update invite to the disciplinary hearing. This elaborated slightly on the previous allegations but the Claimant considered that they were still insufficiently clear.

64. The disciplinary hearing went ahead on 11 September. The hearing was recorded with a transcript produced thereafter. Terry George chaired the hearing with Kelvin Mawer present as the Claimant's union representative. The Claimant accused Mr George and Mr Michael Rothwell of conducting a witch hunt. That was, Mr George said, why they had to ultimately bring in Heather Rothwell to conduct the disciplinary hearing. Mr George struggled to control the meeting and to deal with the volume of representations the Claimant wished to make. At one point he confessed to being out of his depth and struggling to follow matters. Essentially the Claimant's defence was that there had not been a clear job description for his position as Operations Director or agreement on what fell within his remit. He had never received a contract detailing his responsibilities. He had not received a detailed handover from Darren Rothwell. He said he had been led to believe that all issues relating to property maintenance, including renewal of licences and electrical works, remained with Darren Rothwell. Given the group structure, he felt that there had been crossed wires. The whole process was in any event a sham and he maintained that the decision to dismiss him had already been taken. He said that he had been targeted as a result of supporting members of staff, including Mr Howells, which had not gone down well with Mr Rothwell. Mr George's view was that the Claimant knew what he was meant to be doing in his Operations Director role. He had tried to remain open minded but it was difficult when he knew the Claimant and his work.

65. There was insufficient time to conclude the hearing such that the Claimant received a further disciplinary invitation letter on 22 September. Mr George denied that at this point he had decided on the Claimant's guilt. He said that he never had to decide on the level of punishment and was happy that this had not been his decision. The Claimant felt that additional allegations had been added as, in his view, there had been a realisation on the Respondent's part that it did not have enough to terminate his employment.

66. The reconvened disciplinary hearing took place on 25 September before Mr George again. Mr Mawer also attended this further meeting as the Claimant's representative. The hearing did not reach a conclusion and was effectively aborted.

67. On 28 September a further disciplinary invitation was received by the Claimant from Mr Beasley informing him that Heather Rothwell would now be conducting the meeting and noting that there was an extra part added to the fourth allegation which included a failure to plan and promote the launch of the Viaduct refit.

68. Mrs Rothwell is the wife of Darren Rothwell. She could not recall who had asked her to become involved in the Claimant's case but accepted that it could have been Michael Rothwell. She accepted that he could be described as the "*main man*" in the business though she also thought his co-owners and directors had equal responsibility. She had been employed by a group company, All Points North Limited, as a director for 13 years, the last 5 of which she was involved in human resources matters. Shortly before the Claimant became Group Operations Director she had become self-employed and provided property related services to the group. However, that had since ceased. She had anticipated that she would be called upon to provide HR services as a consultant thereafter, but that came to little. Mr Beasley took over an element of HR administration. She had had no prior involvement in the Claimant's disciplinary case apart from assisting in the compilation of documents to be provided to the Claimant in advance of his second meeting with Mr George.

69. The Claimant then received a letter from Heather Rothwell dated 26 September but sent by email dated 28 September stating that following a breakdown in communications between himself and Mr George it was necessary to reconvene the meeting on 9 October. The relevant documents enclosed were listed in the invitation letter. The Claimant duly attended that meeting, again accompanied by Mr Mawer. Ms Rothwell at that stage had only seen document extracts provided for Mr George's second meeting with the Claimant. At the hearing on 9 October, the Claimant went through documentation he wished to raise in support of his defence. Mrs Rothwell made a note of the documentation and the Claimant's points so that after the meeting she located and reviewed this documentation for herself. She did not go looking for any other relevant documents herself but felt she understood what the Claimant had provided (without needing to go back to him) and did not consider them to be relevant.

70. Mrs Rothwell had been aware in advance that the Claimant was saying that he was being blamed for matters which were her husband's responsibility. She, however, considered that the Claimant's responsibilities were clear from his job description.

71. The documentation raised by the Claimant included an email chain regarding the use of the insurance company, Romero, to arrange safety inspections. On 15 November 2017 Bob Thomson of Romero emailed Steffi Mustard on her querying a safety certificate issue saying his understanding was that the Respondent intended to manage risk management in-house going forward. Mrs Mustard forwarded this on to the Claimant and Mr Beasley asking whether they were no longer using Romero at all. The Claimant responded saying: *"I haven't agreed any change, where have they got this from?"* Mr Beasley shortly after provided his own comments by email saying that he had been told that he was taking the task over but that he had no idea where that had come from. He wondered whether Mr Thompson had picked up on the fact that the venue managers had all now been trained to level 3 health and safety and presumed that they would take over this task.

