EMPLOYMENT TRIBUNALS

Claimant: Mr P Pearman

Respondent: Bondco 628 Limited

HELD AT: **Sheffield** **ON: 31 October 2019 and 1 November 2019**

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimant: Mrs C Fowler, Solicitor
Respondent: Mr M Hobson, Managing Director
Ms R de Ville, HR Director

JUDGMENT having been sent to the parties on 13 November 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These reasons are supplied at the request of the respondent.
2. The respondent trades as '*Corporation'*. Mark Hobson, the respondent's managing director, says in his witness statement that Corporation is *"a well-known and popular part of Sheffield's night-time scene".*
3. The claimant had two jobs with the respondent. He worked for the respondent as a disc jockey. (I shall refer to this position by the abbreviation *'DJ'* from time-

to-time). This was upon a part-time basis. In that role, the claimant worked each Friday night. At the time of the events with which the Tribunal is concerned the claimant also held the role of general manager. It is common ground between the parties that the claimant's two roles were at all times regarded as separate employments.

4. By a claim form presented to the Employment Tribunal on 3 July 2019, the claimant brought a number of complaints. Separate complaints arose out of each employment.

5. Upon the claims arising out of the claimant's role as general manager he pursued the following complaints:

   5.1. That the respondent made an unlawful deduction from his wages between 14 February 2019 and 2 April 2019.

   5.2. Constructive unfair dismissal.

6. Arising from his employment as a DJ the claimant brought the following complaints:

   6.1. Unfair dismissal.

   6.2. A failure upon the part of the respondent to provide him with a written statement of particulars of the reason for his dismissal from that role.

7. Arising out of the complaints summarised in paragraphs 5 and 6, the claimant also complained that the respondent had failed to provide him with a written statement of employment particulars (in respect of both employments).

8. I shall firstly set out my findings of fact. I shall then go on to consider the issues that arise in the claim and the relevant law before going on to set out my conclusions.

Findings of fact

Commencement of employment

9. In making my findings of fact, I have benefited from hearing evidence from the claimant and from Mr Hobson. The claimant called evidence from Francesca Smith, a former employee of the respondent. The respondent also called evidence from Rosemary de Ville. She is Mr Hobson's mother and appeared in the capacity of the respondent's human resources director.

10. In his claim form, the claimant gave the date of commencement of his employment with the respondent as January 2000. This was candidly accepted by Mrs Fowler as being an *"educated guess"* on the part of the claimant. The respondent, in the response to the claimant's claim, gives the date of commencement of employment as 7 February 2000. This was said to be the date upon which the claimant commenced employment for the respondent as food and beverage manager (which is also known as the *"wet and dry"* manager).

11. The respondent said in paragraph 2 of its details of response (at page 53 of the hearing bundle) that the claimant became assistant manager in 2008 at which time he took up employment as a disc jockey. The respondent said that the

claimant had been a self-employed DJ prior to 7 February 2000. The respondent also said that the claimant's job title changed from assistant manager to general manager at some point after 2008 and was done at the claimant's request (but with no change in duties).

12. The claimant says (in paragraph 6 of his witness statement) that he did freelance as a disc jockey prior to 7 February 2000. The claimant's account was that his employment as a DJ coincided with the commencement of his employment with the respondent initially as food and beverage manager. That the claimant viewed his employment in both roles as commencing at the same time is apparent not only from his evidence but also from his schedule of loss as his claim for the basic award in the unfair dismissal complaints is based upon the same multiplier. As will be explained subsequently, the multiplier is applied to the gross weekly wage to arrive at the amount of the basic award. The multiplier is based upon the claimant's age and length of service at the effective date of termination. In each case, the multiplier advanced by the claimant is 23.5.

13. Mr Hobson gave no evidence in his witness statement as to when the claimant commenced employment with the respondent as disc jockey. It is not in issue that he did so. The only question between the parties is to when he became employed in that capacity. Ms De Ville says that the claimant *"continued to work as a self-employed DJ until his joint remuneration was required for mortgage purposes in 2003".* Her evidence that the claimant took up employment as a DJ in 2003 is at odds with the respondent's assertion in the details of response that he became an employed DJ in 2000. Given this inconsistency and that there was no challenge to the claimant's evidence that the two roles commenced at the same time persuades me to prefer the claimant's account that he commenced each employment on 7 February 2000.

14. The claimant accepts Mr Hobson's case that employment as assistant manager commenced on 7 February 2000 (as opposed to some point earlier that year). In my judgment, the claimant is correct to do so. There is corroborative documentary evidence within the bundle (at page 63). This is described as a *"statement of employment".* The claimant accepts that this document was signed by him. It gives the date of commencement of his employment in the capacity of "*wet and dry"* as 7 February 2000 and I shall therefore proceed upon the basis that that is the date of commencement of both employments.

15. The claimant accepted the statement of employment dated 7 February 2000 (copied at page 63) as bearing his signature and being a true copy of the original. The same cannot be said for the document at pages 67 to 74.

16. This document purports to be a contract of employment made between the claimant and the respondent. At page 74 (the final page of the document) is shown Ms de Ville's signature and a signature purporting to be that of the claimant. The claimant said, at paragraph 22 of his witness statement, that *"I absolutely and categorically deny signing the contract at pages 67 to 74. I had never seen this document prior to its disclosure as part of these proceedings. I do not accept that it is a true reflection of the terms on which I was employed. I note that it only purports to cover my management role and does not include my correct start date. I first saw this document on 5 August 2019 after Mr Hobson delivered it to my solicitor".* The claimant goes on to say (in the same paragraph) that, *"I would like to note that throughout the bundle*

Mr Hobson and Ms de Ville refer to various company documents and policies – the health and safety policy, for example. They have also included a document at pages 192 to 193 called "disciplinary procedure". I have never seen these documents or any policy documents prior to this case."

17. The respondent was unable to produce the original of the document which is copied into the bundle at pages 67 to 74. The copy in the bundle was, according to Mr Hobson, a facsimile (or copy) of a copy and not the original.

18. The respondent attempted to demonstrate that the document commencing at page 67 was authentic by (amongst other things) reference to samples of the claimant's signature within the bundle. Similarly, the claimant sought to disprove the document's authenticity in the same way.

19. Neither party assisted the Tribunal with the production of a report from a handwriting expert, nor had either party applied to the Tribunal to adduce such expert evidence. Mrs Fowler began to cross-examine Mr Hobson upon the differences between some of the sample signatures within the bundle and that shown at page 74. I interceded as I was concerned that the Tribunal was being asked to make a determination upon a matter (being the provenance of the claimant's signature) which lay outside its competence without the assistance of expert evidence. I allowed the parties the opportunity of considering their position. Mrs Fowler indicated that the claimant was content to proceed with the case upon the basis that, in reaching a conclusion upon the authenticity of the document commencing at page 67, the Tribunal would have no regard to the samples of handwriting evidence within the bundle. The respondent indicated likewise. The Tribunal therefore proceeded upon this basis in order to deal with the issue of the authenticity of the document at pages 67 to 74. In reaching that determination no regard shall be paid to the handwriting samples.

20. I shall now continue with the chronology of matters before returning to the issue of the status of the document commencing at page 67. On 6 April 2001 Mr Hobson wrote to the claimant (page 66). This letter concerned refurbishment within the Hartshead Square area of Sheffield. The nightclub being run by the respondent was at the time based at Bank Street in Sheffield and the Hartshead Square redevelopment meant that the respondent had to vacate from the premises at Bank Street and move out with effect from 17 March 2001. Mr Hobson said, "*Due to these circumstances we'll sadly be unable to offer you work during this period [pending the acquisition of new premises] but hope you will be able to return to your position when the new club opens. You will receive one week's wage for the first week of lay off, and this will be paid into your bank along with your outstanding hours on Friday 4 May 2001. After that date, it may be advisable to contact the Benefits Agency for any assistance*".

21. The respondent then moved to the present premises at Milton Street whereupon the claimant resumed both of his employments.

Events from the end of 2018

22. Nothing of any import of relevance to the claimant's claims then occurred until towards the end of 2018. The Tribunal can do no better, in order to set the scene, than set out the salient parts of Mr Hobson's witness statement. He says (at page 150),

'The business [of the club] is seasonal with peaks and troughs dependant on the fluctuation of the student population. The quarters of a financial year 2017/18 showed a deficit from the previous financial year and whilst it was not usually significant, it highlighted the problem of falling numbers of customers as leisure habits were changing nationwide.

The claimant was aware of this fall in numbers simply because of his role as general manager. Steps were taken to attempt to remedy the situation of falling numbers, however no spending cuts were deemed necessary until September 2018 when the seasonal peak created by the return of the students failed to reach the anticipated level".

