EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101760/2022

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Preliminary hearing held on the Cloud Video Platform
On 1 and 2 December 2022

Employment Judge A Jones

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| Mr E Stack | Claimant<br>In person |
| Mr J Maxwell Hobbs | First Respondent<br>in person |
| Superrational Limited | Second respondent<br>Represented by<br>Mr J Maxwell Hobbs |

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JUDGMENT AND ORDERS OF THE EMPLOYMENT TRIBUNAL

1. The claimant has sufficient qualifying service to claim unfair dismissal in terms of section 94 Employment Rights Act 1996.

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2. The claimant made protected disclosures for the purposes of section 43B Employment Rights Act 1996.
3. Mr William Howell should be conjoined as a respondent to the claimant's claim.
4. The case should be listed for a final hearing before the sitting Employment Judge and members for four days in the Edinburgh Tribunal office on the first available dates.

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REASONS

Introduction

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1. ' The claimant lodged a claim on 5 April 2022 in which he complained that he had been unfairly dismissed, automatically unfairly dismissed and subjected

to detriments for having made protected disclosures and in terms of unpaid wages. There have been two preliminary hearings for the purposes of case management. At the last hearing a further hearing was listed to determine a number of preliminary matters.

5 2. This hearing took place on the Cloud Video Platform. The claimant continued to represent himself in relation to his claims although he was accompanied by his partner during the hearing. Mr Maxwell Hobbs represented himself and the second respondent. Mr Howell, in respect of whom there was an application by the claimant to be conjoined to the proceedings was present
10 during the hearing other than when Mr Maxwell Hobbs was giving evidence. The claimant gave evidence on his own behalf and also called Mr Koterwas, who had been a colleague during his employment with the second respondent. Mr Maxwell Hobbs gave evidence as did Mr Howell. Evidence in chief other than in relation to Mr Koterwas was by way of written witness
15 statement. All witnesses were cross examined. The claimant and Mr Maxwell Hobbs made oral submissions and Mr Howell adopted Mr Maxwell Hobbs submission in relation to the application made regarding him.

3. A joint bundle of documents had been lodged and the claimant had lodged additional documentation. It became apparent during the hearing that the
20 respondents objected to the claimant having been allowed to lodge that additional bundle. This has not been made clear at the commencement of the hearing and it was not until after the claimant had made reference to documents within that bundle and during the cross examination of the respondent's witnesses that this issue was raised. The objection was taken
25 on the basis that the documents were lodged after the date on which had been ordered. However, as the respondents had had a period of around 10 days in which to consider the documents and there had already been reference to the documents during the proceedings, the Tribunal accepted that the documents should be admitted.

30 4. At the commencement of the hearing, the claimant indicated that he was no longer seeking to argue that what had been called PD5 was a protected disclosure. The claimant also sought to lodge further additional documents.

He said that these documents were in relation to information in the witness statements which he had received from the respondents. Although it transpired that the specific issue to which this related was a statement in the respondents' witness statements which was subsequently confirmed by them as inaccurate, the respondents objected to these documents. The documents related to that issue were admitted, but the application to lodge a spreadsheet was refused.

Issues to determine

5. The Tribunal was required to determine the following preliminary issues.

   L Did the claimant have two years' service at the date of his dismissal to entitle him to claim he had been unfairly dismissed in terms of section 94 Employment Rights Act 1996 ('ERA')

   ii. Did the claimant make qualifying disclosures in terms of section 43B ERA, and

   *iii.* Should the claimant's application to conjoin Mr Will Howell as a respondent to the proceedings be granted.

Findings in fact

6. Having considered the evidence, the documents to which the Tribunal was referred and submissions of the parties including the authorities to which reference was made, the Tribunal found the following facts to have been established.

7. The claimant was the founder and Chief Executive Officer of the second respondent from its inception until the First Respondent ('JMH') took over that role in December 2015. At the same time Mr Howell ('WH') joined the company and both he and JMH became directors of the second respondent, SuperRational.

8. Draft service agreements were prepared for the claimant and other directors around June 2016 by a firm of solicitors instructed by them.

