EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr Duncan Gordon	**v**	B & D Country Inns II Limited

Heard at: Reading **On**: 21 to 24 October 2019 and 25 October 2019 (in chambers)

Before: Employment Judge Hawksworth (sitting alone)

Appearances
For the Claimant: In person
For the Respondent: Mr J Heard (counsel)

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal contrary to section 103A of the Employment Rights Act 1996 fails and is dismissed.

REASONS

Claim

1. The respondent operates a chain of inns and restaurants. The claimant worked for the respondent from 4 February 2016. From 1 November 2016 he was the general manager of one of the inns. The claimant's employment with the respondent terminated on 3 December 2017.

2. The claimant's claim form was presented on 25 April 2018 after a period of ACAS early conciliation from 22 February 2018 to 5 April 2018. The claimant says that he was dismissed because he made protected disclosures.

3. The respondent defends the claim. The ET3 was presented on 15 June 2018.

Hearing and Evidence

4. The hearing took place over 5 days. I am grateful to Mr Gordon and Mr Heard for their assistance; both presented their cases well, were helpful and co-operative with each other, and assisted me to ensure that the hearing was conducted smoothly and within the time allocated.

5. I took the first morning of the hearing as reading time; I read the witness statements, together with the documents referred to in those statements.

6. I began hearing evidence on the afternoon of 21 October 2019. On 21 and 22 October 2019 I heard evidence from the claimant. On 22, 23 and 24 October 2019 the respondent called the following witness (in this order):

   - Mr Oliver Thomson, Project Manager;
   - Ms Jane Laycock, Director of People and HR;
   - Mr Hector Ross, Chief Operating Officer;
   - Mr Oliver Vigors, Co-Chairman.

7. There was an agreed bundle of 483 pages. Two documents were added to the bundle at the request of the claimant; the respondent did not object. The additional documents were the claimant's covering email enclosing his grievance (added as page 283a) and a screenshot from a mobile phone showing a call made on 2 November 2017 (added as page 423a).

The claimant's strike out application

8. At the start of the hearing, the claimant made an application to strike out the respondent's response, on the ground that the manner in which the respondent had conducted proceedings had been scandalous, unreasonable or vexatious, that there had been non-compliance with an order of the tribunal, and that it was no longer possible to have a fair hearing.

9. The main ground for the strike out application was that there had been a delay in service of the respondent's witness statements.

10. At a preliminary hearing, the tribunal made an order for exchange of witness statements to take place on 23 September 2019. The respondent's representatives were not ready to exchange on this date, but did not tell the claimant this. The claimant sent his witness statement to the respondent's representatives on 23 September 2019 as directed, although he had to rush his preparation to meet this date. The respondent's representatives did not send the respondent's statements to the claimant until 4 October 2019. There was some confusion arising from what the respondent's representatives told the claimant about what would happen to his statement pending service of theirs. As a result, the claimant was not aware that, if he wished, he could do further work on his statement before a new date for exchange, and so he made no changes to the statement he had served on 23 September 2019. The respondent's representatives said

that the claimant's statement was not read by them or shown to the respondent's witnesses before service of their statements on 4 October 2019.

11. For reasons given at the hearing, I refused the strike out application. I took into account in particular that, although there had been a considerable delay by the respondent, the claimant did receive the respondent's statements more than 14 days before the start of the hearing, and so the statements were served within the period set out in the Presidential Guidance on Case Management.

12. I concluded that any prejudice to the claimant from the delay with exchange of statements could be addressed by the following steps which were taken during the hearing:

- allowing the claimant the opportunity to provide any further explanation during his evidence that he wished to give about the meeting of 22 September 2017 (as the claimant's evidence about this meeting was in a section of his statement he had to rush to meet the date for exchange);
- the claimant asking questions if he wished during his cross examination of the respondent's witnesses about whether they had seen his statement before finalising theirs; and
- the claimant being given notice as the hearing progressed about the order/timing of the respondent's witnesses, and being offered breaks as needed before each witness for additional preparation/gathering thoughts.

The Issues

13. The issues for determination were agreed by the parties at a preliminary hearing on 12 December 2018. The issues were set out in the case management summary which was sent to the parties on 14 January 2019. They were (retaining the original numbering):

Protected Disclosures

1. Did the claimant make the following disclosures to the respondent, which are disputed by the respondent as matters of fact:

a. In an informal discussion with the Operations Manager on 17 July 2017, the claimant alleges he informed the Operations Manager that Hector Ross (Chief Operating Officer) had told him to ignore the fire regulations and that Mr Ross had instructed one of the Assistant Managers to also ignore the said regulations.

b. At a meeting on 19 July 2017, the claimant alleges he told Mr Ross and Jane Laycock (Director of People and HR) that he had been told to ignore the fire regulations and that Mr Ross had also

instructed one of the Assistant Managers to ignore the said regulations.

c. On 4 August 2017, the claimant alleges he made the same disclosure again to Mr Ross and Ms Laycock.

d. On 11 August 2017, the claimant raised a formal grievance in writing to Ms Laycock and Mr Ross making the same allegations and inferring that they were covering up the matter.

e. On 16 August 2017, the claimant alleges he made the same disclosure to Oliver Thomson (Projects Manager) and Ms Laycock.

f. At a meeting on 22 September 2017, the claimant met with Oliver Vigors (Chairman) and Ms Laycock making the same allegations.

2. If any or all of the above disclosures are made out, did the claimant possess any reasonable belief that the above disclosures were made in the public interest and tended to show:

a. that the health and safety or any individual was being or likely to be endangered per s43B(d) ERA 1996; or

b. that the respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject per s43B(b) ERA 1996.

3. Were the above disclosures made to the claimant's employer as required by s43C(1) ERA 1996?

Automatic Unfair Dismissal

4. Was the reason or principal reason for the claimant's dismissal on 3 November 2017 because he made the protected disclosures at paragraph 1 above?

Remedy

5. If the claimant succeeds, in whole or part, the tribunal will be concerned with issues of remedy and, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

14. The respondent said in its amended grounds of response served on 29 January 2019 and confirmed during the course of the hearing that it admits that the disclosures 1d and 1e (ie the claimant's grievance and the claimant reading his grievance at a meeting on 16 August 2017) are protected disclosures.

Findings of fact

15. As is to be expected in a case in which witness evidence was heard over a period of four days, there were factual disputes between the witnesses on a number of points, to varying extents. The facts set out here are those which I considered to be helpful to assist me in determining the issues I had to decide. Where I make no finding about an issue, or where I make a finding with less detail, this is not because of any oversight, but reflects the extent to which I found the point of assistance in determining the issues before me.

16. The claimant first began working for Longshot Country Inns I Limited, an associated company of the respondent, on 3 February 2015. He was assistant manager at an inn in Cookham. In this role he worked with Hector Ross, the respondent's chief operating officer officer. When the claimant left the business on 15 November 2015 to take up another job offer, Mr Ross was sad to see him go as the claimant was a well-liked member of the team who took a pride in his work and looked after his customers. Mr Ross made it clear to the claimant that the door would always be open to him if he wished to return to work with the respondent.