Mr Hobson then goes on to say that it "*was not until the quarterly meeting with the accountant, myself and the financial manager on 28 November 2018 … did the full extent of the seriousness of the financial situation become unknown"*.

23. Page 149 is a copy of a document prepared by the respondent's accountant. This statement corroborates that the financial situation was reported "*to the management*" on 29 November 2018. The respondent recorded a loss of £63,672 for the quarter ended 30 June 2018 and a loss of £93,050 for the quarter ended 30 September 2018. Mr Hobson's evidence (given under cross-examination) was that a loss for the quarter ended June may be anticipated. The real cause of the respondent's financial difficult was the much worse than anticipated September quarter for 2018.

24. Mr Hobson and Ms de Ville attribute the timing of their notification of the difficulties to the claimant and the other members of staff to a difficult personal issue which had affected a member of the respondent's management team. It formed no part of the claimant's case presented by Mrs Fowler that the difficulty was not a reasonable explanation for the delay in the notification of the circumstances to the claimant and the others. The Tribunal therefore deems it inappropriate to say anything more about this aspect of the matter, particularly in view of the fact that these reasons will be in the public domain as they will be published upon the government's *Employment Tribunal Judgments* website.

25. Mr Hobson goes on to say in his witness statement that,

"*Between 3 and 4 December an emergency meeting with the claimant (general manager) and the respondent (managing director) was held to identify potential solutions and areas of savings. The claimant made no suggestions. Further subsequent meetings were held with the remaining employees to both inform them of the situation and asked for their input regarding cost cutting. Whilst both stringent cuts and price increases were made from the end of November it became clear towards the end of December that they were not enough".*

Mr Hobson then goes on to say,

"*During this time Rosemary de Ville had been vocal in urging for the necessity of short time working if the business were to have a chance of surviving and whilst invoking laying off or short time working as a last resort and never a first, it became a reluctant necessity to maintain the business and some employment and to avert insolvency. From this date and until his departure from the company on 2 April [2019] the claimant made no financial and cost saving suggestions. Whilst fully appreciating the bad timing of the Christmas break, on 20 December 2018 all relevant employees including the claimant were told*

that due to the financial situation short time working would be invoked after the holiday break. On 7 January 2019 all relevant employees including the claimant were given by hand a notice of short time working, ie a variance to their original terms and conditions, which stated their revised hours of work and resulting wages, which they were asked to sign if they wished to continue working for the company under the revised terms. A response was requested within two days with immediate effect".

26. Ms de Ville gives evidence largely corroborative of that of Mr Hobson. She says at paragraph 4 of her witness statement that,

"The right to impose laying off and/or short time working has always been company policy and laying off and short time working for a twelve month period has been invoked in the past".

This was a reference to the closure in April 2001 to which I have already referred (in paragraph 20).

27. The claimant did not take issue with Mr Hobson's statement that he (the claimant) would have been aware in the fall of customer numbers in the autumn of 2018. He says in paragraph 10 of his witness statement that,

"During 2018 I was not specifically aware that the respondent was making less profit, as that information was not made available to me. However, the figures at page 149 of the bundle [being the accountant's report] do not surprise me since I had and all the other staff had observed that admissions to the club had fallen over the year."

He agrees with Mr Hobson's evidence about the respondent's club (in common with other clubs) facing challenging trading conditions due to the general public's changing recreation habits.

28. In order to corroborate his account of a meeting with the claimant on 3 or 4 December 2018 Mr Hobson produced the note that is at page 86 of the bundle. Pages 87 is a record of meetings *"on either 3 or 4 December 2018"* with the staff there listed (which list excludes the claimant). The note at pages 87 also records a meeting held on 5 December 2018 with John Hickman, digital marketing head.

29. Going back to the note at page 86, this records a meeting with the claimant *"on either 3 or 4 December".* Mr Hobson records in the note at page 86 that he met with the staff on 3 and 4 December and that on one of those dates he met with the claimant. His explanation for creating a separate note is contained within the body of the note itself. Mr Hobson said,

"*As the situation was grave and the discussions frank the meetings with the senior members of staff were on a one to one basis. This I hoped would be a focussing method from which we could hopefully gain further cost saving methods that we had not yet identified."*

He goes on to say that,

"*I began by outlining the current negative financial situation and that savings were required. I did not give specific amounts, but stated the sums were very large. I told Phil [the claimant] that should we not attain these savings the business would fold. I told him to immediately look into areas of potential saving*

as a matter of urgency. Given his position of general manager and expertise I expect a positive input."

30. In paragraph 12 of his witness statement, the claimant says that he does not recall meeting with Mr Hobson on either 3 or 4 December. He says that he would be "*confident that I would have done so had it actually taken place given my position with the respondent and the nature of what was allegedly discussed. I do not believe it took place. I was certainly never provided with a copy of Mr Hobson's note of the meeting and did not see it until the disclosure stage of this case*".

31. I accept that there are some odd features of the note at page 86. It is difficult to understand why Mr Hobson could not have identified the specific date upon which he met with the claimant. The document at page 87 is more explicable as Mr Hobson met with the staff there listed on 3 and 4 December 2018: in other words, he met with different members of staff upon different days. Further, as the claimant rightly points out, the note at page 86 is not signed by him (or for that matter Mr Hobson) as a true and accurate record of what was discussed.

32. That being said, upon this issue I prefer the evidence of the respondent and find that a meeting was held between Mr Hobson and the claimant on 3 or 4 December 2018. Firstly, the claimant does not deny that such a meeting took place. He simply says that he could not recall it. Secondly, the respondent referred to the fact of the meeting both in Mr Hobson's witness statement and in the grounds of resistance (at page 53). This was consistent with a similar assertion in the grounds of resistance filed by the respondent in answer to an Employment Tribunal claim brought by Keith Winson, promotions manager. The details of response in that case and which refers to a meeting held in early December 2018 may be found at page 185. The respondent therefore has persistently maintained that these meetings took place over the course of separate Employment Tribunal proceedings. Thirdly, while recognising that the burden of establishing his account rests upon Mr Hobson it would have been fairly easy for the claimant to have produced rebuttal evidence from any of the members of staff listed at page 87. Indeed, it would have been foolhardy for Mr Hobson to have presented the note at page 87 to the Employment Tribunal and which lists the members of staff said to have been party to a meeting with him had the respondent not been confident in the authenticity of that document.

33. There appears to be no notes of the subsequent meeting with members of staff which took place on 20 December 2018. However, the Tribunal accepts that such a meeting did take place. It is referred to in the notes of a meeting held with the claimant on 17 January 2019 to which I will come in due course.

34. At this stage, I observe there appear to be two sets of notes for this meeting. One is described as the minutes of the meeting held on 17 January 2019 (pages 91 to 94). The other appears to be a transcript of the same meeting and is at pages 9 to 26 of the separate hearing bundle (which I shall refer to as *bundle 3*: the primary hearing bundle is separated into two parts). There is reference in this material (at page 11) to a meeting taking place with members of staff around three weeks after Mr Hobson found out about the gravity of the respondent's financial situation. This fits with the chronology of a meeting taking place on 20 December 2018.

The parties' dealings in early 2019

35. On 7 January 2019 Mr Hobson wrote to the claimant (page 89). This says that,

"Following our meeting on 20 December 2018, I am writing to inform you that due to the current financial circumstances it has become necessary to place you on short time working".

The details of the short time working are then set out. The claimant's hours were reduced by one half. The letter says that, "*These changes will commence immediately. Corporation fully appreciates your support during this difficult time and we will keep you updated. Further to our meeting on 2 January 2019 please also take this as notice that the paid discretionary lunchbreak has now ceased as of this date. To accept these changes to your contract of employment, please sign both copies and return one to me by 8 January 2019*."

36. The claimant replied on 13 January (page 89A). Although this letter was noted to be *'without prejudice'* no issue arises that it is in fact a privileged document. It should therefore be seen by the Tribunal. (The claimant takes no issue with the assertion in Mr Hobson's letter of 7 January 2019 that a meeting took place on 20 December 2018. Therefore, this corroborates the Tribunal's finding in paragraph 32 that a meeting did indeed take place that day).

37. More substantively perhaps the claimant recorded his formal objection to Mr Hobson's *"proposed terms".* The claimant said that he did not feel that a suitable consultation period or notice of change was given to him. The claimant asked for clarity as to how long short time working would continue. The claimant concluded by notifying the respondent that he (the claimant) would be continue working but *"under protest".*

38. Mr Hobson acknowledged the claimant's letter of 13 January 2019. He did this on 15 January 2019 (page 90). He arranged the meeting which in the event took place on 17 January 2019. Present at the meeting were the claimant, Mr Hobson, Ms de Ville and Mr Hickman.