9. An investment fund called the OION Fund made an investment into the second respondent company around July 2018. The terms of that investment were set out in a letter dated 9 July 2018, which was signed by the claimant and the JWH. The offer of finance which was made was subject to written acceptance of the offer letter. The offer letter included a term "It will be a condition precedent to any form of investment, that a contract of employment is agreed and signed by all key directors of the company; the level of remuneration being offered to directors will also be agreed and confirmed within the investment documentation/' The paragraph continued "finally, should the company's cash balance fall below £20,000, then the Directors will agree to defer all or part of the salary due to them."

10. In an email dated 16 July 2018 to a Nick Sharpe, in response to the requirements of the offer, JMH attached a number of documents including Directors Service Agreements in respect of four directors including the claimant.

11. The claimant provided to the respondent monthly invoices for 'consulting services' for £2000 per month between March and June 2019 inclusive.

12. The nature of work carried out by the claimant for Superrational from January 2016 until his dismissal did not alter. During that period, he carried out duties associated with the role of Chief Creative Officer. There were insufficient funds in the company to pay the claimant or other directors a regular salary between January 2016 and November 2109 and all directors submitted invoices at times when there were funds available to pay them for the services they were rendering to the company. The second respondent did not set up under the PAYE system until around November 2019.

13. From January 201 6 until his dismissal, the claimant reported to JWH as a line manager and the Board of Directors more generally. He could not provide a substitute to carry out his work and attended weekly Management Calls.

14. On 28 November 2019 JMH sent to the claimant an email stating 'Here's your service agreement, updated with the discussed salary and bonus.' That email attached the original service agreement which had been sent to the OION

fund dated January 2016. JMH sent a further email with a different attachment where the service agreement was dated November 2019 later that day. At 19.04 that evening the ciaimant replied to the emails stating 'Please find the corrected version attached now'. That document was signed by the claimant and JMH.

15. On 29 September 2021, the claimant sent a message to the management team of Superrational entitled 'Worried Director. He attached a link to an article called 'Trading Whilst Insolvent: A Worried Director's Guide.' On 5 October 2021 the claimant sent an email to JMH and copied to other board members of the second respondent stating "There is a recent development of team members other than John looking closely at our finances. I for one think this is a good thing but it is being interpreted instead of a necessary evil required of any one of us when there are concerns, rather as meddling. It is my duty as a director to be sure things are in hand beyond taking it on any other director's word".

16. A meeting took place between the claimant and JMH on 6 October during which the claimant said "So, well, we're in a crisis financially, and we can't finish a question about the financial management of the company. It gets shut down on the basis that it's someone else's department and not mine or Ted's for example".

17. Around 6 October, the claimant instructed a firm of solicitors to give him advice on his position as a director and shareholder with the second respondent and informed the solicitors that he was concerned that the second respondent was at risk of wrongful trading.

18. Around 5 November, the claimant informed Mr Hirani, who was at the time a representative of an investor in the second respondent that he was concerned that Superrational was already or was about to trade while insolvent.

19. A board meeting of the second respondent took place on 8 November. Mr Hirani attended the meeting as a representative of an investor company. He indicated at the meeting that his company had invested just under £450k in total and that further investment could be made but it would be on the basis

that JMH stood down from his role as CEO and Mr Howell would also be required to stand down.

20. On 9 November, Mr Howell sent an email to the board members stating 'Liquidation is not the only option right now. This is the absolute last resort. We don't have creditors knocking our door down. .......If a Velocity deal actually materialises, we will be delaying the inevitable, which is for Velocity to take over the company. It may be a way to force the company to be acquired by one of their larger investments once the tech stack is finished. This is not in the best interests of the shareholders.'

21. On 10 November, at 7am the clamant sent an email to the various members of the board of the second respondent and others, complaining he couldn't 'afford to buy a £1.50 biscuit as a treat for his son while he was in hospital yesterday' and '£78000+ deferred salary as loans to the company, reputational damage and staff collapse imminent as a result of the minor aspects of insolvency and possible wrongful trading (excuse my tone). We are not acting ethically. After all this, all you can think of is the shareholders (and just those other than me and Velocity, the two largest)? Are creditors last on your list while we're insolvent?"