17. The claimant did return to work for Longshot Country Inns I Limited, on 4 February 2016. He was first based at an inn in Windsor. Mr Ross was keen for the claimant to progress with his career with the respondent, and arranged for him to move to a role as general manager at the respondent's inn at Kingsclere. The claimant began in the role of general manager at Kingsclere on 1 November 2016. At this point his employment transferred to the respondent which was at the time called Longshot Country Inns II Limited. (Later, Longshot Country Inns II Limited changed its name to B & D Country Inns II Limited.)

<u>11 April 2017: Hampshire Fire and Rescue Authority inspection</u>

18. On 11 April 2017 there was an inspection of the Kingsclere inn by Hampshire Fire and Rescue Authority. The claimant accompanied the fire safety officer on his inspection.

19. The inn at Kingsclere is an old building. The fire safety officer identified a number of issues during his inspection. One issue was in relation to a building occupied by staff, called the Cottage. A prohibition notice was imposed on the Cottage following the inspection, requiring that no-one should occupy the Cottage pending remedial works to ensure that it was safe.

20. At the fire inspection the claimant and the fire safety officer also discussed Cannon and Kisby, two guest rooms in the main part of the inn. Because of the physical layout of the building, in the event of a fire the occupants of Cannon would not have direct access to a fire escape if they were unable to exit the building via the main stairs. They would have to go through another guest room (Kisby) to reach a fire escape. This issue had been

considered at two previous fire inspections before the claimant moved to Kingsclere, and the fire safety officer had not recommended any remedial action or served any prohibition notice in relation to the booking of these two rooms. The rooms had been let separately for 25 years and there had been no problem.

21. No prohibition notice was issued by the fire safety officer in relation to Cannon and Kisby on 11 April 2017. However, it was agreed that some steps would be taken, including the installation of a break glass release outside the door of Kisby to enable access through Kisby to the fire escape in the event of a fire.

22. The claimant included details about the fire inspection in his weekly report to his managers on 15 April 2017. He said that it had been agreed that, because of Cannon being an inner room, Cannon and Kisby would only be booked to 'couples who know each other' or 'family'. He also mentioned the requirement to install a break glass release outside Kisby.

23. On 21 April 2017 the fire safety officer sent a record of the inspection in a letter which was addressed to the claimant and which included an action plan of steps to be taken. Two of the improvement areas were i) that the Fire Safety Risk Assessment should include 'the correct use of the Kisby and Cannon rooms due to the Cannon room being an inner room' and ii) that suitable locks or fastenings should be fitted to doors on escape routes to allow access without a key.

24. The claimant sent an email on 24 April 2017 to Mr Ross and Oliver Thomson, the respondent's project manager. Mr Thomson was responsible for managing and overseeing work on and maintenance of all of the respondent's buildings. The claimant said he was 'a little uneasy' that the fire action plan had been addressed to him, and noted that some of the remedial work had to be completed by 1 June 2017. He asked to be kept in the loop regarding communications with the authorities and contractors. Mr Thomson replied on 26 April 2017 with an update on the work which was planned or being carried out in response to the action plan. Mr Thomson said it was possible to ask for an extension if needed.

<u>May 2017: carrying out the steps required by the action plan</u>

25. WJ Fire (a contractor working for the respondent) did the remedial works required following the fire inspection. This included fitting a break glass release outside the door to Kisby.

26. On 26 May 2017 WJ Fire amended the Fire Risk Assessment (FRA). Paragraph 16:22 as amended stated: '*Cannon room must never be let to anyone who doesn't know the occupants of Kisby room. It must either be let to a family or people who know each other and consent to the people renting Cannon to be able to use Kisby as a fire escape at all times'.*

27. The FRA at paragraph 2.04 named Mr Ross as the responsible person for the building. Mr Ross also signed off the statement of general policy in the respondent's health and safety policy.

28. On 30 May 2017 the claimant emailed the fire safety officer to request further time to carry out work on two items which were unrelated to the Cannon and Kisby issue. He copied in Mr Ross. Mr Ross replied to the claimant by email the same day; he thanked the claimant, informed him that he and Mr Thomson would take the matter forward directly with the fire safety officer and said that there was no need for the claimant to correspond further with the fire safety officer.

29. I find that Mr Ross said that he and Mr Thomson, rather than the claimant, would communicate with the fire safety officer because that was (as anticipated by the claimant in his email of 24 April 2017) part of their roles.

5 June 2017: follow-up fire inspection

30. The fire safety officer returned to Kingsclere on 5 June 2017 to discuss the work that had been done. Mr Thomson met with the fire safety officer and walked around the site with him.

31. During the visit, Mr Thomson and the fire safety officer viewed the newly installed break glass release outside Kisby, and discussed the use of Cannon and Kisby. The fire safety officer said that he would prefer the two rooms to be sold as a group booking first, but he would not impose a restriction on the rooms being sold to separate parties.

32. After this, Mr Thomson and the fire safety officer were joined by the claimant in the bar area. The claimant showed the fire safety officer the fire file he had put together, including the typed booking procedure for Cannon and Kisby.

5 July 2017: Mr Ross's conversations with the claimant and the deputy manager

33. On 5 July 2017 Mr Ross had a conversation with the claimant. He told the claimant that he could book people into Cannon or Kisby even if they did not know the guests in the other room. The claimant was unhappy about this, and while trying to reassure him, Mr Ross said something like 'if anyone goes to prison, it will be me'. I find that that in his discussion with the claimant Mr Ross did not use the words 'ignore fire regulations' and that Mr Ross genuinely believed that the instruction to the claimant was not in breach of any fire regulations.

34. In a separate conversation at around this time, Mr Ross also told the deputy manager at Kingsclere that he could book guests into Cannon or Kisby who did not know the guests in the other room.

35. The claimant felt that he had been placed in a difficult position by Mr Ross. He read through the respondent's health and safety policy and the fire risk

assessment. He thought about what to do, and decided that he could not report his concerns to the fire safety officer, as Mr Ross had told him not to correspond directly with the fire safety officer. He decided that he would have to try to persuade the respondent directly to address his concerns.

17 July 2017: the claimant's conversation with the Operations Manager (disclosure 1a)

36. On 17 July 2017 the claimant spoke to the Operations Manager about the instruction he had been given by Mr Ross. He said: *"Did you know that Hector told me and [the deputy manager] to book anyone into Kisby? It was a real dick move and I wouldn't stand for that shit"*.

37. The Operations Manager was aware of the fire inspection in April 2017 and the improvements that had been required by the fire safety officer.