72. Ultimately, Mrs Rothwell was of the view that the Claimant was guilty of gross misconduct in failing to conduct relevant safety checks and to ensure that the certificates were up-to-date. She considered that this was sufficient

misconduct to justify the Claimant's immediate dismissal and indeed terminated his employment for that reason. She considered that all of the other matters of the Claimant's conduct raised against him were examples of misconduct which might on their own have been dealt with by way of some form of disciplinary warning, first or final. Certainly, had they all been raised against the Claimant (but without the safety issue), her view was that she would not have terminated the Claimant's employment. However, she believed that the health and safety certification issue was sufficient on its own to require the Claimant's dismissal, which was then communicated to him in writing. She had the written authority to make whatever decision she determined to be appropriate from Mr George and Mr Wilson and understood herself to have Mr Michael Rothwell's similar authority. It is noted that Mr Rothwell was a director of the holding company but not of any of the 3 Respondent companies. Mr Wilson was a director of all three and Mr George of none of the Respondent companies.

73. She explained to the Tribunal that she concluded the health and safety certification was the Claimant's responsibility. She did not consider there to be any evidence that he genuinely misunderstood the scope of his responsibilities. In fact, she concluded that this was not his genuine belief. Even if it had been, she said that she would still have dismissed the Claimant because the responsibilities were in his job description. It was put to her in cross examination that she felt able to conduct the disciplinary hearing because, in advance of it, she knew she was not in a position of a potential conflict of interest in terms of her husband's duties because she considered it to be a given fact that the responsibilities in question were responsibilities of the Claimant alone. She agreed.

74. The Claimant received a letter from Mrs Rothwell on 17 October 2018 confirming his summary dismissal. Her core reasoning for upholding the allegations was that she did not find the Claimant's defence to be acceptable. The Claimant was made aware of a right to appeal her decision but considered that an appeal would have been futile.

Applicable law

75. Section 43A of the Employment Right Act 1996 provides that a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of the Sections 43C to 43H. Section 43B of the Employment Rights Act 1996 provides as follows:-

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more of the following:-*
>
> *(a) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject; ……*
>
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered,…."*

76. It is clear that a disclosure must actually convey facts and those facts must tend to show one of the prescribed matters. The making of an allegation or the expression of opinion or state of mind is insufficient.

77. As regards the public interest requirement, the Tribunal has been referred to the case of **Chesterton Global Limited v Nurmohamed [2017] IRLR 837** where Underhill LJ cited following factors as a useful tool in determining whether it might be reasonable to regard a disclosure as being in the public interest as well as in the personal interest of the worker:

    a. "*the numbers in the group whose interests the disclosure served…..;*
    b. *The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
    c. *the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
    d. *the identity of the alleged wrongdoing –… "The larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest…"*

78. Section 103A of the Employment Rights Act provides that:

> *"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."*

79. This requires a test of causation to be satisfied. This section only renders the employer's action unlawful where that action was done because the employee had made a protected disclosure. In establishing the reason for dismissal, this requires the Tribunal to determine the decision making process in the mind of the dismissing officer which in turn requires the Tribunal to consider the employer's conscious and unconscious reason for acting as it did.

80. The issue of the burden of proof in whistleblowing cases was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason

that he or she is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal.

81. This case also involves allegations that the Claimant has been subjected to a detriment in the commencement of a disciplinary process on account of his having made a protected disclosure.

82. Section 47B of the 1996 Act encapsulates a worker's rights (in circumstances other than where the worker is an employee and the detriment in question amounts to dismissal) providing at subsection (1) that :-

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

83. Again, the issue of causation is crucial. The Tribunal refers to the case of **NHS Manchester v Fecitt and others [2001] EWCA Civ 1190** and in particular the judgment of Elias LJ. His view was that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. He said:

> *"Once an employer satisfies the Tribunal that he has acted for a particular reason – here, to remedy a dysfunctional situation – that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false (whether consciously or unconsciously) or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the **Igen** principles".*

84. In a claim of ordinary unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct pursuant to Section 98(2)(b). This is the reason relied upon by the Respondent, albeit incompetence may be a potentially fair reason as one related to an employee's capability (see Section 98(2)(a)). If the Respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

> *" [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) –*
> *depends upon 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
shall be determined in accordance with equity and the substantial merits of the case".