39. Both the notes of the meeting and the transcripts are lengthy documents and I shall not set them out in full here. They are familiar to the parties. Of particular importance to my determination are the following points:

    39.1. Ms de Ville maintained that she had issued a contract of employment to the claimant which contained the right to impose short time working upon him. It is worth setting out the first paragraph of page 10 of the third bundle (which in fact commences at the bottom of page 9), in which Ms de Ville says, "*I issued them to you, it was a long time ago but you were issued with them and it was logged. Because there were so many of them, terms and conditions, grievance and disciplinary, health and safety, drugs, fire etc the pile was about two inches thick. The procedure then was that people signed to say that they had received them and took them away and read them. Also they were told that if after reading them they had any queries they should come back and talk to me. The relevant section which we have implemented before is, 'if the company were at any time to suffer economic distress they have the right to lay off staff or place them on short time working with no contractual guarantee pay, should that situation arise employees would be allowed to take other paid jobs during the lay off period and for the days outside of short time*

working days with flexibility on both sides. This would require consent if the additional job were with a business competitor.'"

39.2. The claimant asked for clarity as to the anticipated length of short time working. He suggested a review in four months' time. In reply Ms de Ville said, *"we cannot say that Phil, it would be wrong and unfair to make false statements to people and for them to work out their finances on four months only to be dashed*." (I refer to page 15 of the third bundle). In a similar vein further on down the page Ms de Ville says, "*We can't give a time and it would be wrong to do so, people would then cut their coat according to their cloth and perhaps a disappointment four or five months down the line*".

39.3. The claimant said (at page 17), "*So how you expecting us to give you help or solutions if you didn't know [the situation]. You can't pass that down the food chain. Everyone is going to be working their own thing saying hey, I could do my bit. For example, the paid lunchbreaks, totally acceptable, I have no issues with this, but it would have been nice to be consulted. I'm not disagreeing*".

40. On 24 January 2019 Mr Hobson prepared a further note of a meeting held that with the claimant. This is at page 95. The note is brief and reads, "*On Thursday 24 January [2019] I met with the claimant and informed him that the original documents he had requested had been removed from the finance office. I expressed to him the severity of this situation and informed him that the retained CCTV footage would now be checked (we retain footage for two months). The claimant remained ambivalent throughout this exchange"*.

41. In connection with this issue of locating a copy of the claimant's contract of employment, in paragraph 27 of his witness statement the claimant takes issues with the last paragraph of the notes of the meeting of 17 January 2019 (page 94). The claimant read into this paragraph an implication that he did not request a copy of his contract on 17 January 2019. The claimant's account is that he *"most certainly did".* He then goes on to say at paragraph 28 of his witness statement that, "*At the end of the seven day period [allowed by Mr Hobson on 17 January 2019 for the claimant to decide how the claimant wished to proceed] I again requested a copy of my contract, as it had not been produced. On 24 January Mr Hobson told me that he couldn't find the documents (bundle page 95) because they had been removed from the finance office. This was different to what Ms de Ville said at the meeting on 17 January which was that they may not be in the finance office at all but in Mr Hobson's loft. An electronic copy of the document was referred to as well but this never materialised either".*

42. (The final paragraph of page 94 says that the claimant agreed to give Mr Hobson his decision by 23 January "*and repeated his request for his signed receipt of terms and conditions [Ms de Ville] stated that as they were very old they may not be in Linda's filing cabinet but archived off site in [Mr Hobson's] loft so it may take some time to find them*").

43. I am satisfied from the material within the bundle that the claimant did ask for a copy of his terms and conditions of employment evidencing a contractual right for the respondent to place him upon short time working. I do not read into the final paragraph of page 94 the inference that the respondent draws that the claimant did not request his *"complete contract".* It is clear from the face of

page 94 (and in particular the final paragraph) that this is precisely what the claimant was looking for. Any doubt about the matter may be dispelled from Mr Hobson's note at page 95. This shows that Mr Hobson was aware that the claimant was wishing to have sight of the relevant contractual documents.

44. On 14 February 2019 the claimant was paid one half of his usual salary for his manager's role. The pay for the disc jockey role was in fact unaffected.

45. On 15 February 2019 the claimant made a further request for a copy of his contract. The letter is at page 95A. The claimant said, "*If nothing is received at that stage [being within seven days of the date of his letter] I will need to explore other options as I cannot continue working on short time hours indefinitely. I'm again asking for some clarity on how long the proposed short time hours will ask? I do not feel that we have come to any suitable resolution at this point and I am still working short time hours under protest".*

46. The claimant's letter of 15 February 2019 was again marked 'without prejudice'. Again, this was not a 'without prejudice' letter and it is proper that it was placed before the Tribunal.

47. On 25 February 2019 the claimant sent a further letter to Mr Hobson (page 96A). This was in the form of a subject access request pursuant to the Data Protection Act 2018. The claimant reiterated (for the third time) that he continued to work under protest. Again, this letter was incorrectly marked 'without prejudice'.

48. Page 96 of the bundle is a record of a meeting held between the claimant and Mr Hobson on 18 February 2019. Mr Hobson recorded that the *"original documents"* (presumably a reference to the claimant's contract of employment) had been removed from the finance office and that electronic versions were being sought. It was as a consequence of hearing nothing material for a further seven days the claimant made his Data Protection Act request to which I have referred at page 96A.

49. On 5 March 2019 Mr Hobson wrote to the claimant (pages 97 and 98). He told the claimant that attempts were being made to locate the original and signed contract of employment. He explained, "*This item was located in different places, held both electronically and in a physical format. This search has produced a very serious situation as we have discovered that certain personal documents have been removed from the building. Even though the finance office is only accessible by a limited number of people, we have been unable to ascertain who was responsible for this. We are therefore in the process of locating the document you have requested electronically. They are potentially held on more than one device and we are currently attempting to access them. As there are a number of these devices you will appreciate that this process is taking a considerable amount of time and bearing in mind the current short time working situation, my time to search for these is limited*". There was then some reference to the claimant's Data Protection Act request.

50. Mr Hobson then went on to say (at page 98), "*With regards to the meeting of 17 January 2019, it was decided at this meeting that you would receive an additional full week to make your decision regarding short time working. It was again pointed out to you that you had two choices, the acceptance of short time working or a decision to leave, this did not include a third option of working under duress. After the expiry of this week, when no decision from you was*

forthcoming you were asked if you were going to sign the short time agreement letter, which to my great surprise and sadness, you declined. Consequently I was expecting to receive your letter of resignation within the following four weeks period. This has not been forthcoming and I would remind you once again that under the laying off and short time working procedure, there are only two options and employees cannot invent additional options to suit their own purposes. Under the circumstances I feel that I have been more than patient with your unacceptable actions regarding this situation and therefore I require you to deliver to me a signed letter of your acceptance of the short time working. I require a physical letter to be delivered to me personally by 5 o'clock pm on 8 March 2019. If this is not forthcoming, under the Short Time Working Hours Employment legislation, I will take your non-acceptance as your resignation. As such your one month period of notice will commence from this date."

The claimant's resignation from the general manager role and events to 5 April 2019

51. On 8 March 2019 the claimant wrote to Mr Hobson (page 99). This was in response to Mr Hobson's letter of 5 March 2019. The claimant wrote,

"*Please accept this letter as my resignation from the position of 'general manager' at Bondco 628 Ltd trading as Corporation. I am resigning on the grounds of what I believe to amount to a fundamental breach of my contract of employment (if one exists, I cannot recall having a copy or even signing one and you have yet to provide a copy to me) and/or breach of mutual trust in confidence. That being, the significant cut of my hours and wages without proper consultation or notice. As a result, I feel that I have been constructively dismissed from my post. You have stipulated that I work one month's notice, from the date that I confirm my resignation, I am willing to do this in good faith"*.

52. The claimant wished to continue with his employment as disc jockey. Mr Hobson's evidence is that upon receipt of the claimant's resignation from his general manager role he asked him about his DJ job. Mr Hobson's evidence is that the claimant said, "*I may stay, I may resign from that too, I haven't really decided*". Mr Hobson described the claimant's approach as "*less than civil and insubordinate*". There is a note to this effect in the bundle at page 100. It is unclear who this was prepared by. However, it appears to have emanated from the respondent.

53. The note at page 100 shows that the respondent apprehended difficulties ahead with the DJ post albeit appearing to recognise that the claimant was entitled to resign from one post and not the other. The claimant performed his DJ set on each Friday between 8 and 29 March 2019 inclusive.

54. On 8 March 2019 Mr Winson resigned from his position with the respondent.

55. On 29 March 2019 Mr Hickman emailed Mr Hobson (page 107). Mr Hickman served Mr Hobson with one week's notice of resignation from his position with the respondent. The email was sent at 23:59 on 29 March.