19 July 2017: meeting with the claimant, Mr Ross and Ms Laycock (disclosure 1b)

38. On 19 July 2017 the claimant had a regular meeting with Mr Ross and Jane Laycock, the respondent's HR manager. The claimant recorded this meeting on his mobile phone. The other participants at the meeting were not aware of this.

39. During the meeting the claimant said: "*You asked me to, you know, ignore the whole fire-regulations thing. And remember you said, you know, take off Kisby and Cannon and all that…but then you actually told [the deputy manager] as well, a few weeks ago, and he was feeling quite bad about that so that got me angst."*

40. The claimant chose not to rely on a discussion which took place between Mr Ross and Ms Laycock during a part of this meeting when the claimant was not present, because Mr Ross and Ms Laycock were not aware that they were being recorded.

26-28 July 2017: email exchange between the claimant, Mr Ross and Ms Laycock

41. The claimant was due to have another regular meeting with Mr Ross and Ms Laycock on 25 July 2017 but he did not attend. On the evening of 25 July 2017 Mr Ross sent an email to the claimant and to the Operations Manager (prompted by something said in the claimant's weekly report for that week), asking 'What is the current restriction in terms of bedrooms?'.

42. Ms Laycock sent the claimant an email the following day. Mr Ross was copied in. Ms Laycock asked whether the claimant was OK and said that this was her 'first concern'. She went on to say that neither she nor Mr Ross had been informed that the claimant would not be able to attend the meeting on 25 July 2017, and this was the second time that he had missed

a meeting and not informed them. She reminded the claimant that the meetings were to help support the claimant with developing the business.

43. The claimant replied on 28 July 2017, also copying in Mr Ross. He apologised and explained that he had had problems with his car. He also explained that he had had some difficulty sending Ms Laycock some information which she had been expecting from him. His email ended by saying, *'Can we schedule a time to discuss an exit strategy for myself. I would like to keep this information private & on a need to know basis'.*

44. This was the first time the claimant had mentioned an exit strategy. Mr Ross replied immediately, in an email to the claimant four minutes later saying, *'We don't want you to leave Dunc…I just want you to communicate better! Why are you leaving?'*.

45. In his witness statement, the claimant said that he asked about an exit strategy to improve his negotiating/bargaining position regarding his concerns about Cannon/Kisby. He had decided that, in the light of Mr Ross's email of 25 July 2017 asking about the restrictions on Cannon/Kisby, he would have to address the issue more directly than he had done previously. He felt that, as he had decided not to report his concerns about the Cannon/Kisby arrangements to the fire safety officer, he would have to negotiate with the respondent himself to try to persuade them to address his concerns. He decided that if he told the respondent that he felt strongly enough about this issue to resign over it, his position in his discussions with the respondent would be strengthened.

<u>4 August 2017: meeting with the claimant, Mr Ross and Ms Laycock (disclosure 1c)</u>

46. The claimant met with Mr Ross and Ms Laycock again on 4 August 2017. He recorded the meeting on his phone. Mr Ross and Ms Laycock did not know that the conversation was being recorded.

47. At the start of the meeting, the claimant said that he had come to the decision that he wanted to leave and that '*probably the major thing which turned my mind was the whole fire regulation nonsense'*. He said he was '*still really miffed about the whole …fire thing'*.

48. Mr Ross explained to the claimant why he believed that the rooms could be let to strangers. He explained the previous discussions which had taken place with the fire safety officer and the fact that the rooms had been let separately for 25 years. He said this was why he had instructed the claimant that he could sell the two rooms separately. The claimant said that he hadn't been aware of this background. Mr Ross went on to reassure the claimant that the responsibility for fire safety lay with him (Mr Ross), not the claimant.

49. During this meeting, the claimant also told Mr Ross and Ms Laycock that part of the reason he was concerned about the fire safety issue was

because he was in the process of completing a visa application. This was not true. The claimant had not in fact made a visa application at that time, as he had over two years left on his visa. The claimant's evidence was that he decided to say that he was motivated by his visa application as part of his negotiating/bargaining strategy. He felt that his concerns would be more acceptable if he explained that they arose from worrying about the possible impact on his visa application.

50. Mr Ross offered the claimant help with his visa application. The meeting ended with the claimant saying that he didn't really want to leave. Mr Ross offered to write to the claimant. The claimant accepted this suggestion and replied 'sorted'. There was no discussion about what the letter would say. The respondent's understanding (recorded in Ms Laycock's note of the meeting) was that this letter was to clarify the claimant's responsibilities relating to fire safety at Kingsclere. The meeting ended with handshakes. The claimant thought that the letter would be an end of the matter.

4-9 August 2017: follow up after the meeting of 4 August 2017

51. Later on 4 August 2017, Mr Ross sent the claimant a follow up email saying that he was pleased they had found a solution. He said that he would send the claimant 'a letter for peace of mind', and that Ms Laycock had been in touch with an immigration solicitor who could provide the claimant with advice and support with his visa application. The email concluded *"...keep communicating with me!"*.

52. Ms Laycock emailed the claimant on 8 August 2017 saying that she was 'delighted to have found a way forward together'. She confirmed that Mr Ross had full liability for the issues relating to the recent fire safety inspections, that she had taken steps to find help and support with the claimant's visa, and finally, she encouraged the claimant to improve his communication, particularly in attending meetings etc and quicker responses to emails.

53. The claimant replied to say that he was still waiting to receive the letter that was agreed would be sent. He said it was explained very well at the meeting. He concluded by saying 'Let's sort this out and move on in a positive fashion'.

54. On 9 August 2017 Ms Laycock emailed the claimant with a letter from Mr Ross. The letter said that Mr Ross had full responsibility and liability for the issues relating to health and safety and fire safety. It also confirmed that the respondent was compliant with the recent fire inspections. A copy of the Fire Risk Assessment (FRA) was enclosed, and Mr Ross said that the actions were complete. I find that Mr Ross believed that the information contained in the letter was what had been agreed.

55. Unfortunately though, the copy of the FRA that was enclosed with the letter to the claimant was the wrong version. Paragraph 16.22 had not been updated to reflect Mr Ross's belief that guests who did not know

each other could stay in Cannon and Kisby. It still said *'Cannon must never be let to anyone who doesn't know the occupants of Kisby'.*

56. The letter to the claimant also reiterated that the claimant should improve his communications, particularly in attending meetings and actioning business related requests in a timely manner.

11 August 2017: the claimant's grievance (disclosure 1d)

57. On 11 August 2017 the claimant sent an email to Mr Ross and Ms Laycock attaching a formal grievance complaint. He was unhappy with the letter that he had been sent after the meeting on 4 August 2017. He said he had only been given a document that he already had (the FRA which had not been updated at paragraph 16.22). He was also unhappy because part of the explanation he had been given at the meeting was that the windows in Cannon could also be used as an exit route, but he had later realised that this was not correct as the windows were bolted closed. In his grievance, the claimant said:

> *"You instructed us to disobey and ignore the fire officer's direct instructions that would result in putting customers lives at risk"*

58. The claimant's grievance included details and an explanation of his concerns that customers' health and safety were being put at risk.