85. Classically in cases of misconduct a Tribunal will determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard. The Tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

86. The reason for dismissal is "*the totality of the reason which the employer gives*" (see **Robinson v Combat Stress UKEAT/0310/14**). The fact that upon analysis some parts of that reason do not stand up to scrutiny does not mean the dismissal is unfair if what is left means dismissal was still within the band of reasonable responses.

87. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

88. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

89. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to his dismissal – ERA Section 123(6).

90. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any conduct on the employee's part that occurred prior to the dismissal.

91. As with any finding of contribution, in the separate claim seeking damages for breach of contract (notice pay), it is for the Tribunal to determine whether the Claimant was guilty of an act of gross misconduct. There is also a dispute in this case as to the amount of notice required to lawfully terminate the Claimant's employment.

92. The Claimant seeks to recover a bonus entitlement he says was withheld from him for the final quarter and up to the termination of his employment. Section 13 of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract. In accordance with Section 13 (3), where the total amount of wages paid is less than the total amount of the wages properly payable to a worker, any shortfall of pay is to be treated as a deduction. A necessary question therefore for the Tribunal is to determine is what was *"properly payable"* to the Claimant.

93. Having applied the facts to the relevant legal principles, the Tribunal reaches the following conclusions.

Conclusions

94. The Claimant complains of an unauthorised deduction from wages in respect of the Respondent's failure to pay him a bonus which he maintained was contractually due to him. The Claimant was presented with a written contract of employment which expressly referred to an element of discretion in the payment of a bonus based on a percentage of the turnover of the 3 venues which the Claimant had responsibility for. However, regardless of the meaning or effect of the terms of that written contract it was presented to the Claimant on the basis that any changes to his contractual terms would take effect only on 31 October 2018. Regardless, therefore, of whether or not the Claimant accepted/rejected the new terms, they have no relevance, as was rightfully accepted on behalf of the Respondent, to the Claimant's entitlements arising on a termination of his employment on 17 October 2018.

95. The Respondent's position in the evidence presented to the Tribunal was unclear and inconsistent. Ultimately, Mr Michael Rothwell's position was that when the aforementioned new written contract was presented to the Claimant a statement within it that bonuses were *"entirely at the discretion of the company"* simply reflected the existing position.

96. However, what evidence is there to support the Respondent's contention that the Claimant's bonus entitlement had always been at the Respondent's discretion? The earlier correspondence setting out how the Claimant's bonus was to be determined, provided indeed a clear mechanism for calculation, with no reference to the Respondent's ability to withhold payment at its discretion in any or any specified circumstance. The Claimant's potential bonus earnings based on likely and anticipated profits from the venues he managed was substantial and indeed exceeded his agreed basic salary of £55,000. The Claimant had always been paid his bonus entitlement and, certainly latterly, on a quarterly basis with no indication of any exercise of any discretion by the Respondent. The

Respondent relies on bonus payments being withheld from time to time from the venue managers who the Claimant himself managed in the event of unsatisfactory performance, but no such withholding was ever made in the case of the Claimant. Nor was any ever threatened or suggested to him. There is no basis for the Respondent's assertion that bonuses ceased to be payable in the case of the Claimant's misconduct or a termination of employment. There was certainly no express agreement that this could be the case and none can be implied. Reference is made by the Respondent to the case of an Aaron Joycey accused of misconduct but he was subordinate to the Claimant and the Tribunal has no idea as to the nature of his terms and conditions.

97. The Claimant was entitled to receive a bonus. There was ultimately no dispute as to how, if the entitlement arose, it should be calculated. Whilst there had been a dispute on the levels of net profit in the management accounts, management accounts were provided (excluding the cost of the Viaduct refurbishment) which the parties agree to be accurate and the Claimant's calculation of 7% on the net profit figures for July, August, September and the period up to his dismissal in October 2018 (less amounts already received) is accepted. The Respondent is accordingly ordered to pay to the Claimant the gross sum of £16,821.30 as an unauthorised deduction from his wages.

98. The Tribunal next considers whether the Claimant made any protected disclosures. The Claimant maintains that he raised concerns that Mr Howells was being bullied, in particular by Mr Michael Rothwell, and that his health and safety was been endangered as a result. In submissions, it was accepted on behalf of the Claimant that Mr Michael Rothwell was put forward as the person who had subjected him to a detriment and as the decision-maker in his dismissal, such that it was necessary for the Claimant show that Mr Rothwell was aware of the disclosures that had been made. As a result, no reliance was put on disclosures (of a similar nature) made allegedly to others, such as John and Steffi Mustard.