56. On 30 March 2019 Mr Hobson wrote to the claimant (pages 108 and 109). Mr Hobson said, "*I am saddened to accept your letter of resignation [of 8 March 2019] due to short time working, however as I was not able to indicate if or when full time would resume I can fully appreciate that financial circumstances must dictate that you seek full time employment elsewhere. My letter of 5 March*

2019 states the reason for lack of immediate provision of documents, however the original terms and conditions from 20 years ago have been identified". Mr Hobson does not expand upon what he meant by the latter remark. He then went on to air concerns that Mr Hobson had resigned from one post and not from the other. He said that this "*requires further investigation and legal clarification*". He confirmed that the claimant's final day in his role as *'assistant manager'* (a term which appears to have been used by the parties interchangeably with the term *'general manager'*) was to be on Thursday 4 April 2019. In the event, the parties agreed that the claimant had no need to work beyond 2 April 2019. Mr Hobson accepted in evidence at the hearing before me that the claimant was effectively on garden leave for the remainder of his employment on 3 and 4 April.

The claimant's dismissal from the DJ role and subsequent events

57. On 5 April 2019 Mr Hobson wrote to the claimant in connection with his disc jockey post (page 113). He said, "*Further to your recent actions that have come to our attention, we now have no alternative but to dismiss you with immediate effect for gross misconduct. This will take immediate effect"*. The letter was sent by email at 7:46pm. The claimant had in fact been due to do a shift working as a DJ that night (5 April being a Friday). The claimant says (at paragraph 36 of his witness statement) that, "*I did not know what this related to. I had no warning this was on the cards and had not been invited to any meetings by Mr Hobson to discuss any concerns he may have had. I was not allowed the opportunity to appeal or provided with written reasons for my dismissal*".

58. The claimant requested written reasons for his dismissal on 13 June 2019. Mr Hobson replied on 19 August 2019. He said that the reasons for the claimant's dismissal were:

    58.1. *Three breaches of restrictive covenants.*

    58.2. *One breach of the social media, internet and email security policy.*

    58.3. *Two incidents of gross misconduct in breach of the disciplinary procedure.*

    That email is at page 144.

59. On 31 July 2019 the claimant's solicitor spoke to Mr Hobson and requested a copy of the claimant's contract of employment. This was hand delivered to the claimant's solicitor's offices on 2 August 2019 (as confirmed in the email at page 141 of the bundle). The contract that was forwarded is that copied within the bundle between pages 67 and 74.

60. The solicitor acting for the claimant sought further information about the provenance of the document that was delivered on 2 August 2019. Mr Hobson said on 5 August 2019 (page 139) that, "*The document you have received is a copy of hard copy which was retrieved from off-site storage in my loft, together with several others pertaining to Mr Pearman eg:*

    (1) His CV.
    (2) His statement of employment from February 2000.
    (3) The investigation report for the police regarding the locking in of a customer."

61. The latter incident appears to have occurred in January 2006. The claimant accepted that, "*it is quite likely that I was given a warning for this. Although I believed it was the head doorman's error I was prepared to take responsibility for it"*. The claimant correctly observes that the incident happened 13 years prior to the events with which the Tribunal is primarily concerned and could not therefore constitute a live disciplinary warning upon the claimant's file.

62. In the respondent's grounds of resistance copied at page 59 (concerning in particular the claim for unfair dismissal from the disc jockey role) the respondent says that it had come to the attention of the respondent that the claimant and Mr Winson "*were planning to cause extreme and extensive public disorder at the company venue on [5 April 2019]. The riot they have planned was designed to shut down the venue, destroy the business and put out of work the remaining members of staff. If they had been successful with this course of illegal action the mayhem they planned could have resulted in potential injury or death to either staff members or members of the public. From the following Friday 12 April 2019 and consecutive Fridays until 31 May 2019 the claimant and Mr Winson enticed staff to move with them to the Plug nightclub, 14-16 Matilda Street, Sheffield and operate a rival event. The danger to both our employees and the public was averted*".

63. Ms de Ville's evidence upon this issue is at paragraphs 7 and 8 of her statement. She referred to Mr Winson having resigned with immediate effect on 8 March 2019. She says,

"As can be evidenced, the claimant remained in his post of DJ only to make his arrangements and inform the company's customers on the evening of 5 April that he was moving a trademarked night to a rival venue the following week – 12 April, he also enticed four other employees. The claimant regularly contacted the financial manager at her home … to enquire about the financial situation. This was not from concern for the company, for having ascertained no significant improvement he went ahead with his plan to sink the company and put all the remaining employees out of work. He did not take up the appeal option as outlined in the company's disciplinary procedure and he was not notified immediately of the reasons for his dismissal, of which he was well aware, as the severity warranted an extensive and ongoing investigation. To date information is still being received regarding his deliberate conspiracy".

64. Mr Hobson gives corroborative evidence. He says in his witness statement (on page 151) that,

"*From 15 March I received various messages from Plug nightclub staff. This venue is a rival operation in very close proximity to Corporation premises. These messages alerted my suspicions as to what I believed to be an internal conspiracy which also involved Mr K Winson. This culminated in a damning message from Plug nightclub staff on 29 March evidencing the claimant's intentions. These being:*

(1) Collusion with a rival venue.
(2) The attempted closure of the company's Friday night "Drop" event and closure of the company.
(3) The removal and use of the company trademark on social media.
(4) The removal and use of a company trademark to a rival venue.
(5) Enticement of staff and freelancers away from the company"

65. Mr Hobson also drew an adverse inference from the timing of Mr Hickman's resignation (that being one minute before midnight on Friday 29 March 2019). Mr Hobson said,

"The inference here is that his [Mr Hickman's] resignation was issued at this precise time as it is the exact time seven days hence he intended to cease working. Should he and the claimant have ceased working at this time (halfway through the performance) then this would have caused public panic and possibly injury. Putting the public in the way of such potential harm is gross misconduct".

66. Mr Hobson also said in his witness statement (at page 152) that he checked the claimant's work computer on Wednesday 3 April 2019 and discovered that he had deleted *"all of the company's work files".*

67. In the next paragraph upon the same page Mr Hobson explains that,

"My suspicions were heightened further from 5 April by some very odd behaviour by certain freelance staff who worked closely on Friday evenings with the claimant. This included the accidental resignation of the freelance cameraman (Tristan Ayling) who produced film shorts of the evening who stated that "we have some plans for a classic last episode." An extremely odd statement when ceasing filming and last episodes have never ever been discussed. Our freelance photographer Dominic Worrell worked on Friday nights only, but would regularly swap shifts should one of the other two photographers need the work. Dominic had stated to me in the past that he enjoyed this work and this is why he took on the role. He stated it wasn't for the money. This he would gladly do. When asked on 6 April by one of the photographers if he would swap his shift on Friday 12 April he strongly refused. A reaction that was out of character. We correctly concluded that these two individuals had been tasked by the claimant to record both photographically and on film the right the claimant and his accomplices intended to instigate at the company venue".

68. In an attempt to corroborate their evidence about the matters referred to in paragraphs 62 to 67 of these reasons, Ms de Ville and Mr Hobson produced some documentation that I will now turn to within the bundle. At pages 101 to 105 are text messages from the respondent to Nicole Jewitt of the Plug nightclub seeking to arrange a meeting. The texts are dated between 18 March and 4 April 2019. It is unclear how these text messages point to any improper activity upon the part of the claimant. Mr Hobson had some difficulty explaining their significance other than some vague suggestion that Ms Jewitt was trying to avoid him (Mr Hobson).

69. At page 106 is an email from Ms Jewitt to several recipients including the claimant. This is dated 29 March 2019 and is timed at 5.34pm. The opening line says,

"Further to our meeting this morning I am emailing to confirm the details for the new Friday weekly club night – RIOT launching 12 April here at Plug".

The claimant says in paragraph 39 of his witness statement that,

"I did not attend this meeting because I was still employed and working my notice period at Corporation but was subsequently copied into the email. I was copied into the email for information purposes only because Keef Winson, who

was organising and promoting the new nightclub, wanted me to DJ at it. I had not agreed to do it because obviously it would conflict with my set at Corp. If Mr Hobson had asked me about the email, this is what I would have told him. I said yes to the offer straightaway when Mr Hobson dismissed me on 5 April".

The claimant then went on to say at paragraph 42 of his witness statement that he did "*DJ at the new 'Riot' club night during April, May and June but the night never made any money and I did not get paid. I was on at the Plug for eight weeks, 12 April to 31 May and then at the Mulberry Tavern for two weeks (7 and 14 June). It will be re-launched at Sheffield University Students' Union in September but I'm not employed to DJ and again will only earn money from it if the night makes money*".