59. Later the same day, Mr Ross attended the Kingsclere site and spoke to the claimant. Mr Ross emailed the claimant a document to print out, this was a procedure for letting Cannon and Kisby. It said that all guests should be made aware of the fire exit system and that group bookings should automatically be put into these rooms. It said at point 4 that the rooms could be sold separately provided that the guests in both rooms were made fully aware of the fire exits and agreed to be in the rooms. The claimant said this contradicted the fire safety officer's instructions. He and Mr Ross had a further discussion about this.

60. Mr Ross told the claimant that Mr Thomson would hear his grievance, as Mr Thomson was the last point of contact between the fire safety officer and the business. Mr Ross said that it was not acceptable not to turn up to management meetings, or fail to return calls/emails. The claimant agreed.

61. The claimant said that during this meeting, Mr Ross threatened to send him to another site. Mr Ross said that he told the claimant that if he was uncomfortable working at Kingsclere, he would be happy to transfer him to another location. Mr Ross sent a summary of this meeting to other managers in an email on 14 August 2017. The email recorded that he had said that if the claimant 'felt uncomfortable at Kingsclere, then [Mr Ross] would have no option but to transfer him to another site immediately pending outcome.' I find that Mr Ross's broadly contemporaneous email sets out what is likely to be the wording or close to the wording used by him. I find that this was an attempt by Mr Ross to find an alternative way to

resolve the claimant's concerns if he remained uncomfortable with the arrangements which the business required for Cannon and Kisby.

62. That evening, Mr Ross sent the procedure for booking guests into Cannon and Kisby to all staff at Kingsclere. The procedure stated at point 4 that guests who do not know each other could be booked into the rooms.

16 August 2017: Grievance hearing (protected disclosure 1e)

63. The claimant was invited to a grievance hearing with Mr Thomson and Ms Laycock. It took place on 16 August 2017.

64. The grievance hearing started with the claimant reading his grievance letter out loud.

65. Mr Thomson said that in the grievance hearing he told the claimant that before the meeting, he had spoken on the phone with the fire safety officer on 15 August 2017 to confirm the position with Cannon and Kisby. The fire safety officer had confirmed the rooms could be booked to guests who do not know each other, with the necessary safeguards in place. I accept Mr Thomson's evidence on this point. Although it was not included in his witness statement, there is a reference to it in the contemporaneous note of the grievance hearing taken by Ms Laycock. The note records Mr Thomson as saying:

> *'The fire officers have said that the guests don't need to know each other in Cannon and Kisby. It was confirmed verbally yesterday. It is an operational problem. We need to have a policy where any bookings of 2/more should have Cannon and Kisby first, otherwise they should be the last rooms to be booked.'*

66. In the grievance hearing Mr Thomson explained his conversation with the fire safety officer and the respondent's position that it was safe to let Cannon/Kisby to people who did not know each other. He said that responsibility rested with Mr Ross and accepted that perhaps the fire safety officer's letter should have been sent to Mr Ross. Mr Thomson suggested the following steps by way of a solution:

- *'We must implement the operational change relating to Kisby and Cannon*
- *Update [Fire Risk Assessment] with name change and address*
- *Booking reservation procedure to be improved*
- *I will get Hants fire to confirm in writing that guests don't need to be from the same family – we can have a meeting here if necessary.'*

67. Mr Thomson went on to ask the claimant how he saw the future. He said to the claimant:

> *'We don't want you to think your employment is in jeopardy, this doesn't change or affect anything. You must know you are supported.'*

68. When the claimant said it would not change what has happened, Mr Thomson said:

> *'B&D would always support you and we always work hard to ensure that anyone wishing to leave the company parts on good terms in case that is a worry to you….Can we turn it around?'*

69. The claimant replied, 'No'. Mr Thomson suggested the claimant take a couple of weeks to think this through.

70. The next day, Mr Thomson spoke to the fire safety officer and asked him to provide written confirmation of their discussions regarding Cannon and Kisby.

71. On 21 August 2017, a grievance outcome letter was sent to the claimant. It was written by Ms Laycock. It included confirmation of the responsibilities of the respondent's directors and general managers regarding health and safety. It concluded, *'I hope this is helpful for you and responds as you expected to the issues raised in your grievance, and that the matter may be closed.'*

72. The respondent's grievance procedure provided that the outcome letter would be sent by the decision maker, but in the claimant's case it was sent by Ms Laycock (the Director of People and HR). I find that this was done for convenience, because it was administratively easier for Ms Laycock to write the letter than Mr Thomson, as his role meant that he was frequently moving between sites. He also thought that as this was an HR matter it was appropriate for Ms Laycock to confirm the outcome.

73. The claimant said that this breach of the grievance procedure (together with some of the other correspondence) demonstrated that Mr Thomson did not make the grievance decision himself and that Mr Ross and/or Ms Laycock were actually pulling the strings. I do not agree. The claimant and Mr Thomson had a good working relationship and considerable respect for each other. It is clear from the note of the meeting that Mr Thomson formed his own view on the issues raised by the claimant and discussed his suggested outcome with the claimant. It is also clear from the steps taken by Mr Thomson after the meeting that he did his best to resolve the claimant's concerns.

<u>23 August 2017: the claimant's notification of an appeal and subsequent correspondence</u>

74. On 23 August 2017 the claimant notified an appeal under the grievance procedure. He was unhappy that the letter of 21 August 2017 did not include any reference to the discussion that he should take a couple of

weeks to see how he felt, and that if he still felt he couldn't work for the company, the respondent would help with what support he needed.

75. The claimant emailed Ms Laycock on 25 August 2017 asking what the next steps in the process would be. Ms Laycock replied to the claimant on the same day. She confirmed what was said at the end of the grievance meeting about the claimant taking a couple of weeks to consider his position. She concluded by saying *'our offer was and still is genuine. We very much want to continue working together and value your contribution'.* Her letter was sent to the claimant under cover of an email which described the letter as 'a response to your appeal letter'. In her email, Ms Laycock provided the claimant with an update regarding the written confirmation from Hampshire Fire and Rescue. She also responded to a separate matter which the claimant had raised about staff accommodation charges, saying that the claimant's comments had been taken on board and actioned.

76. On 27 August 2017 the claimant emailed Mr Thomson to ask some questions about next steps in his appeal, and about the unrelated accommodation issue. Mr Thomson replied to say that these matters were 'above his pay grade' and that Ms Laycock, would respond on her return to the office.

77. On 29 August 2017, Mr Thomson forwarded to the claimant two email chains of communication with Hampshire Fire and Rescue Service. The first confirmed that the name on the correspondence would be changed to Mr Ross. The address had to be the site address and this could not be changed.