99. The Claimant's case that he made a number of disclosures of this nature directly to Mr Michael Rothwell. Whilst not limited to these instances, particular reliance is placed on disclosures which are capable of being evidenced beyond an acceptance of the Claimant's own account to the Tribunal. Indeed, there are uncontested transcripts of meetings the Claimant attended with Mr Michael Rothwell and Mr George where there is evidence of the Claimant raising directly with Mr Rothwell concerns about the treatment of Mr Howells. The Claimant refers to an understanding that Mr Michael Rothwell had verbally abused Mr Howells over a club microphone and threatening him with sack. He refers to Mr Howells being at risk of a breakdown as a result. The Tribunal accepts that the Claimant raised with Mr Rothwell concerns about the 15 July 2018 email from Mr Rothwell highly critical of Mr Howells and sent to Mr Howells directly by mistake. An element of that expressed concern was on the impact it would have on Mr Howells. Despite his protestations before the Tribunal to the contrary, the Tribunal is clear that Mr Rothwell understood that the Claimant was saying that Mr Rothwell himself was a cause of Mr Howells' upset.

100. The raising of the concerns did amount to a disclosure of information. The Claimant was not simply referring to an undefined risk or prospect of

complaint from Mr Howells, but to aspects of behaviour which could give rise to such a complaint. The Tribunal can also accept that, when he made the disclosures, the Claimant did reasonably believe that Mr Howells was upset to the extent that the treatment he was receiving constituted an endangerment to of his personal health and safety.

101. The key issue for the Tribunal, as it had indeed identified with the parties at an early stage in the proceedings, was whether the Claimant also reasonably believed that the making of the disclosures was in the public interest.

102. It is submitted on the Claimant's behalf that the disclosures were manifestly not in his private interest – it did not benefit him personally. It would not have been appropriate for him to raise a grievance since he was not the person being subjected to the treatment he was bringing to Mr Rothwell's attention. On the other hand, the issue of the treatment of Mr Howells had certainly become quite personal to the Claimant (one where he had a personal interest arising from his friendship with Mr Howells) and Mr George was astute to recognise that the Claimant supported Mr Howells in a dispute with Mr Horsfield who benefited from the support of Mr Michael Rothwell. They were, in his view, acting like the two Lukes were, to use his words, their personal *"pets"*. The Claimant took a personal interest in Mr Howells and was antagonistic towards Mr Horsfield. In a spat between them, the Claimant backed Mr Howells. He was doing so involving himself in the pursuance of a private feud. Some, albeit by no means all, of the behaviour the Claimant raised was conducted publicly in front of other staff and customers. However, in any event, the Tribunal does not consider that the Claimant was raising an issue of the treatment of staff wider than his championing of Luke Howells' cause in the face of what the Claimant saw as not always justified criticism from Mr Rothwell and the behaviour of Mr Horsfield. The Claimant was not seeking to promote the welfare of employees generally, despite his refence to the avoidance of bullying in the workplace, but indeed, as is referred to in the Tribunal's factual findings, was concerned as to how the issues might rebound on the Respondent in terms of the potential for claims against it. These were not public interest disclosures. The Claimant at the time he made the disclosures would certainly not have seen himself as promoting any public or wider interest. The nature of the alleged wrongdoing and the seniority of the person to whom the disclosures were made do not, in the circumstances, allow the Claimant to maintain that he held a reasonable belief that they were made in any public rather than private interest.

103. On the basis of such finding, it is unnecessary for the Tribunal to look at the issue of causation, albeit it is necessary in any event for the Tribunal to turn its mind to the decision-making process and the identification of the relevant decision makers in the Claimant's separate complaint of ordinary unfair dismissal.

104. It is the Claimant's case that, whilst he was ostensibly dismissed by Mrs Heather Rothwell, the reality of the situation was that she was carrying out the wishes of Mr Michael Rothwell and he had already decided that Claimant was to be removed from his employment with the Respondent.