70. There was no evidence from the respondent to gainsay that of the claimant that he had not attended the meeting held on Friday 29 March with Plug. In any event, Friday was not a working day for the claimant pursuant to the notice of 7 January 2019 at page 89 (which stipulates that the claimant's working days as general manager upon short time working were Mondays, Wednesdays and Thursdays of each week). Further, the timing of the meeting of 29 March 2019 at Plug did not conflict with the claimant's duties as DJ that day.

71. Pages 110 to 112 contain a copy of email exchanges between Mr Hobson and Mr Ayling. These are all dated 5 April 2019. Mr Hobson suggested to Mr Ayling (at page 112) that he (Mr Ayling) had resigned during the course of the previous week. Mr Ayling said that he had not and as far as he was aware "*we have an agreement until April 26th"*. Mr Ayling said, "*we have some plans for a best of compilation and having all the presenters in for a classic last episode".* Mr Hobson replied that, "*your inference that episodes would not go on past the last agreed date gives credence to the stance that you would be ceasing filming. We therefore feel that it would be prudent for all concerned to draw a line at this point".* Mr Ayling replied to the effect that he understood Mr Hobson's position. Mr Hobson's first email to Mr Ayling (at page 112) was timed at 19:37 on 5 April 2019.

72. The respondent also produced copies of the claimant's work diary. There was some debate between the parties as to how the respondent had come by these given that the diary was recorded upon the claimant's personal computer account. Be that as it may, the respondent highlighted a meeting scheduled with Ms Jewitt of the Plug nightclub for 2pm on Tuesday 12 March 2019 and for 12 noon on Friday 1 March 2019 (at pages 44 and 46 of bundle 3 respectively). The claimant said that he had not attended these meetings and that in any event these were non-working days.

73. Within the bundle at pages 24 to 35 is documentation which is described as *"documents evidencing the claimant's employment".* Taking these in turn and by reference to the page number: page 24 is an email consisting of a *"Riot"* press release dated 9 April 2019 issued by the claimant. *"Riot"* was the name of the show being hosted by the claimant and Mr Hickman with effect from Friday 12 April 2019. The venue for the show was to be the Plug. The email press release of 9 April 2019 says, "*Do you love Friday at Corp? Do you love the music? Do you love the DJs? Do you love the craziness*?" The release goes on in very much in the same vein before going on to say that, "*The team that helped bring you Friday nights at Corp have a new home at Plug to bring you the biggest and best new Friday club night in Sheffield "RIOT".* Would-be

patrons were then enticed by the prospect of the claimant being *"in the Main Room spinning big fxckin' alt tunes, DJ Presley [Mr Hickman] in the Warehouse smashing out pop party anthems and guest DJs every week in the third room playing Urban Anthems".* The flyer was accompanied by artwork bearing a distinctive *"Riot"* logo on a yellow background.

74. Page 26 was an email issued on 5 April 2019. It read, "*We are very sorry if you were expecting us to see us DJ last night at Drop. We were ready to go but one hour before leaving to set up for Drop we were told not to come in!"* It goes on, "*Fear not … we will not let you down!!! We have done a last minute deal and are moving everything to Plug. We want to give you the best Friday club night in Sheffield and we would like to introduce you to our new club night RIOT, it starts next Friday on 12 April at Plug"*.

75. Page 34 is a post by Mr Winson advertising the new club night at Plug with requests for readers to *"share far and wide".* The post is dated 10 April 2019.

76. At page 118 is artwork advertising *'Drop'.* This is the name given to the show presented by Mr Hickman and the claimant at Corporation. In a notarised statement dated 17 April 2019 at pages 120 and 121 Mr Hobson explains that he trades under the name '*Drop'* and moved the '*Drop club night'* to the premises from which the respondent trades as Corporation on 13 September 1997. Mr Hobson was prompted to take the step of obtaining the notarised statement because of "*false and damaging statements on the Drop Sheffield Facebook page"* dated 7 April 2019. It is not clear from the bundle whether the statements of 7 April 2019 are contained within it. The Tribunal will work upon the premise that the impugned posting of 7 April 2019 was very much in the same vein as those of 9 April 2019 at pages 24 and 26.

77. Page 119 is artwork advertising Riot each Friday at Plug. The headline reads:

"*Ex Friday Corp/Drop DJs present RIOT every Friday at Plug*".

The artwork is very similar to that at page 118 advertising *'Drop'* and features what appears to be the same animated character.

78. Finally, I need to refer to the documents at pages 40 to 43 of bundle 3. These evidence the claimant having deleted files from his work computer. The claimant said in evidence that he was in the process of tidying up his files before leaving his role as general manager. He said that the files were obsolete containing nothing of value and in any event all of the material was available to the respondent on the hard drive. There was no evidence from the respondent to gainsay the claimant's account.

Francesca Smith's evidence

79. The Tribunal also had the benefit of hearing from Miss Smith. She was a former employee of the respondent. She had been charged with the task of digitising, tidying up and archiving employee records which were to be found within the respondent's finance manager's office. Miss Smith described (in her evidence before the Tribunal) a scene of some disarray when she took up this task. She described documentation *"overflowing from the drawers".* She set about digitising the records for the current employees (including the claimant) and organising the hard copies into personnel files. She said that she gave to Mr Hobson for his retention the obsolete documents for former employees and believed that these were stored by Mr Hobson in his loft at home. Miss Smith

has known both the claimant and Mr Hobson from childhood through her mother's and then her own association with the respondent.

Mitigation

80. The claimant said, at paragraph 43 of his witness statement, that "*Since leaving Corporation in April I have been avidly searching for a new day time position but unfortunately have been unsuccessful in securing new employment. I have taken my search for new employment very seriously in so far as I have scheduled my day so much so that my looking for work has become a job in itself by getting up early in the morning at 8am, taking my fiancée to work, returning home to check my incoming emails overnight from the employment websites … I am on. I then take the time to check all the relevant job applications that might be suitable for me and store them. Take a break for lunch and then spend the afternoon applying or writing cover letters to apply for the positions. So far I have applied for over 120 jobs and only received three interviews, two of which I am still waiting for the results".*

The claimant produced a lever arch file consisting of his *curriculum vitae* together with copies of job applications and responses from those to whom he has applied. The Tribunal noted that the first document chronologically was an acknowledgement dated 17 June 2019 of the claimant's application for work as a general manager with Mitchells and Butlers. Two days later, on 19 June 2019, the claimant received a response to the effect that the application would not be taken further. There then follows a large volume of job applications made by him. The respondent produced no evidence of jobs which the claimant may have obtained had he applied for them.

Issues and relevant law

81. I now turn to the issues in the case and a consideration of the relevant law. As I have observed, the claimant claims that he was constructively unfairly dismissed from the general manager role. He also says that the respondent made an unlawful deduction from wages when it reduced his salary by one half with effect from 14 February 2019 until the termination of his contract of employment. There is no issue that he was expressly dismissed by the employer from the DJ role.

82. In order to establish a right to complain of unfair dismissal the employee must show that he has been dismissed. In the context of a constructive dismissal claim this arises where the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

83. Whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or give notice but the conduct in either case must be sufficiently serious to entitle him to leave at once.

84. In this case, the claimant claims that he was entitled to resign from the general manager position and claim that he was constructively dismissed because of a breach of both an express and an implied term of the contract. The breach of the express term is the failure to pay to him his contractual remuneration. The breach of the implied term is based upon the claimant's contention that the respondent was in breach of the term which is implied into all contracts of employment that the parties will not without reasonable and proper cause act in a manner calculated or likely to destroy or seriously damage mutual trust and confidence between them. If conduct objectively considered is likely to cause damage to the relationship between employer and employee then a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant in judging the employee's claim that the implied term has been breached. Conduct is repudiatory if viewed objectively it shows an intention no longer to be bound by the contract. Neither the intentions of the parties nor their reasonable belief that their conduct would not be accepted as repudiatory are determinative.

85. Upon a consideration of the constructive dismissal case, once repudiation of the contract by the employer has been established then the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer. There must be unequivocal acceptance of the repudiation by words or conduct. The employee must make up his mind to leave soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

86. Should the Tribunal determine that the claimant was constructively dismissed from the general manager role then it if for the employer to show one or more of the permitted statutory reasons for the dismissal. It is for the employer to show the reason for the express dismissal from the DJ role.

87. The burden is upon the employer to show the relevant permitted reason which will be the set of facts known to the employer or beliefs held by him which cause him to dismiss the employee. The employer has to show why in fact he dismissed the employee. In the case of a constructive dismissal, this requires the employer to show the reasons for his conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer.

88. In this case, the relevant permitted reason advanced by the respondent for the constructive dismissal of the claimant form the general manager role is that falling within section 98(1)(b) of the Employment Rights Act 1996: that is to say, a substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The employer therefore needs to show that the reason for the dismissal was one which he considered to be substantial and of a kind such as to justify the dismissal. In particular, the respondent relies upon economic necessity as the permitted reason and one which is substantial such as to justify the dismissal. An employer seeking to rely upon economic necessity as a reason for dismissal should produce some evidence to show that there was some need for economy.