78. The second set of emails concerned the steps taken under the action plan, including the updated FRA. Paragraph 16.22 of the FRA had been amended by including the procedure which had been prepared by Mr Ross and seen by the claimant on 11 August 2017. Point 4 of the procedure provided that if the rooms were sold separately, guests in both rooms must be made fully aware of the fire exits. It said this should be used as a last resort, after group bookings and sale of other rooms first.

79. The fire safety officer's email to Mr Thomson referred to the updating of the FRA to show directions to all staff regarding the booking of the two rooms. It also referred to the conversation he had had with Mr Thomson on 5 June 2017. It is clear from this email and the attached amended FRA that the fire safety officer had seen the amended FRA. Completion of the action plan was formally noted by Hampshire Fire and Rescue Service on 4 September 2017.

80. At around this time the claimant and Mr Thomson worked together on wording to inform guests booking Cannon and Kisby about the fire exit arrangements. This was one of the steps which had been agreed between the claimant and Mr Thomson in the grievance meeting to improve the booking reservation procedure for the two rooms.

81. On 5 September 2017, Ms Laycock wrote to the claimant updating him. Like Ms Laycock's letter of 25 August 2017, this letter was also described in the covering email as a letter of response. It said that the letter of 25 August 2017 had confirmed the point which had been omitted from the letter of 21 August 2017. It also explained that since the previous letter, Hampshire Fire and Rescue Services had responded to the outstanding queries. It concluded, *'we sincerely hope that you are satisfied with the responses received and very much look forward to developing our continued working relationship.'*

82. In his email response on 9 September 2017, the claimant said he was unhappy about Ms Laycock being involved in the grievance appeal and having written the grievance appeal response letter. He said that Ms Laycock had manipulated the grievance proceedings to further her own agenda and to seek to cover up the whole matter from the very beginning, and that she was using Mr Thomson as a puppet. I find that this was a mischaracterisation of Ms Laycock's correspondence. It was perhaps confusing for Ms Laycock's two letters to be described as responses to the appeal, however, I find that Ms Laycock's letters to the claimant after his appeal letter were actually updates on the steps being taken to address the claimant's concerns and the matters he raised in his appeal letter, and to explore whether it might be possible to resolve things without an appeal hearing. When it became clear to Ms Laycock that this was not possible, she took steps to arrange an appeal hearing with Oliver Vigors, the respondent's co-chairman.

83. On 15 September 2017 the claimant was invited to the appeal hearing which was to take place on 22 September 2017.

84. The claimant emailed Mr Thomson on 18 September 2017. He said he did not accept that the meeting with Mr Vigors would be an appeal, because he had already received two letters of response to his appeal from Ms Laycock. Ms Laycock replied the same day to say that the respondent felt that the specific matters discussed in the grievance had been addressed and closed but as the claimant remained unsatisfied with the response, they were proposing an appeal hearing. The claimant confirmed that he was happy to meet with Mr Vigors, but he did not regard the meeting as an appeal hearing.

85. For the reasons set out above, I find that, although they were described as 'responses', the letters from Ms Laycock, were not actually formal responses to the claimant's appeal but were attempts by the respondent to resolve matters without an appeal meeting. I find that the meeting with Mr Vigors could still be described as an appeal meeting.

<u>22 September 2017: Grievance appeal hearing (protected disclosure 1f)</u>

86. The claimant's meeting with Mr Vigors was held at the respondent's London offices. The claimant was accompanied by a colleague. The claimant recorded the meeting.

87. The claimant said he made a protected disclosure in the meeting on 22 September 2017 (at line 79 of the transcript). The words used were: *'So the issue is…Hector went off and Hector told me specifically disregard the instructions from the fire officer, if anyone goes to jail for this it will be me.'.*

88. At the appeal hearing, Mr Vigors asked the claimant what the outstanding issues were with the Cannon/Kisby arrangements, now that the action plan had been completed and the fire safety officer had been sent the updated FRA. The claimant and Mr Vigors disagreed about whether the word "separately" in paragraph 16.22 of the FRA was sufficient to convey that Cannon and Kisby could be let to people who do not know each other. To assist the claimant to regard the situation as concluded, Mr Vigors agreed that extra words (which the claimant felt were necessary for clarity) could be added to paragraph 16.22 of the FRA.

89. Mr Vigors asked the claimant what else he wanted to resolve things. The claimant said he would like a period of a month's garden leave to enable him to move to a different part of the country. The claimant also asked towards the close of the meeting for a reference. Mr Vigors checked a number of times with the claimant that this is what he wanted by way of a resolution and said that he would take these requests away for the business to consider them.

90. Following the meeting Ms Laycock, who had attended the appeal as a note-taker, wrote to the claimant to say what the outcome would be. She had been involved in the matters that were the subject of the claimant's grievance, and had also attended the grievance hearing. However, the respondent had a small management team and no other HR manager. I find that, although Ms Laycock wrote the letter confirming the outcome of the appeal, she was not the decision-maker. Mr Vigors considered the claimant's appeal himself, took steps to find out what the claimant wanted, and reached a decision himself as to what the outcome of the appeal should be.

91. The outcome letter said that the agreed resolution would be the amendment to the Fire Risk Assessment and for the claimant to take part of his notice period (3 of his 4 weeks' notice) as garden leave. It concluded: *'on receipt of your resignation we will confirm exact dates'*. The suggestion of a 3 week garden leave period was arrived at after the appeal hearing, following a discussion about the needs of business. The claimant felt this was going back on what had been agreed at the appeal hearing, where he had asked for a month's garden leave, but it is clear from the transcript of the appeal hearing that Mr Vigors said the business would consider the request, rather than agreeing it at the time.

92. Paragraph 16.22 of the FRA was amended by the addition of the words 'ie two different bookings' after the words 'sold separately'. A copy of the updated FRA was sent to the claimant by email on 25 September 2017. It was also sent to the fire safety officer by Mr Thomson.

27 September 2017: meeting between the claimant and Mr Ross

93. The claimant and Mr Ross met on 27 September 2017. The claimant told Mr Ross that the changes to paragraph 16.22 of the FRA were not correct. Mr Ross agreed to change the wording to "two different people who don't know each other". (The further amendment was sent to the fire safety officer by Mr Thomson on 28 September 2017.)

94. In agreeing to this further change, Mr Ross was doing what he could to resolve the claimant's concerns about the rooms even though he did not consider any further changes to be necessary. In his discussion with the claimant, Mr Ross emphasised his desire for customers and employees to be safe and said that he and the claimant "enjoy working together".

95. After Mr Ross had agreed to modify paragraph 16.22 of the FRA, he asked the claimant about his plans. He said that he didn't know whether the claimant wanted to stay or go. He said the claimant needed to make his mind up and that the last thing he wanted to do was push the claimant out of the door.