22. Later that morning a letter was sent to the claimant from the second respondent and signed by JMH terminating the claimant's employment with immediate effect and making reference to 'paragraph 16 of your Directors Service Agreement, dated 1st January 2016.' The email attaching the letter was sent to the board and executive team of the second respondent and also Mr Hirani.

23. On 12 November the claimant sent an email to JMH which he copied to others stating 'I have been concerned about your stewardship of Delic for some time. So concerned, in fact, that I sought independent legal advice in relation to the company's financial position in September, based on my knowledge of the relevant details at the time. The lawyer I spoke with is an insolvency practitioner, registered in the relevant jurisdiction. His opinion is that the company was close to insolvency already in September and that we were all,

as directors, at risk of wrongful trading. As the records of our communications will show, I have spoken out about my concerns in relation the company's financial position on numerous occasions in management meetings, on Slack and in the one board meeting you've convened during this time. I *have* repeatedly emphasised our fiduciary responsibility - the need to be forthright about our finances with investors and with staff and our duty to prioritise repayments to creditors, ahead of own interests as directors.'

24. On 19 January a statutory demand for payment of debt of £18,599.29 owed to the claimant by the second respondent was served on the second respondent on the claimant's behalf.

25. A board meeting took place on 26 January at which the claimant made a statement regarding this notice and stated 1 continue to have concerns about Superrational's financial position and believe that we need to take seriously the risk that we're trading insolvent ......The company appears to be accumulating debts that its unable to repay, the situation appears unsustainable to me. I feel we cannot continue to ignore the risk that we're past the tipping point to insolvency. As long as I believe we are insolvent my duty as a director is to prioritise the interests of staff and creditors who are not directors. And I recognise that they should be repaid before me"

26. On 31 January 2022 at 9am the claimant sent an email to JMH appealing against the decision to dismiss him.

27. Later on 31 January, a notice was intimated to the claimant removing him as a director from the second respondent company.

28. Around 28 November 2022 a winding up petition was presented to the Court of Session on behalf of the remaining directors of Superrational together with the appointment of a provisional liquidator.

## Observations on the evidence

29. The claimant was a credible and reliable witness. He provided a careful and detailed witness statement which formed his evidence in chief. Little of the

content of that statement was challenged in cross examination. Mr Koterwas ■was also a credible and reliable witness. He gave evidence in a direct manner and was clear when he could not remember particular dates or events.

30. The Tribunal did not however find either JHW or WH to be satisfactory witnesses. Their witness statements were very brief and almost identical. Their evidence under oath was that they had written the statements independently. The Tribunal did not accept that evidence and concluded that either one of them had written both statements or they had drafted them together. In addition, both statements included an allegation that the claimant had been paid £12,000 as an employee of another company for work he was doing as a consultant for Superrational. The claimant produced documentation to demonstrate that this had not been the case and that the sum referred to had been provided directly to Superrational. Both JMH and WH withdrew that aspect of their statements at the commencement of their evidence. Neither could explain how they came to make such an allegation which was demonstrably untrue and in exactly the same terms in both statements.

31. In addition, the Tribunal found JMH to be an obstructive and unhelpful witness. While the Tribunal appreciates that the relationship between the remaining directors of Superrational and the claimant had broken down, JMH appeared to be deliberately obtuse in his responses to questions asked by the claimant. He raised an objection to documents being lodged which demonstrated that his witness statement was inaccurate. The Tribunal reminded JMH that in terms of the overriding objective parties were required to co-operate. However, it appeared to the Tribunal that JMH was simply objecting to documents being lodged, or not answering questions directly to be difficult because he was aggrieved at the claimant pursuing his claims.

32. Similarly, WH repeatedly asked why questions were relevant or why he had to answer them despite being informed by the Tribunal that it was not a matter for him to determine the relevance of evidence.

33. Both JMH and WH sought to maintain that none of the directors had been employees until they signed a contract in November 2019. They could not explain why they had given undertakings to an investor that they would all be engaged as employees or why they had sent service agreements in support of that undertaking. Where the claimant or Mr Koterwas' evidence was in conflict with that of JMH or WH, the Tribunal had no hesitation in preferring the evidence of the claimant and Mr Koterwas.