89. The claimant's dismissal from the DJ role is admitted. It therefore falls to the respondent to establish a genuine belief in one or more of the permitted reasons for that dismissal. In this case, this is one that relates to the claimant's conduct.

90. In the case of the express dismissal, should the respondent establish a genuine belief that the claimant committed the acts of conduct in question, then the question for the Tribunal will be whether the respondent had reasonable grounds upon which to sustain that belief after having carried out as much enquiry into the matter as was reasonable.

91. Should the employer demonstrate to the satisfaction of the Tribunal that he had a permitted reason for the express or constructive dismissal of the employee then the Tribunal will go on to consider the reasonableness of the employer's decision to dismiss the employee. The burden upon the question of reasonableness is neutral. The Tribunal must consider the reasonableness of the employer's conduct and not simply whether the Tribunal considers the dismissal to be fair. The Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there will be a band of reasonable responses or a range of managerial prerogative open to the employer within which one employer might reasonably take one view, another quite reasonably will take another. The function of the Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band or range of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair. If the dismissal falls outside the band it is unfair. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

92. Broadly, once the employer has established the fact of the belief giving rise to the dismissal, then the Tribunal's function is to review the quality of the material before the employer in order to satisfy itself that the employer had in mind reasonable grounds upon which to sustain that belief and that the employer had formed that belief having carried out as much investigation into the matter as was reasonable in the circumstances of the case. If the Tribunal is so satisfied then the Tribunal must go on to ask itself whether the dismissal of the employee fell within the range of reasonable responses open to the reasonable employer. The Tribunal must take into account the size of the administrative resources of the employer's undertaking in deciding upon this issue which shall be determined in accordance with the equity and substantial merits of the case.

93. Where dismissal is being contemplated by reason of economic necessity, the employer must be able to adduce evidence as to how the decision to rationalise was made and of the consideration which was given to the matter, the advantages and disadvantages which were considered and the importance which was attached to the different features which went into the decision. Consideration must be given as to what steps the employer took before the dismissal. An employer must seek to ascertain the reason for the economic necessity and explain this to the employee concerned.

94. Should the employee found to have been unfairly dismissed (constructively or expressly) then questions of remedy will arise. The principal remedy for unfair dismissal is re-employment. That is not in question in this case. Therefore, the Tribunal will look at an award of monetary compensation.

95. The relevant statutory provisions are to be found at sections 118 to 126 inclusive of the 1996 Act. The basic award is calculated by reference to the formula in section 119. It is calculated by looking at the period during which the employee has been continuously employed and applying to the employee's gross salary (subject to a statutory cap) a multiplier which is arrived at by reference to the number of years of employment and the employee's age at the effective date of termination. The basic award may be reduced in circumstances where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, then the Tribunal shall reduce that amount accordingly.

96. The compensatory award is in such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

97. The Tribunal may find that the dismissal was procedurally unfair but find that had a fair procedure been adopted then the employee would have been dismissed in any event. That is a matter which affects compensation, as does the question of the longevity of the employment relationship in any event had the dismissal not taken place.

98. Furthermore, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

99. In determining whether the employer has shown that the employee would have been dismissed if a fair procedure had been followed gives rise to a number of possible outcomes. The evidence from the employer may be so unreliable that the exercise of seeking to reconstruct what might have been is too uncertain to make any prediction, though the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. The employer may on the other hand show that if fair procedures had been complied with the dismissal would have occurred when it did in any event. The Tribunal may also decide that there was a chance of dismissal in which case compensation should be reduced. The Tribunal may decide that employment would have continued but only for a limited period. The Tribunal may decide that employment would have continued indefinitely because the evidence that he might have terminated earlier is so scant that it can effectively be ignored.

100. The assessment of the compensatory award requires the Tribunal to consider the extent to which any or all of the losses are attributable to dismissal or action taken by the employer. The word attributable implies that there has to be a direct and natural link between the losses claimed and the conduct of the employer in dismissing. If the dismissal was not a cause of the claimant's loss of wages then no award is due.

101. In assessing unfair dismissal compensation an Employment Tribunal is entitled to have regard to subsequently discovered misconduct and if thought fit to award reduced compensation (or indeed no compensation at all). It cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice in being dismissed.

102. An unfairly dismissed employee has a same duty to mitigate loss as arises at common law. This means that the employee must take reasonable steps to obtain alternative employment. Where a party seeks to allege that another has failed to mitigate the burden of proof is on the party making the allegation. It is the duty of the employee to act as a reasonable person unaffected by the prospect of compensation from the former employer. However, the onus is on the former employer to show the employee has failed in his duty to mitigate his loss by unreasonably refusing an offer of re-employment or by taking reasonable steps to obtain new employment as the case may be.

103. A right to lay off or put an employee upon short time working must be permitted by the contract of employment. If an employer lays off an employee or puts him on short-time working without having an express or implied contractual right to do so this will amount to a fundamental breach of contract leaving the employee entitled to resign and claim constructive dismissal. A term permitting lay off will only be implied into a contract if there exists for that employment a custom of laying off that is reasonable, certain and notorious. Where a term is expressly provided for allowing lay off or short time working or there is an implied contractual term to that effect then there will not be generally an implied term that a period of lay off or short time working will be no more than is reasonable. That said, there may be situations where the employer's behaviour was such that a lengthy lay off may amount to a breach of the implied term of trust and confidence.

104. The common law implies into every contract of employment a duty of fidelity on the part of the employee. This continues for as long as the employment contract subsists and imposes an obligation on the employee to provide honest, loyal and faithful service during employment. This means amongst other things that an employee must not compete with his employer and must not make preparations to compete with the employer during working hours. This implied duty can be augmented by express terms.

105. During working hours, the employee must devote the whole of their time and attention to the job they are employed to do. The implied duty of fidelity will prevent employees who wish to compete with their employer once their employment has ended from taking propriety steps towards that end during working hours. The duty of the implied duty of fidelity will often be breached where a senior employee is involved in soliciting or poaching his employer's staff.

Conclusions

106. The constructive dismissal complaint turns upon the issue of whether or not there was a provision in the claimant's contract of employment permitting the imposition of short time working. I find that there was no such provision. The question of whether a term was implied into the contract of employment to this effect may be quickly disposed of. One instance of short time working dating from April 2001 (referred to in paragraph 20 above) is in my judgment insufficient to establish a custom that is reasonable, certain and notorious either within the industry in which the respondent is engaged or within the particular employment concerned. There was no evidence from the respondent as to any such industry-wide practice. It is significant in my judgment that the letter of 6

April 2001 at page 66 makes no reference to contractual terms permitting short time working. That the claimant consented to that and then resumed his employment several months later (as he says in paragraph 8 of his witness statement) falls short of the necessary certainty and notoriety which is required.

107. I find that there was no express contractual term permitting the imposition of short time working. Much about the respondent's evidence as to the provenance of the contract at pages 67 to 74 was unsatisfactory as I shall now detail in paragraphs 108 to 117 below.

108. The respondent failed to produce the original document for the Tribunal or the claimant. Mr Hobson's claim that the original had been placed in his loft as part of a tidying up exercise ran contrary to the evidence of Miss Smith that only obsolete records were place in Mr Hobson's loft. The claimant's records were not obsolete as he was a current employee of the respondent. I take into account that Miss Smith has known Mr Hobson and Ms de Ville since she (Miss Smith) was a child. There was no suggestion when Miss Smith was cross-examined that she had any *animus* towards Ms de Ville or Mr Hobson. She was a very credible witness for that reason.

109. Mr Hobson accepted that Miss Smith had digitised copies of the current employee's records. This exercise included the claimant. Mr Hobson then claimed that the digital files had been corrupted but did not produce any evidence of this.

110. Ms de Ville was wholly unable to explain the absence of any contemporaneous records of any of the policies (to which she refers at paragraphs 9 and 10 of the third bundle recited in paragraph 39.1 above) being handed to the employees.

111. The wording referred to at page 10 of the third bundle (and cited in paragraph 39.1 above) does not correspond to the salient parts of the contract commencing at page 67 (in particular, the relevant short time working provisions at page 68) or the wording in the updated statement of terms and conditions of employment produced by the respondent upon the second morning of the hearing. (The latter is for new employees and no issue arises that it was issued to the claimant). Ms de Ville was unable to explain the provenance of the wording referred to in the transcript of the meeting of 17 January 2019.