105. The Tribunal can readily accept, on the evidence, that Michael Rothwell was the person who generally *"called the shots"* within the Respondent group of companies. He was part owner of the individual Respondent companies, the sole director of the individual Respondent's holding company and it was clear on the evidence that his partner in life and business, Mr George, did not wish to bear the responsibility which attached to the role of a director. The Tribunal can also accept that Mr Rothwell had a view as to what he would consider to be the appropriate outcome of the disciplinary process which he had himself initiated. His involvement in the early part of the process will almost inevitably allow the raising of an inference that anyone else who became involved subsequently would be likely to support his own view given the family and strong personal connections between all those others with key positions and interests in the businesses. However, the mere fact that the subsequent disciplinary process was to be dealt with by Mr George and then by Mr Michael Rothwell's sister-in-law is insufficient, on its own, to lead to a conclusion that they were merely implementing a decision already taken by Mr Michael Rothwell.

106. On the evidence, the Tribunal accepts that Mrs Rothwell had the authority to make whatever decision she considered to be appropriate in terms of the disciplinary case against the Claimant and that she genuinely considered that the Claimant was guilty of gross misconduct in the failure to maintain up-to-date safety certification in respect of the venues under his control. That was her own view and, on the basis of that view, she determined that the Claimant ought to be dismissed. The Tribunal is satisfied that the safety certification was the focus of her enquiry and, whilst there were other allegations of misconduct pursued against the Claimant, her appreciation was that they would not, even when taken together, amount to a justification for the Claimant's dismissal.

107. The issue of the certification was a genuine one and certainly not manufactured by anyone, Mr Michael Rothwell included. The Tribunal has found that there was a visit by the landlord's agents which led to a search for the relevant fire, alarm, lighting and electrical certification which was required in order to demonstrate that the premises were safe, not least for their continuance as public entertainment venues and in circumstances where the Respondent's entertainment licences were dependent upon and therefore at risk if the necessary certification was not a place. Mr Rothwell expressed to the Claimant's solicitor that the Claimant's perceived failings had put lives at risk.

108. Mr Michael Rothwell might have been surprised or even displeased had Mrs Rothwell not come to this conclusion, but that does not mean that she did not come to a genuine conclusion on the evidence before her. She did and, in the circumstances, no one will ever know how Mr Rothwell would have reacted had she considered that the Claimant was in fact not guilty of any misconduct in respect of the safety certification or that a more lenient sanction than dismissal ought to have been applied.

109. The Tribunal concludes that Mr Michael Rothwell's motivation for initiating an investigation which led to a disciplinary process (leading in turn to the Claimant's dismissal) was his discovery that, to his mind, the Claimant had not been fulfilling his responsibilities in terms of the fire and safety

certification. Again, the emergence of this as an issue was not of the Respondent's or Michael Rothwell's invention, but arose from a visit by the landlord's agent. There was in Michael Rothwell's mind a genuinely serious situation which needed to be addressed and in circumstances where he genuinely believed that the potential risks to the businesses were immense if the Respondent venues were found not to have in place the necessary certification.

110. The Tribunal wonders whether, had there not been other issues regarding Michael Rothwell's view of the Claimant as an effective manager, the discovery in respect of the certification would necessarily have led to the Claimant's disciplinary process. There may be an element of the discovery of perceived defective certification not being wholly unwelcome in terms of the Claimant's future within the businesses based on Mr Rothwell's view of him as a manager. Nevertheless, it was the genuine reason for Mr Rothwell initiating a formal process, albeit he sought to widen the investigation into other aspects of the Claimant's performance which might objectively be viewed as somewhat of a fishing expedition. It is curious that on the discovery of the certification issue (and in particular questions as to the whereabouts of the certificates) that Mr Michael Rothwell did not simply get in touch with the Claimant to ask if he knew where they were. The Claimant being on holiday or about to depart on holiday would not have stopped him. On the other hand, Mr Beasley was involved in the matter at an early stage and was individually more driven than Mr Michael Rothwell would ordinarily have been to ensure that matters of discipline were dealt with in accordance with a strict procedure.

111. The Tribunal does not view the Claimant's support for Mr Howells and in particular his raising of concerns about the treatment of Mr Howells as the reason for Mr Rothwell's decision to commence the disciplinary investigation. It is clear from the transcripts of the meetings that the Claimant had felt able to engage in a robust debate and disagreement with Mr Michael Rothwell about the qualities of Mr Howells and where the blame might lie in the workplace dispute he had with Mr Horsfield. Mr George performed an effective role as mediator pointing out that both the Claimant and Mr Michael Rothwell had their blindspots and favouritisms. After Mr Michael Rothwell had sent the *"Times up"* email inadvertently to Mr Howells it was Wayne Beasley who was vigourously pointing out to Michael Rothwell the concerns he had about the repercussions of the email and how indeed Mr Howells might have a claim for constructive dismissal or otherwise arising out of Mr Rothwell's behaviour. Mr Michael Rothwell disagreed with Mr Beasley's point of view and showed significant frustration at Mr Beasley, yet the evidence is not that Mr Beasley was penalised for in any sense obstructing Mr Rothwell's wishes. Indeed, the Claimant's view is that Mr Beasley was promoted.