34. All of that said, in truth there was little dispute on the evidence itself, other than the allegation by the respondents that all directors had agreed that they would act as consultants which the Tribunal did not accept. The dispute centred round the legal interpretation of the relevant facts.

Submissions

35. The claimant said that the respondents' position that he did not have two years' service was based on their suggestion that there was an agreement between the directors that they would not act as employees. His position was that there was no evidence to suggest there was such agreement. He also said that the error in the respondent's witnesses' statements called their credibility into question more generally. He said the work he did before he signed a contract was the same as that he did after the contract and that he was an employee from January 2016.

36. In terms of the protected disclosures, his position was that he did not have to prove that he was right about the concerns that raised regarding potential insolvency but that there was a reasonable basis for him to hold such a view. He said he had genuine and real concerns that the second respondent was tipping into an insolvent position and there was a risk of wrongful trading. He said it was in the public interest to raise these issues particularly given the impact on creditors and staff. His position was that the financial position of the company now was little different to that which prevailed when he raised these concerns and therefore he had made protected disclosures.

37. In relation to the application to conjoin WH, it was said that the claimant did not have the benefit of legal advice when he lodged the claim, that there was no prejudice to WH given that he was already going to give a day's evidence on behalf of the respondents at a final hearing and that this was simply a relabelling of the existing claims. Further, now that the company has sought voluntary liquidation, he would be prejudiced by having no recourse should his claim be successful

38. The respondents' position was that the claimant did not become an employee until 28 November 2019 when he signed the service agreement. In terms of the protected disclosures, reference was made to Martin v Southwark London Borough [2021] 6 WLUK 672 and the five-stage test set out therein to be satisfied where it is alleged a protected disclosure has been made. It was the respondents' position that the alleged disclosures were merely the claimant's personal view based on information available to all directors and were no more than concerns. Reference was made to K'ilraine v London Borough of Wandsworth [2018] ICR 1850 and Cavendish Munro Professional Risks Management Ltd v Geduid [2010] I.R.L.R. 38 and it was said that it was an allegation which was made, or an opinion and therefore not a disclosure of information. It was also said that the claimant made the alleged disclosure to Mr Hirani for the purposes of personal gain as he wished to take over as CEO and therefore this could not amount to a protected disclosure.

39. The respondents' objected to the conjoining of WH on the basis of time bar. WH adopted the submission made in that regard.

## Discussion and decision

### Employment status

40. The Tribunal had little hesitation in concluding that the claimant was an employee of Superrational from at least January 2016 until his dismissal. The claimant was not cross examined on his evidence regarding the duties he performed. The respondents' position was solely based on the suggestion that

there had been an agreement between the directors that they would not act as employees and would instead be consultants until November 2019. Even were such an agreement to have been made (and the Tribunal found no evidence to suggest that to be the case), the fact that a person agrees not to be deemed to be an employee for purposes of being paid is not determinative of their employment status. The question of employment status is a question for fact for a Tribunal to determine on the basis of the evidence.

41. The claimant carried out duties consistent with that of an employee at least once JMH commenced in his role of CEO. The claimant reported to JMH and reported to the board more generally on the duties he was carrying out. He was given tasks to do by the Board, and there was no suggestion that he could arrange for someone else to carry out those tasks. The Tribunal was of the view that directors submitted invoices for 'consultancy services [5] at times when there were funds to pay them and because the company had not been set up for PAYE. There was no difference between the duties or status of the claimant from January 2016 until his dismissal and therefore the Tribunal concluded that the claimant's qualifying service for the purposes of claiming unfair dismissal commenced in January 2016 and the Tribunal has jurisdiction to consider his claim of unfair dismissal in terms of section 94 ERA.