112. The claimant furnished Mr Hobson with one month's notice to bring the contract of employment to an end. The document commencing at page 67 (in particular at page 70) provides for two weeks' notice on either side. The claimant was therefore not acting consistently with the purported contract of employment which tells against the contract at page 67 *et seq* being one binding upon the parties. Furthermore, upon the same issue Mr Hobson referred to a requirement to give one month's notice in his letter of 5 March 2019 at pages 97 and 98. Again, Mr Hobson's practice was inconsistent with the purported contract.

113. Mr Hobson was unable to produce the letter of appointment (referred to at page 68) or the grievance and disciplinary policies (referred to at page 71).

114. The Tribunal ordered Mr Hobson, at close of business on the first day of the hearing, to produce the original of the purported contract. At the outset of the hearing upon the second day, Mr Hobson said that he had looked for it in his loft but he was unable to find it.

115. Mr Hobson had failed to produce the contract for the benefit of the claimant despite the claimant making several requests for it before giving his notice of resignation. However, when the claimant's solicitor asked for a copy of it this was produced within two days. Mr Hobson was then unable to satisfactorily reply to the claimant's solicitor's enquiries as to that document's provenance. It is curious that Mr Hobson was able to produce that document within two days of 31 July 2019 in circumstances where he had been unable to produce it prior to 8 March 2019. Again, there was no satisfactory explanation for this.

116. Mr Hobson's evidence that some of the claimant's documents ended up in his loft sits at odds with the evidence of Miss Smith and in any case is wholly unconvincing. There can be no sensible or rational basis upon which to make a decision to split current employees' information between the office on the one hand and the managing director's loft on the other. It is against the probabilities that Mr Hobson would take such a step.

117. There was an anachronism in the contact at page 70. Reference is there made to a prohibition against discrimination upon the grounds of religion and age. These were not protected characteristics for the purposes of domestic equality law in 2002. Discrimination related to religion or belief was introduced into domestic law in 2003 and age in 2006. These were protected characteristics under the EU Equal Treatment Framework Directive 200/78 which was passed in November 2000. It is simply not credible (as Mr Hobson sought to argue when this point was put to him) that these were inserted by the respondent as a *"good employer"* in circumstances where this employer was unable to produce a copy of a contract of employment quickly at the request of the employee and whose explanations for non-production were so unsatisfactory.

118. I received no submissions as to where the burden of proof lies upon this issue. If the burden of proof in the authenticity of the document rests upon the claimant, then he has the difficult task of proving a negative: that is to say, that the purported contract is not one to which he was party. In that circumstance, all he can do is adduce evidence from which a Tribunal may properly infer that the contract was not in fact signed by him. In my judgment, for the reasons given, the claimant has succeeded in discharging that burden. If the burden of proving the authenticity of the document is upon the respondent then in my judgment the respondent has manifestly failed so to do for the same reasons.

119. It follows therefore that the respondent has failed to establish a contractual right to impose short time working upon the claimant. In those circumstances, the respondent's only course was to ask the claimant to consent to a variation of the contract. The claimant withheld that consent. In my judgment, the claimant did resign in response to the respondent's breach. The claimant's letter of resignation cited at paragraph 51 above was very clear. He resigned because the respondent had unilaterally reduced his wages. That was a breach of an express term of the contract. The respondent had also acted in a manner calculated or likely to destroy or seriously damage mutual trust and confidence. There was no proper and reasonable cause for the respondent having so acted, the respondent having no contractual entitlement so to do.

120. In my judgment, the claimant did not affirm the contract of employment by waiting until 8 March 2019 to tender his notice of resignation. He resigned around nine weeks after the imposition of short time working upon him. This is an insignificant period in the context of an employment lasting, at that stage,

just short of 18 years. Furthermore, the claimant had reserved his position as he had indicated on three occasions that he was working under protest. He was therefore plainly conveying to the respondent the message prior to his resignation that he was not accepting the lawfulness of the respondent's actions.

121. It follows therefore that the claimant was constructively dismissed. By application of the principles set out in paragraphs 81 to 105 above it is then for the respondent to show a permissible reason for the claimant's dismissal. In the context of constructive dismissal, this is the reason for the employer's conduct which entitled the employee to terminate the contract thereby giving rise to the deemed (or constructive) dismissal of the employee by the employer. In this case, the reasons for the employer's conduct entitling the employee to treat him as constructively dismissed related to economic necessity which is a permitted substantial reason for dismissal.

122. The Tribunal is satisfied that the respondent has discharged the burden of showing that it acted in breach of contract (constructively dismissing the claimant) for this substantial reason. The evidence of Mr Hobson and Ms de Ville is corroborated by the note from their accountant at page 149. This speaks as to significant losses for two successive quarters of the financial year. Indeed, the claimant himself fairly acknowledged (at least indirectly) the financial difficulties by reason of reduced attendances at the club.

123. Mr Hobson's account was that all the employees were served with notice of short time working and their hours were reduced in each case by 50%. The Tribunal accepts Mr Hobson's account. There is corroborative evidence of this at pages 1 to 6 of the third bundle.

124. I reminded myself that it is not for the Tribunal to substitute its view as to the right way forward for the respondent given these difficult circumstances. It is the respondent's business and it is not for the Tribunal to go behind the business decisions made by the respondent. However, the respondent must adduce evidence as to how the decision to rationalise was made and the considerations that were given to the matter.

125. It is not clear to the Tribunal of the basis upon which the imposition of a 50% pay cut upon all of the employees was going to resolve the matter nor any evidence that the respondent weighed the pros and cons in the balance weighing the interests of the employees on the one hand and the respondent on the other. This is a point which was raised by the claimant at the meeting of 17 January 2019 when he asked whether consideration had been given to a review of the matter. The claimant suggested this be done in about four months' time. Ms de Ville refused to countenance that suggestion.

126. The matter is compounded by the fact that according to the note of the meeting with the claimant of 3 or 4 December 2018 (at page 86) the respondent expected the claimant to come forward with cost savings ideas. No time scale was put upon this. The next that happened was the meeting of 20 December 2018 at which the claimant was informed that short time working was to be imposed upon him. This was done, without any further consultation with the claimant, with effect from 7 January 2019. The claimant was therefore not effectively consulted about any costs saving or other ideas that he may have had. In sum, short term working was simply imposed upon him.

127. The Tribunal therefore accepts that the respondent had a genuine belief that there was an economic necessity requiring a reduction in the wage bill. The Tribunal also accepts that the respondent had reasonable grounds upon which to reach that belief. However, the Tribunal does not accept that the respondent's belief and decision to impose a wage cut was reached after carrying out as much enquiry into the matter as was reasonable. There was a wholesale failure to consult meaningfully with the claimant. The respondent was effectively seeking to impose upon him that the claimant work upon short time working indefinitely. The respondent's approach to the matter therefore fell outside the range of reasonable managerial responses. A failure to effectively consult the claimant and to fail to agree to the claimant's reasonable suggestion of a review in or around April or May 2019 was an act falling outside the range of reasonable managerial responses. This was all the more so in circumstances in which the respondent had no contractual entitlement to impose short time working upon the claimant.

128. The relevant multiplier for the basic award (taking into account the claimant's age and length of service) is 23.5. This must be applied to the claimant's gross salary of £380.77. This gives a basic award of £8,948.10.

129. There is no basis upon which it can be said to be just and equitable to make any reduction to the basic award on account of any conduct prior to his dismissal upon the part of the claimant. That which the respondent would have as the claimant's questionable conduct as outlined in paragraphs 68 to 78 all arose towards the end of March and early April 2019. This was after the claimant was constructively dismissed. In any case, the Tribunal finds nothing within that conduct rendering it just and equitable to make a reduction to the basic award for reasons that shall be explained.

130. A reduction to the compensatory award on account of contributory conduct only arises in circumstances where the employee's conduct is in some way causative of the dismissal. The claimant accepted the respondent's repudiatory breach on 8 March 2019. At that point, there is no evidence that the claimant was looking to work as a disc jockey in another club. Nothing that the claimant did contributed to his constructive dismissal from his managerial role.

131. There is simply insufficient evidence to render it just and equitable to reduce the compensatory award upon account of the fact that the claimant would have been expressly dismissed in any event for some other reason had he not resigned on 8 March 2019. Had the claimant agreed to a variation of the contract to allow short term working then there was no suggestion that he would have been dismissed anyway and that the contract would have had limited longevity. The Tribunal was not presented with any evidence from the respondent that the claimant was liable to dismissal from his general manager role for anything done by him in that capacity of which the respondent was unaware at the time but of which it has subsequently become aware.