96. Towards the end of the meeting, Mr Ross invited the claimant to consider whether he wanted to work for him or not and asked him to let him know by Sunday (1 October 2017). He told the claimant that he did not want to lose him. The claimant said *'I need a bit more time than Sunday'.*

97. On 28 September 2017, Mr Ross asked the claimant to confirm he was in agreement with the updated paragraph 16.22. The claimant did not reply. Mr Ross chased this up the following day and the claimant replied "Hooray". He asked two other questions, to which Mr Ross replied, *'No further amendments will be made at this time. The FRA is written by WJ Fire, our Fire Safety consultants, and has been signed off.'*

6-13 October 2017: further correspondence about resignation and Cannon/Kisby

98. By 6 October 2017 the claimant had not confirmed whether he wished to work for the respondent or not. On 6 October 2017 Ms Laycock wrote to the claimant seeking confirmation of his position. She explained that they were still waiting for final confirmation of dates from the claimant so that the matter could be brought to a close and the respondent could plan accordingly. She said the respondent needed to be able to plan from Sunday 19 November 2017. It is not clear from the letter whether this was the date by which a response was requested, or the date by which the claimant's employment would have ended, including his one month notice period. Given the previous deadline which had been suggested by the respondent, I find that the latter is more likely.

99. The claimant replied on 11 October 2017. He did not say in his email that he wanted to stay with the respondent. He raised some issues, including the drafting of the wording for guests in Cannon and Kisby and said 'I can't leave until this has been resolved'. He did talk about having time to think about whether he was going to resign or not, but went on to say: "Tendering my resignation is my decisions. & I am under no obligation to resign when you want or ask me to. This is something that will happen to a time scale that works for me, no matter how much I am pushed to do it right away'. It did not expressly set out a decision to resign, but the overall impression of this email was that it was a question of when rather than if the claimant was going to resign.

100. On 13 October 2017, the claimant emailed Mr Ross, Ms Laycock and Mr Thomson to confirm that the wording for guests in Cannon and Kisby was finalised and to ask some questions about the procedure for providing the wording to guests. Mr Thompson replied. On 14 October 2017 the claimant sent another email asking 'So this is alright now to be sent?' Mr Thomson confirmed that it was.

<u>16 October 2017: meeting between the claimant, Mr Ross and Ms Laycock</u>

101. On 16 October 2017 the claimant had a meeting with Mr Ross and Ms Laycock. The claimant recorded this meeting. Mr Ross agreed that the wording for the information to Cannon/Kisby guests would be finalised that day, commenting to the claimant: 'I'm not sure you are ever going to be satisfied'.

102. There was a lot of discussion about the claimant's position. Mr Ross said that the claimant had said to Mr Thomson that he was going to be resigning, and that he needed to know whether the claimant would be staying or going. He said he needed to know by the end of the week 'whether you will be staying with us or not'. (22 October 2017). Mr Ross said that he did not want the claimant to resign, he wanted to 'park this and move on'. I find that this was a genuine reflection of Mr Ross's position at this time. He also said, 'We've got to communicate better. You've got to tell me if you have issues, pick up the phone'.

103. The claimant said that when he had mentioned tendering his resignation to Mr Vigors it was September, and that the position was different in mid-October because people don't typically employ senior managers in November and December. Again, this gave the impression that it was a question of the timing of the claimant's resignation, rather than him still thinking about staying with the respondent. Mr Ross and Ms Laycock left the meeting asking the claimant to confirm by Sunday (22 October 2017) whether wanted to continue working for the respondent.

104. On the evening of 16 October 2017 Mr Thomson replied to an email from the claimant about the booking procedure for Kisby and Cannon (which included the wording to guests). Mr Thomson said it could be implemented

and given to the team. Mr Ross also replied saying that he would like the claimant to action the procedure. The claimant replied on the same day to say the procedure was being printed and filed and he would start the training and roll it out. The claimant agreed that this marked the conclusion of the Cannon and Kisby issues as far as he was concerned.

105. After this exchange of emails, Ms Laycock emailed the claimant. She said, *'You now have the document…which [Mr Ross] promised so please can you let us have a definitive answer by close of play Sunday 22 [October 2017] as to whether you are staying with us or resigning as you have said to us on several occasions now.'*

106. On 19 October 2017, the claimant emailed Mr Ross and Mr Laycock following on from the meeting on 16 October 2017. He said he was not able to see his solicitor of choice until the following week. He said that if the respondent would let him have 'a draft agreement for consideration' he would get advice the following week.

107. Ms Laycock was not sure what agreement the claimant was referring to or what he was expecting. She replied on 20 October 2017 saying '*We simply asked you if you would let us know by Sunday if you were committed to'* staying with the respondent or *'if you are regrettably leaving us'.*

108. After 20 October 2017 the claimant did not get back to Mr Ross or Ms Laycock. Ms Laycock tried to call him twice on 26 October 2017 but got no response.

109. The claimant said in evidence that he had not at this stage decided that he was leaving the respondent. He had asked for a draft agreement at the suggestion of a solicitor he had spoken to. He did not reply to Ms Laycock's email of 20 October 2017 because he was panicking and was unsure about the law on whistleblowing protections.

110. I find that if the claimant wanted to stay with the respondent once (as the claimant accepted) the concerns he had raised in his whistleblowing complaint had been concluded, he would have said so. He could have corresponded with Mr Ross or Ms Laycock at any point after the evening of 16 October 2017 to say this. He no longer needed to threaten to resign as part of a negotiating strategy to press the respondent to take action about his concerns. It is also not clear, why, if he thought he may be going to stay with the respondent, he would ask about a draft agreement. The impression which the claimant gave, in his email of 11 October 2017, what he said in the meeting on 16 October 2017 and his request on 19 October 2017 for a draft agreement, was that he was likely to be leaving, and it was just a question of timing.

111. On 27 October 2017 Ms Laycock provided Mr Ross with an update that she had heard nothing further. It seems that by this date Mr Ross and Ms Laycock had had discussions about the claimant's employment ending if he did not confirm that he wanted to stay, as Ms Laycock's email says that

she plans to send 'the email' to the claimant on Monday and then discussions will follow about rota cover, handing back company stuff, and the claimant 'physically walking away'.

3 November 2017 - dismissal

112. There was no further communication from the claimant to Ms Laycock or Mr Ross. On 2 November 2019 Ms Laycock sent a letter to the claimant by email. It said that the respondent would prefer to have dealt with everything by agreement, but given the delays and to enable the respondent to deal with staff planning issues, the respondent had decided that the claimant's employment would come to an end on 2 December 2017 by reason of resignation, and that he would be on garden leave for the whole month.

113. The claimant replied by email to say that he had not resigned and was waiting for a draft agreement. He also called Ms Laycock, she said that he should attend work the next day and they would be in touch.