## Protected disclosures

42. The claimant alleges that he made four protected disclosures. He had initially alleged that he had made five but withdrew what was called by him £PD5' during the course of the hearing. The disclosures relied upon were as follows:-

    i. On *5,* 6 and 14 October 2021 and 3 November 2021 during meetings with various members of the second respondent's executive team, addressed principally to the first respondent and Mr Howell, the second respondent's Chief Operating Officer, the claimant raised concerns that the second respondent was or was likely to fail to comply with a legal obligation, being their duties as directors of a company.

il On 6 October 2021 the claimant informed a solicitor and registered insolvency practitioner, Mr Niekerk that he was concerned that the directors of the second respondent were or were likely to be in breach of their fiduciary duties to avoid wrongful trading as the company was at risk of insolvency.

iii. On 5 November 2021 the claimant informed Mr Hirani, who-was at the time representing an investor of the second respondent that he was concerned that the second respondent was being financially mismanaged; that he reiterated those concerns on 8 November during a board meeting at which Mr Hirani was present and that on 10 November 2021 , he sent an email to the board and others reiterating those concerns, and that

iv. On 12 November (in writing), and 14 and 15 December 2021 and 26 January 2022 (verbally), the claimant raised concerns with the second respondent that the directors of the second respondent were or were likely to be in breach of a legal obligation being their fiduciary duties as directors of the company.

43. HHJ Auerbach summarised at paragraph 9 in Williams v Michelle Brown AM UKEAT/0044/1 9/009 the requirements of section 43B. “It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.” Therefore, the following questions were relevant.

Was there a disclosure of information?

44. The information which was disclosed was essentially the same in relation to all disclosures. The Tribunal accepted that taken together, in relation to each

disclosure, the claimant was disclosing information that the second respondent was either trading while insolvent or at risk of doing so. It is accurate to say that the information he had available to him was the same as that available to other directors. However, information does not exist in a vacuum. Because one person does not assimilate information in the same way as another does not mean that it is not information for the purposes of section 43B. It is true to say that it was the claimant's opinion that the second respondent was at risk of insolvency and wrongful trading, but that opinion was based on his assimilation of the information available to him. It seems to the Tribunal that the opinion is no different from someone looking at dangerous equipment in a workplace and saying that it poses a significant health and safety risk. If another person having looked at the machinery did not see the risk either because they were deliberately blind to it or they did not have the knowledge to allow them to see the danger, that would not change the position that a person had disclosed such information.

45. The Tribunal was also mindful of the respondents' position that the claimant was simply making an allegation and that therefore this was not a disclosure of information. As has been recognised, there is often an overlap between the disclosure of information and the making of an allegation. Whether something is a disclosure of information for the purposes of section 43B will depend on the relevant facts and the context in which the disclosure is made.

46. In the present circumstances, the Tribunal was satisfied that in relation to each of the disclosures made by the claimant, he disclosed information for the purposes of section 43B.

Were the disclosures made to an appropriate person?

47. The first and fourth protected disclosures were made to the claimant's employer and as such were made to an appropriate person. The disclosure made to the solicitor instructed by the claimant also qualifies for protection. In terms of the disclosure to Mr HiranL the Tribunal accepted that he represented an investor in the second respondent at the time the disclosure was made. The Tribunal was satisfied that the disclosure had already been made to the

claimant's employer, that it was true and that it was not made for personal gain. As discussed above, the Tribunal accepted that the overriding motivation of the claimant was to ensure the proper and legal functioning of the second respondent. It was satisfied that the disclosure was made to Mr Hirani for a proper motive and to seek to persuade the claimant's colleagues that they needed to take his disclosures seriously. Therefore, this too amounted to a protected disclosure in this regard.

**Did the claimant reasonably believe it was made in the public interest?**

48. The Tribunal then considered whether the claimant reasonably believed that the disclosures were made in the public interest. Again, the Tribunal was satisfied that this test had been met. Whether a company is able to pay its staff and creditors and whether a company which has made an investment is likely to lose its investment are all matters which are in the public interest. Moreover, whether directors of a company are in danger of acting unlawfully and in breach of their fiduciary duties is also a matter of public interest. It is relevant for staff and creditors.

49. The Tribunal took into account the respondents' position that the claimant was acting in self interest in an attempt to take over the running of the company. However, as a matter of fact this was not accepted by the Tribunal. It would be inevitable that there would be some degree of self interest for the claimant in raising these matters given he was an employee and a director. However, this did not mean that the raising of the matters was not in the public interest. For a disclosure to be in the public interest there may still be an element of self interest and the two circumstances are not mutually exclusive. The Tribunal was satisfied that disclosure was made in the public interest and that this was a reasonable view for the claimant to take in the particular circumstances.