112. The Claimant and Mr Rothwell were to an extent "in tune" regarding some of Mr Howells' failings as a venue manager. Whilst the "Time's up" email caused the Claimant concerns which he raised he also saw the validity of a number of the complaints Mr Rothwell had about Mr Howells and that they were matters the Claimant had to deal with. There does not appear to have been a reaction to move against the Claimant in the aftermath of the two lengthy meetings the Claimant had attended with Mr Rothwell and Mr George – the Tribunal nevertheless being mindful of the

lack of any kind words expressed by Mr Rothwell when the Claimant was receiving hospital treatment.

113. The Claimant's suggestion is that, when Mr Rothwell realised he could not get rid of Mr Howells, he switched his attention to getting rid of the Claimant. This proposition has no evidential basis. Mr Howells was not dismissed. Mr George's view had been that he ought to be supported in his role. Mr Howells had been invited into a meeting the Claimant had attended with Mr George and Mr Rothwell. It is submitted on the Claimant's behalf that Mr Rothwell turned against him arising out of the Claimant's failure to dismiss Mr Howells, but that of course does not relate to the Claimant's raising of any risks to Mr Howells personal wellbeing.

114. Nor does the Tribunal consider, as has again been suggested as part of the Claimant's case, that a motivation for his removal was the Claimant's refusal to accept the new contract of employment with, in particular, the aforementioned new bonus provision. There is no evidence that Mr Michael Rothwell knew of any concern the Claimant had with the new contract or anticipated a particular battle over it. The Claimant's account is that in fact the contract was not provided to him until quite shortly before the termination of his employment and there is no evidence that Mr Beasley was likely to have brought to Mr Rothwell's attention an anticipated disagreement regarding its terms. The lack of acceptance of the basis of the Claimant's bonus entitlement after his employment ended does not allow the drawing of any inference as to the Respondent's attitude to bonus whilst he was still employed. Obviously, post-employment there had been a significant breakdown of relationships and a mutual loss of trust.

115. On behalf of the Claimant, it is suggested that the Respondent's disclosure of management accounts in these proceedings, which would have resulted in a lesser bonus entitlement, is indicative of the Respondent's concern about the level of bonus entitlement and desire to change the Claimant's bonus terms to his detriment. It is more likely, however, that in circumstances where the Claimant's employment had been terminated purportedly on grounds of gross misconduct, the Respondent did not feel well disposed towards any additional payment being made to the Claimant.

116. The Tribunal now turns to the reasonableness of Mrs Heather Rothwell's conclusions as to the Claimant's misconduct. In submissions it was acknowledged on behalf of the Claimant that, if it was accepted that Mrs Rothwell genuinely took the decision to dismiss the Claimant, the Tribunal would inevitably find that she genuinely believed the Claimant was guilty of misconduct. Did she however hold such belief on reasonable grounds after reasonable investigation?

117. In this regard the Tribunal is concerned solely with the allegations relating to the fire, emergency alarm, electric installations and safety certification. Mrs Rothwell dismissed the Claimant because of her belief in his misconduct in relation to that certification. All the remaining matters were matters that she would have considered appropriate to be dealt with either as lower level conduct issues or aspects of inadequate performance.

118. As regards Bar Fibre, there was clear evidence upon which she could reasonably rely that the electrical installation condition report was out of date. It had been last certified on 3 April 2015 where the next recommended inspection was 3 years hence. As regards the fire detection and alarm system inspection report for that venue, Mrs Rothwell did not have clear information as to the recommended date of the next inspection. There was an emergency lighting certificate recording an inspection/testing on 18 August 2018 (after the SES visit), but she did not have any earlier test certificate.