114. On 3 November 2017 Mr Ross and Mr Laycock met with the claimant. Mr Ross said that the respondent had reached the point where they needed to say goodbye. The claimant would be given one month's notice and there was no need for him to work his notice. A letter was given to the claimant. It started by saying:

> "*You have talked about resigning for many months. This has left us in a very difficult position not knowing when you are actually going to resign. My letter to you on 2nd November 2017 treats you as having resigned because we presumed that you do not wish to have a dismissal on your career record – however, if you wish to regard that letter as a notice of dismissal, then so be it."*

115. The respondent accepts that the claimant's employment terminated by dismissal. The decision to dismiss the claimant was Mr Ross's, taken with input from Ms Laycock.

116. Mr Ross was very clear that there was never any question about the claimant's work performance. The claimant was a valued employee and Mr Ross did not question his work ethic 'for a second'. Mr Ross's preference, which he made clear to the claimant up to 16 October 2017, was for the claimant to stay working for the respondent. I find that if the claimant had replied to Mr Ross or Ms Laycock prior to 2 November 2017 by saying that he wanted to stay with the respondent, he would not have been dismissed.

117. Mr Ross said, and I accept, that he made the decision to dismiss the claimant because the respondent could not wait any longer for the claimant to reply about whether or not he wished to stay with the respondent. Mr Ross felt that a crossroads had been reached where a decision had to be made one way or another about whether the claimant wanted to stay with the respondent. Ms Laycock discussed the termination

of the claimant's employment with Mr Ross. She said, and I accept, that the decision was taken to dismiss the claimant because he had talked about resigning 3-4 times, and the respondent did not know when he was going to be leaving and needed to plan.

The law

Protected disclosures

118. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is:

- a 'qualifying disclosure' (a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' set out in section 43B has occurred or is likely to occur);

- which is made in accordance with one of six specified methods of disclosure set out in sections 43C to 43H.

119. In relation to 'qualifying disclosure', in this case the relevant failures relied on by the claimant are those in sub-sections 43(1)(b) and 43(1)(c).

120. Sub-section 43(1)(b) is a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject.

121. Sub-section 43(1)(c) is a disclosure of information that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered.

122. The method of disclosure relied on by the claimant is disclosure to the employer under section 43C. This section provides that a qualifying disclosure is a protected disclosure if it is made to the worker's employer.

Automatic unfair dismissal

123. Section 103A of the Employment Rights Act provides that the dismissal of an employee is unfair where the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

124. The two-year minimum period of qualifying service which is required for an employee to bring an ordinary unfair dismissal claim under section 94 of the Employment Rights Act does not apply.

125. A dismissal which is contrary to section 103A is 'automatically' unfair. The tribunal does not need to consider whether the dismissal was reasonable in the circumstances.

126. Where there is more than one reason for a dismissal, the tribunal must be satisfied that the principal reason is that the employee made a protected disclosure. The protected disclosure must be the 'primary motivation' for the dismissal (Fecitt and others v NHS Manchester [2012] IRLR 64, CA). This is a different (and stricter) test than in a claim for unlawful detriment under section 47B, where a decision will be unlawful if a protected disclosure 'materially influences' the decision-maker.

127. Where there is more than one disclosure, the tribunal needs to consider whether the disclosures taken as a whole were the principal reason for the dismissal (El-Megrisi v Azad University in Oxford EAT 0449/08).

128. In Bolton School v Evans 2007 ICR 641, CA, disciplinary action against an employee was said by the employer to have been taken because of the 'manner' of a protected disclosure, rather than the protected disclosure itself. The employee resigned and claimed constructive dismissal under section 103A. The EAT and the Court of Appeal held that the employee's misconduct arising from the way in which the protected disclosure was made (by hacking into the employer's computer system) was the reason for the constructive dismissal, not the disclosure itself. The court observed that, although tribunals should generally be careful when an employer alleges that an employee was dismissed because of acts related to the disclosure and not because of the disclosure itself, in this case the employer had no other motive for the action taken against the employee.

129. The burden of proof is on the claimant to produce some evidence to suggest that the dismissal was for the principal reason that they have made a protected disclosure. The tribunal must then consider the evidence as a whole and make findings of fact. Finally, the tribunal must decide what was the reason or principal reason for the dismissal, on the basis that it is for the employer to show the reason. If the tribunal does not accept the employer's asserted reason, then the tribunal may (although not 'must') go on to find that the principal reason is the reason asserted by the employee. The burden proof in unfair dismissal cases, including claims under section 103A, is not the same as in the discrimination legislation. (Kuzel v Roche Products [2008] IRLR 530, CA).

Conclusions

130. I have applied these legal principles to my findings of fact as set out above, in order to decide the issues for determination.

Protected disclosures

Disclosure 1a

131. It was clear from the claimant's discussion with the Operations Manager on 17 July 2017 that the claimant was very unhappy about the instruction he had been given by Mr Ross about Cannon/Kisby. However, (even bearing in mind the Operations Manager's knowledge of the background), the words used by the claimant did not contain sufficient detail to amount to a disclosure of information which tended to show that health and safety had been or was being endangered or that a legal obligation had been or was being breached. In particular, there was no reference to any failure to comply with a legal obligation, or any health and safety risk.

132. This disclosure was therefore not a qualifying or protected disclosure.

Disclosure 1b

133. I conclude that the words used by the claimant on 19 July 2017 in a meeting with Mr Ross and Ms Laycock did amount to a disclosure of information which tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation. The claimant said that he was asked to ignore fire regulations and he referred to the procedure for Kisby and Cannon.

134. It does not matter that the claimant was not expressly told to 'ignore the fire regulations' on 5 July 2017 or that (as I have found) the respondent genuinely believed that the instruction to the claimant was not in breach of any fire regulation. The claimant believed that the information he disclosed about the instruction which had been given to him tended to show that there had been, or was likely to be a failure to comply with a legal obligation (the requirement to comply with fire regulations). I conclude that the claimant's belief was a reasonable one, particularly in the light of the earlier comment by Mr Ross that 'if anyone goes to prison' it would be him.

135. The disclosure was also, in the reasonable belief of the claimant, made in the public interest as it concerned legal obligations which were intended to ensure the safety of members of the public staying on the respondent's site.

136. I conclude that the claimant's complaint about the instruction of 5 July 2017 in his discussion with Mr Ross and Ms Laycock on 19 July 2017 was a qualifying disclosure and that, as it was made to his employer, it was also a protected disclosure.

Disclosure 1c

137. I have found that the words used by the claimant in a meeting on 4 August 2017 to Mr Ross and Ms Laycock were: *'the major thing which turned my mind was the whole fire regulation nonsense'*. I conclude that, considered together with and in the context of the information which had been disclosed to the same people at the previous meeting, this also amounted to a disclosure of information which, in the reasonable belief of the claimant, tended to show that there had been, or was likely to be a failure

to comply with a legal obligation (the requirement to comply with fire regulations).

138. For the reasons set out above in relation to disclosure 1b, I conclude that disclosure 1c was also a qualifying and protected disclosure.

Disclosure 1d

139. The respondent has accepted that disclosure 1d (the formal grievance complaint made in writing on 11 August 2017) was a protected disclosure.