Does the claimant reasonably believe that the disclosure tends to show one of the matters ins. 43B(a) -(f)?

50. The ciaimant's position is that each of the disclosures related to a breach of a legal obligation. In particular, it was said to relate to the fiduciary duty owed by each director. In addition, the claimant was of the view that the disclosure demonstrated that there was a risk of wrongful trading, which is a civil offence. The Tribunal considered whether the claimant was merely expressing an opinion that there might be a risk of the directors being in breach of their legal obligations. Again, this will very much depend on the particular facts and circumstances. If the claimant was merely putting forward information that there was a potential risk at some point in the future depending on a number of variables, then this would be unlikely to meet the requirements of section 43B. The claimant's position however was that the debts which were disclosed in the petition for voluntary liquidation were little different from those prevailing at the time he made his disclosures. The Tribunal accepted the claimant's position that he did not have to be correct in his view, but that his view required to be reasonably held and tend to show that "a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject". It had to be based on a sufficiency of evidence and not simply be speculative. Whether someone is likely' to fail to comply with a legal obligation will again depend on the facts which prevailed at the time the disclosure was made.

51. The meaning of this requirement was considered by the Employment Appeal Tribunal in the case of Kraus v Penna pic and anor 2004 IRLR 260, EAT. In that case it was said that likely' should' be construed as 'requiring more than a possibility, or a risk, that an employer (or other person) might fail to comply with a relevant legal obligation'. Instead, 'the information disclosed should, in the reasonable belief of the worker at the time it.is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation' The Tribunal was of the view that the claimant genuinely believed that the directors of the second respondent

were likely to breach their fiduciary duties at the time he made the disclosures His concerns were reasonable in the circumstances and genuinely held.

52. In these circumstances, the Tribunal concluded that the claimant had made four disclosures which were protected disclosures of the purposes of section 43B.

Application to conjoin WH as a respondent to the proceedings.

53. The only objection by the respondents and WH to him being conjoined as a respondent to the proceedings was that the application was time barred. There was no suggestion that there would be any other prejudice WH or the other respondents. Notwithstanding that, the Tribunal did consider the question of prejudice in its deliberation in that regard.

54. The Tribunal is mindful that the claim of ordinary unfair dismissal cannot be directed against WH as an individual. However, individuals can be liable for claims in terms of section 43B(1B) ERA, where an individual has been subjected to a detriment for having made a protected disclosure.

55. The Tribunal took into account that the claimant had made a number of references to WH throughout his claim. WH gave evidence at this preliminary-hearing and is expected to give evidence at a final hearing. There is therefore no prejudice to WH in being added as a respondent to the claimant's claims in relation in relation to protected disclosures.

56. In addition, the second respondent has sought voluntary liquidation.

57. In these circumstances, the balance of prejudice is such that it would be proportionate for WH to be conjoined as a respondent to the claim.

Further procedure

58. In terms of further procedure, the case should now be listed for a final hearing. Date listing letters should be issued with a view to setting dates for a final hearing, which should be conducted in person, at the earliest opportunity.

59. Parties are ordered to co-operate to agree any additional documents to be lodged for a final hearing and to create a single joint bundle of documents for use by the Tribunal at the final hearing. The respondents should be responsible for collating the bundle and providing 3 copies of the bundle for use by the Tribunal together with a further copy for the witness table and a copy for the claimant. The claimant should be provided with a copy of the agreed bundle at least 14 days prior to the final hearing commencing.

60. The case will be listed to be heard before a full Tribunal including the sitting Employment Judge over 4 days in person in the Edinburgh Tribunal. Should parties be of the view that it would be of assistance for a preliminary hearing to be listed to discuss case management issues in advance of the final hearing, they should advise the Tribunal as soon as possible.

61. Evidence should be given orally at the final hearing unless parties make an application for the use of witness statements which is granted. Should further directions be required parties should write to the Tribunal indicating that a preliminary hearing for the purposes of case management is requested.

**Employment Judge:** **A Jones**
**Date of Judgment:** **15 December 2022**
**Entered in register:** **22 December 2022**
**and copied to parties**