119. As regards Mission, the documentation before Mrs Rothwell included fire detection and alarm certification and emergency lighting certification which were both in date at the time of the SES visit. Whilst prior to that certification had been issued in 2016, but not in 2017 in circumstances where an annual check was recommended, Mrs Rothwell simply did not notice the apparent 'in date' certification. She came to the conclusion that the Claimant had entirely failed to ensure up-to-date safety checks and certification as a whole covering Mission and Bar Fibre. She based her decision to dismiss upon that conclusion, but her decision-making must in the circumstances be regarded as fundamentally flawed. There ought to reasonably have been further investigation into the tests required, the period of validity of the certificates and what testing had occurred and when. The only conclusion on the certification that Mrs Rothwell could safely have reached was that was that there ought to have been a further electrical installation condition report in respect of Bar Fibre given that the previous one had been completed on 3 April 2015 with a recommended next inspection in 3 years.

120. Mrs Rothwell did not analyse the certificates in circumstances where she understood when the matter was passed to her that the safety certification was out of date. She was not herself concerned to check the accuracy of that view or the extent to which the safety checks had been omitted.

121. In addition, the existence of the safety certificates dated in July 2018 for Mission begged the question who had been responsible for those checks being carried out. Certainly, she knew that it was not the Claimant as the Claimant was adamant that this was not a responsibility which lay with him and therefore which he had ever carried out or arranged himself. The fundamental question for Mrs Rothwell to consider was the Claimant's duties and responsibilities and, if the safety checks had been carried out, she could not reasonably have concluded that they were his direct responsibilities if they had been carried out by someone else. She ought reasonably to have investigated the circumstances in which those certificates were issued for the Mission venue.

122. No attempt was made to locate evidence which may have supported the Claimant's case. No consideration was given to the emails referred to in the Tribunal's factual findings querying who was responsible for the apparent cancelling of an arrangement for Romero to manage the safety certification process. On its face, the chain of correspondence suggests that the Claimant was not responsible and that Steffi Mustard and Wayne Beasley might have had some knowledge as to what had occurred.

123. This lack of enquiry was symptomatic of Mrs Rothwell arriving at the disciplinary hearing with a firm view that the safety checks and certification was the Claimant's responsibility and his alone. She did not come to the disciplinary hearing with an open mind on that issue. She accepted in cross examination that she had already made her mind up prior to the disciplinary hearing that the safety certification was the Claimant's responsibility. She said that even if she had accepted that the Claimant had genuinely believed that the responsibility rested with Darren Rothwell, as indeed the Claimant was putting forward, she would still have concluded that the Claimant's actions amounted to gross misconduct in circumstances where she considered that the Claimant's job description was such that he could not reasonably have held that belief. Of course, an alternative explanation advanced by the Claimant was that Darren Rothwell continued to be responsible for aspects of the properties and that this included periodical safety checks. Mrs Rothwell was clearly conflicted with potentially serious consequences for her husband, if the Claimant's account was accurate.

124. The Tribunal rejects the submission of the Claimant that if she had been able to reasonably conclude that the Claimant was responsible for the safety certification, dismissal would have fallen outside the band of reasonable responses open to an employer such as the Respondent in the circumstances. The Tribunal accepts that the failure for entertainment venues open to the public to maintain adequate and compliant safety certification was an extremely serious matter with serious consequences in terms of risk to life and the Respondent's business in terms of its licences.

125. However, fundamentally, the conclusions which Mrs Rothwell reached that straightforwardly the certification was defective, tests had not been carried out and that the responsibility lay squarely with the Claimant cannot be said to have been conclusions reached on reasonable grounds and after reasonable investigation. The Claimant was unfairly dismissed.

126. The Tribunal reaches that conclusion without any necessary regard to the criticisms of the Respondent in terms of procedure. The Tribunal would comment that whilst there were irregularities in the procedure adopted, particularly in terms of the seniority of individuals involved at the earlier stages prior to the final dismissal decision, looked at as a whole the Claimant was aware certainly of the nature of the safety certificate allegations levelled against him and was able during a number of lengthy meetings with (at the disciplinary meetings) accompaniment by his trade union representative to put forward his explanation and to point the decision-makers in the direction of documents and his arguments in support of his contention that he was not the person responsible. The Respondent's enquiry went wider than the safety certification in circumstances where there was something of a wider fishing expedition into issues of the Claimant's more general performance and conduct, but these ultimately did not form part of Mrs Rothwell's decision to terminate the Claimant's employment. The nature of the allegations may well have altered and expanded over time, but that is not in itself unusual or unreasonable providing the Claimant had an opportunity to answer any expanded allegations. No breach of the ACAS Code of Practice on Disciplinary Procedures has been pointed to on the Claimant's behalf and none has been identified by the Tribunal.

127. Whilst the Claimant's dismissal, was unfair the Tribunal has been asked to consider whether any compensation ought to be reduced in accordance with the principles derived from the case of **Polkey** on the basis that had a fair procedure been followed the Claimant would or with some degree of probability have been fairly dismissed in any event. The failings the Tribunal has identified in this case go beyond mere procedural failings, but **Polkey** goes wider than such category of failings. Nevertheless, the Tribunal would be entering into an impermissible level of speculation in seeking to assess what was likely to have been discovered had Mrs Rothwell investigated further and analysed the safety test certificates as she ought reasonably to have done. Whilst she may still reasonably have been able to conclude that certainly not all of the requisite certification was in date, that would still leave the question of responsibility, which she had from the outset assumed was the Claimant's. Nor can it be said with any degree of estimation what view would have been taken by her had further investigation disclosed a much more limited failing in terms of the safety certification than what she thought she was faced with i.e. a wholesale disregard of safety certification as an essential duty to be carried out. A reduction of the Claimant's compensatory award is therefore inappropriate on this basis.

128. The Tribunal next turns to the Claimant's conduct prior to dismissal. In this regard, whilst the Tribunal does not and cannot conclude on the evidence before it that the Claimant was guilty of failing in his responsibilities as alleged against him and if so to what extent, it does conclude that the Claimant had a lack of any clear understanding as to the extent of his responsibilities in circumstances where he had never sought to ascertain exactly who was taking responsibility for safety tests and certification. As Operations Director and indeed a statutory director he cannot maintain that he had no responsibility whatsoever in ensuring at the very least that he had sufficient oversight of matters which fundamentally affected the Respondent's licences and the health and safety of its employees and customers. The Claimant had received a job description which indicated broadly that such health and safety responsibilities lay within his remit and certainly Darren Rothwell had made the Claimant aware of the Respondent's relationship with various contractors who were involved in ensuring compliance. To maintain a position that the safety certification was not his responsibility and that he did not know for himself if, when and by whom the safety certification requirements would be completed, must amount to a management failing on his part.

129. It is appropriate therefore that the Claimant's basic and compensatory award be reduced to reflect the Claimant's conduct prior to dismissal and indeed, in the context of his compensatory award, blameworthy conduct which contributed to the decision to terminate his employment. The Tribunal considers that a reduction to those awards by a factor of 25% would be appropriate given that the Claimant was partly responsible for the termination of his employment but could not be said to be jointly or mainly responsible.

130. The Tribunal turns to the Claimant's complaint seeking damages for breach of contract. Was the Claimant guilty of gross misconduct? The Tribunal cannot, on its factual findings, conclude that he was. That would involve it coming to a conclusion similar to that of Mrs Rothwell's in

circumstances where it simply does not have the evidence to conclude that the Claimant fundamentally failed in his personal responsibility to ensure that safety checks were carried out and certification issued. The Tribunal's finding regarding blameworthy conduct reflects its conclusion in the Claimant failing in his duties, but not to such extent as would allow the Respondent to have terminated his contract of employment without notice.

131. As regards the Claimant's period of notice, the Claimant had initially been employed by Bar Fibre Limited on one week's notice for each complete year of service. On that basis, his employment could lawfully have been terminated on 3 weeks' notice. In circumstances where notice is expressly provided for, there is no room for the Tribunal to imply that employment could be terminated only on reasonable notice and seek to define what a reasonable period might have been. Effectively, that is what it has been urged to do on behalf of the Claimant. Whilst no further contract of employment had been agreed with the Claimant and none expressly with the other two Respondent companies, the Tribunal cannot conclude that the parties would have intended the Claimant to have enjoyed periods of notice of varying length depending on the identity of the individual employing company. The Claimant's damages will therefore be limited to a maximum of a three week period with each Respondent company.

132. Finally, the Tribunal is asked to make an additional award of compensation to the Claimant arising out of the Respondent's failure to provide him with a written statement of terms and conditions of employment and notify him any changes thereto. There was of course a written statement of terms issued by Bar Fibre Limited. Subsequently, the Claimant was provided with an offer letter which set out his responsibilities for all three Respondent companies although no statement of terms and conditions and nothing in writing which clearly informed him of the change of the identity of his employer. The Tribunal has the discretion to award a sum representing either 2 or 4 weeks' pay and in the circumstances, given that neither relevant Respondent has failed entirely to document the Claimant's terms of employment, the Tribunal considers it appropriate to make a further award that each of the second and third Respondents pay additional compensation to the Claimant representing 2 weeks' pay.

Employment Judge Maidment

Date 2 October 2019