Disclosure 1e

140. The respondent has accepted that disclosure 1e (the reading of the claimant's formal grievance complaint in his grievance hearing on 16 August 2017) was a protected disclosure.

Disclosure 1f

141. I have found that in the appeal meeting on 22 September 2017 the claimant told Mr Vigors that Mr Ross: '*told me specifically disregard the instructions from the fire officer, if anyone goes to jail for this it will be me'*. The fact that this comment related to the Kisby/Cannon fire exit procedure was clear to Mr Vigors from the context (the wider discussion he had with the claimant about the Kisby/Cannon procedures during the meeting). I conclude that this also amounted to a disclosure of information which, in the reasonable belief of the claimant, tended to show that there was, had been or was likely to be a failure to comply with a legal obligation.

142. For the other reasons set out above in relation to disclosure 1b, I conclude that disclosure 1f was also a qualifying and protected disclosure.

Protected disclosures - summary

143. In summary, I conclude that the claimant made protected disclosures on:

i. 19 July 2017 and 4 August 2017 in meetings with Mr Ross and Ms Laycock (disclosures 1b and 1c);
ii. 11 August 2017 in a written grievance complaint addressed to Mr Ross and Ms Laycock (disclosure 1d);
iii. 16 August 2017 in a grievance meeting with Mr Thomson (disclosure 1e); and
iv. 22 September 2017 in an appeal hearing with Mr Vigors (disclosure 1f).

Automatic unfair dismissal

144. I have found that the claimant made five protected disclosures over the period 19 July 2017 to 22 September 2017. The respondent's dismissal of the claimant on 3 November 2017 took place against the background of

the respondent's discussions and correspondence with the claimant in which he made these protected disclosures.

145. I conclude that the chronology of events leading to the claimant's dismissal and the context in which it took place are sufficient to satisfy the evidential burden which is on the claimant to produce some evidence to suggest that the dismissal was for the principal reason that he made one or more protected disclosures.

146. I next have to consider the reason for dismissal. It is for the employer to show the reason for the dismissal. The dismissal of the claimant will be unlawful if the principal reason for the dismissal was one or more of the claimant's protected disclosures, either individually, or taken together, or the protected disclosures as a whole.

147. The decision to dismiss was taken by Mr Ross. I have to consider what his principal reason or primary motivation was. I have found that Mr Ross made the decision to dismiss the claimant because the claimant failed, after 16 October 2017, to confirm whether he wanted to remain working with the respondent. The claimant was given time to confirm his position, including after deadlines had passed, but Mr Ross felt that the point had been reached where the respondent could not wait any longer for the claimant to say whether he wished to stay with the respondent. He felt that it was difficult for the respondent to manage its business with a general manager who had been suggesting for some months that he would resign and who had not confirmed one way or the other whether he wanted to stay. This was Mr Ross's primary motivation for the decision to dismiss.

148. I bear in mind that, as the Court of Appeal cautioned in Bolton School v Evans, tribunals should be careful when an employer alleges that an employee was dismissed because of acts related to the disclosure and not because of the disclosure itself. In this case, the claimant's failure to reply to the requests for him to confirm whether he wished to resign or not arose out of the discussions he had been having with his employer which included his protected disclosures. However, I am satisfied that the respondent's motive was not any of the protected disclosures (either individually or taken as a whole) and that the claimant's protected disclosures (again, either individually or taken as a whole) were not the principal reason or indeed a reason for the dismissal. The manner in which the claimant made his disclosures was also not the principal reason for the dismissal.

149. The principal reason for the dismissal was the lack of clarity as to the claimant's position after 16 October 2017 and the claimant's failure to confirm after that date that he wished to remain with the respondent. I have accepted Mr Ross's evidence on this central point, and have reached this conclusion for the following reasons:

    a. The respondent did not react in a hostile way to the claimant's disclosures. It took them seriously and continued to do so when he

made a number of disclosures covering the same issues. It took numerous steps to reassure the claimant about his concerns, including meeting with the claimant, amending the Fire Risk Assessment more than once, and liaising with the fire safety officer about the issues the claimant had raised. In order to reassure the claimant, the respondent agreed to steps it did not consider to be necessary, for example the further amendment to the FRA agreed by Mr Ross and Mr Vigors.

b. It was the claimant who raised the possibility of leaving, when he referred to an exit strategy on 28 July 2017. He said that he wanted to leave on a number of occasions, the latest at the appeal of his grievance on 22 September 2017. Even if he did not want to leave and only said this as part of a negotiating strategy in his discussions about the Cannon/Kisby issues, the respondent was not to know that. The claimant's email of 11 October 2017 and his comments on 16 October 2017 gave the impression that it was a question of when rather than if he would leave.

c. Mr Ross repeatedly told the claimant that he did not want him to leave. The last occasion on which Mr Ross told the claimant that he did not want him to leave was on 16 October 2017, after all of the claimant's disclosures. I have found that this was a genuine reflection of Mr Ross's position at the time.

d. The claimant was asked four times (at meetings or in emails/letters) after his appeal hearing on 22 September 2017 whether he wanted to stay or leave. He was given two deadlines. The respondent allowed the claimant some flexibility when he did not reply by these deadlines (even though he had been told on a number of occasions that he needed to communicate better, including replying to emails more promptly).

e. The concerns the claimant had raised in his disclosures had been resolved and concluded on the evening of 16 October 2017. After this the respondent asked again about the claimant's plans for the future and whether he would be staying. By 2 November 2017 the claimant had still not told the respondent whether he wanted to stay with them or not. His only response (his request on 19 October for a draft agreement) suggested that it was more likely that he wanted to leave.

f. This is not a case in which the claimant was dismissed because he was perceived as a difficult colleague because of his whistleblowing, or in which the respondent used the claimant's actions as an opportunity to get rid of a colleague who was seen as a nuisance. The respondent wanted the claimant to stay and it was only when (after the conclusion of the issues he had raised) he failed to confirm that he wished to remain working for the respondent that the decision was taken to dismiss him.

150. Against that background, I am satisfied that the principal reason for the claimant's dismissal was his failure to confirm to the respondent after 16 October 2017 once the issues were concluded, that he wanted to stay working for the respondent, and the respondent's decision that it could not wait any longer for him to confirm his position.

151. Mr Ross's decision was taken with input from Ms Laycock (the respondent's HR manager). It is Mr Ross's motivation which needs to be considered but, for the sake of completeness, I have considered Ms Laycock's motivation as well. I have concluded that Ms Laycock was also motivated by fact that the claimant had not said that he wished to stay with the respondent after the resolution of his concerns about the safety of Cannon and Kisby.

152. In the light of my conclusion that the principal reason for the dismissal of the claimant was not the protected disclosures he made, the claimant's complaint cannot succeed and is dismissed.

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Employment Judge Hawksworth

Date: 28 November 2019

Sent to the parties on: ..04.12.19.

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For the Tribunals Office

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