132. What of the position had the respondent properly consulted with the claimant? Would the claimant still have been dismissed and should compensation be limited accordingly as the procedural unfairness made no difference to the outcome? The evidence is that the claimant was prepared to work short-time for around four months (*per* paragraph 39.2). It is however difficult to reconstruct what would have happened had a fair procedure been carried out. The onus is upon the respondent on this issue and the Tribunal received no evidence upon

which could be based any attempt at reconstruction and a conclusion reached that the claimant would have been dismissed anyway but for the procedural unfairness that has been identified. What evidence there was from Mr Hobson in fact favoured the claimant. Mr Hobson said that the fortunes of the business had turned around. A fair process with a review after several months as suggested by the claimant may thus have led to a different outcome than which prevailed. It is not just and equitable to reduce the compensatory award upon the basis that the claimant would have been fairly dismissed anyway but for the significant procedural failings.

133. The Tribunal is not satisfied that the claimant made reasonable efforts to mitigate his loss after 2 April 2019. There was no explanation as to why the claimant had not sought alternative employment until the middle of June 2019. The Tribunal therefore takes into account the claimant's failure to mitigate when assessing the amount of the compensatory award. Given the claimant's impressive *CV* and experience the Tribunal is of the view that had he set about looking for alternative work in earnest in early April 2019 he would by now have obtained work. Upon that basis it is not just and equitable to make any award of future loss of earnings. Taking into account that the claimant has made reasonable efforts to mitigate after the middle of June 2019 the Tribunal's conclusion is that the claim for loss of earnings should be confined to the period form 2 April 2019 to 1 November 2019. There was no evidence from the respondent that there were any roles available for the claimant for which he did not apply and that he thus failed to mitigate his losses.

134. Loss of earnings is in the sum of £9,311.96. In addition, the Tribunal makes an award in the sum of £500 for loss of the claimant's statutory right not to be unfairly dismissed and for loss of the long notice period which he enjoyed arising from his employment with the respondent.

135. It follows from these findings that the respondent did not have any contractual right to reduce the claimant's wages. The complaint which the claimant makes under Part II of the 1996 Act must therefore succeed. The respondent shall therefore pay to the claimant the sum of £1,077.90 being the amount of the unlawful deduction from his wages. This is the net amount. In order to properly operate the Pay As You Earn regulations, this amount must be grossed up by the respondent who must pay the tax slice to HMRC and the net sum of £1,077.90 to the claimant.

136. I now turn to the complaint of unfair dismissal arising from the claimant's dismissal from the disc jockey role. I do not accept that the respondent had a genuine belief in any of the three bases for dismissal set out in the email of August 2019 cited in paragraph 58 above.

137. The basis of the allegation of *'three breaches of restrictive covenants*' is unclear. There is no evidence that there were any contractual restrictive covenants binding upon the claimant. Therefore, the respondent is left reliant upon the common law duties implied into the contract of employment as set out in paragraph 104 and 105 above. There is no evidence that the claimant was preparing to compete with the respondent at a rival club during the claimant's working hours with the respondent nor that he was competing with the respondent by working as a DJ elsewhere during the currency of his employment contract in his capacity as DJ. The meetings in the claimant's diary referred to in paragraph 72 (which he denies attending in any event) and the

meeting of 29 March 2019 (referred to in paragraph 69) were upon dates and times outside the claimant's working hours as general manager and DJ. There was simply no evidence that the claimant was soliciting the removal of the respondent's employees.

138. The alleged gross misconduct relates firstly to the deletion of accounts upon the claimant's computer. This was upon 3 April 2019, two days before the claimant's dismissal. However, these were obsolete accounts and the respondent had the benefit of hard drive back up anyway.

139. The second allegation of gross misconduct concerning the claimant conspiring with Mr Hickman to cause public disorder was a difficult one to understand. It was never satisfactorily explained by Mr Hobson or Ms de Ville. The Tribunal accepts that Mr Hobson became aware of concerns about Mr Ayling (at the very latest) around nine minutes before he terminated the claimant's contract of employment. However, Mr Ayling denied having resigned his position with the respondent in an email sent to the claimant 16 minutes after the claimant had been dismissed by the respondent. It appears that Mr Hobson was reading much into Mr Ayling's position and the timing of Mr Hickman's resignation at one minute before midnight on 29 March 2019. I refer to paragraph 67 above.

140. Further, the respondent reached its conclusion upon the two allegations of gross misconduct without carrying out any kind of procedure. The claimant was simply summarily dismissed without having the benefit of a hearing. At that hearing, the claimant could have reassured the respondent as to his activities upon the computer on 3 April 2019. The claimant may also have been able to assuage Mr Hobson's concerns about the activities of Mr Hickman and Mr Ayling. It was after all the claimant's settled intention to undertake his work on as DJ for the respondent upon the evening of Friday 5 April 2019. The reference to *'Riot'* was to the name of the 'night' being put on by the claimant. It was not an exhortation to engage in civic disorder of any kind. Furthermore, there is no evidence that the claimant was associated with the Plug nightclub or the *'Riot'* 'night until after his dismissal from the DJ role.

141. All of the claimant's post dismissal activity after around 7:45pm on 5 April 2019 outlined in paragraphs 73 to 77 was legitimate and not in breach of any contractual obligation owed by him to the respondent. After all, the respondent had summarily terminated the claimant in circumstances in which the respondent was not entitled so to do. That being the case, the respondent had lost the protection of whatever covenants it had in respect of the claimant in any event.

142. None of the matters discovered by the respondent following the claimant's dismissal justify a reduction in the compensatory award because it all arose in consequence of the unfair dismissal of the claimant. That is to say, the claimant was preparing to work at the rival venue because the respondent had unfairly dismissed him. He was entitled to do so. The Tribunal has seen no evidence that the claimant was intent upon setting up a competing business in breach of contractual obligations before the respondent acted as it did such as to warrant a reduction for the discovery by the employer of matters after dismissal which would warrant a reduction in the basic or compensatory award upon just and equitable grounds.

143. The allegation of a breach of social media and other policies is unclear and appears to be baseless.

144. Again, there is no scope for a reduction in the basic award on account of the claimant's conduct. By application of the relevant multiplier to the claimant's earnings as a disc jockey the basic award is in the sum of £3,525. It is not just and equitable to make a compensatory award. The claimant obtained another position with effect from the very next working day (that being Friday 5 April 2019). The failure of the claimant's new employer to pay him is a matter between that employer and the claimant. It is not just and equitable to lay that failure at the door of the respondent. This is an intervening cause and the claimant must take it up with Plug.

145. The respondent did not reply to the request for a written statement of reasons for his dismissal from the DJ role within 14 days as is required by section 92(2) of the 1996 Act. That being the case, the Tribunal must make an award of two weeks' gross pay in favour of the employee. The claimant is therefore awarded the sum of £300 for this breach being two week's gross pay from his employment as a DJ.

146. I find that the respondent had not provided the claimant with a statement of employment particulars as required by Part I of the 1996 Act. This statement must be provided no later than two months after the beginning of employment. There is no evidence that anything approaching a statement containing the particulars as required by section 1 of the 1996 Act was provided. That being the case, it is open to the Tribunal to make a further award of either two weeks' or four weeks' pay unless it is just and equitable not to do so. In this case, I find that it is just and equitable to make an award of two weeks' pay to reflect this failure. I mitigate this down from four weeks upon the basis that the respondent appears to have learned lessons and has produced fairly impressive documentation including a statement of employment particulars now given to new employees. On the other hand, it cannot be just and equitable to make no award. Even taking into account that this is a small employer, the fact of the matter is that much of the dispute generated by this matter would have been avoided had a proper statement of employment particulars been given to the claimant at the outset of his employment. The claimant is content to limit his claim to the sum of £508 in total across both employments. An award of £1,016 is therefore made.

147. Finally, I make a comment upon the issue of time limits. This was an issue raised by Ms de Ville at the outset of the hearing. Upon the basis that the effective date of termination of both employments was 5 April 2019 then the claims were clearly presented in time. They were presented on 3 July 2019.

148. As I said earlier, it is common ground that the effective date of termination of the general manager contract was 5 April 2019. However, if that is wrong and the effective date of termination was 2 April 2019 then the claimant's claim was still presented in time. This is because he notified ACAS of his wish to bring a claim pursuant to the Employment Tribunal's Act 1996. He did this on 3 June 2019. That date being within the last month of the limitation period for the presentation of the claim the claimant obtains an extension of time of one month from the date of the issue by ACAS of the early conciliation certificate within which to present his claim. The early conciliation claim was issued by ACAS on 3 June 2019 and therefore the limitation date was 3 July 2019 which was the

date of presentation of the claim. These considerations do not of course affect the unfair dismissal claim for the DJ role, the effective date of termination unquestionably being 5 April 2019 in any event. The same time limit prevails arising from the failure to provide a written statement of reasons in respect of that role.

149. In conclusion therefore, the Tribunal was satisfied that the claims were presented in time and the Tribunal has jurisdiction to entertain them.

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Employment Judge Brain

Date 10 December 2019

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE