EMPLOYMENT TRIBUNALS

Claimants: **(1) Janice Irwin**
(2) Weininger Irwin

Respondent: **Ilford Sports Club Limited**

Heard at: **East London Hearing Centre (by CVP)**

On: **2 - 5 May, 9 May, 18 May 2023 (in Chambers)**

Before: **Employment Judge Sugarman**
Members: **Ms A Berry**
Ms J Forecast

Representation

Claimant: Ms Godwins - Employment Consultant
Respondent: Mr Henry – Professional Representative, Croner

JUDGMENT

1. The duplicate claims contained in Claim Numbers 3220511/20 & 3220512/2020 are dismissed upon withdrawal.

2. The claims of unlawful deductions from wages in respect of pay due to the Claimants for the period December 2019, January 2020, February 2020 and 1-8 March 2020 were brought outside of the 3-month time limit specified in section 23 of the Employment Rights Act 1996 in circumstances where it was reasonably practicable to bring the claims in time and they were not presented within such further period as was reasonable. As such, the Tribunal has no jurisdiction to hear the claims and they are dismissed.

3. The claims of unlawful deductions from wages in respect of pay due to the Claimants for the period 1-19 August 2020 succeed. The amount the Respondent must pay shall be determined at a Remedy Hearing unless agreed.

4. The claims of unlawful deductions from wages in respect of unpaid notice pay, due to both Claimants, succeed. The amount the Respondent must pay shall be determined at a Remedy Hearing unless agreed.

5. The claims of both Claimants for unlawful deductions from wages in respect of the alleged failure to pay them in accordance with the provisions of the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 2015 were brought outside of the 3 month time limit specified in section 30 of the National Minimum Wage Act 1998, in circumstances where it was reasonably practicable to bring the claims in time and they were not presented within such further period as was reasonable. As such, the Tribunal has no jurisdiction to hear the claims and they are dismissed.

6. The claims of both Claimants for automatic unfair dismissal pursuant to s103A and s104 of the Employment Rights Act 1996 fail and are dismissed.

7. The claims of both Claimants for ordinary unfair dismissal pursuant to s98 of the Employments Rights Act 1996 succeed. The Claimants were unfairly dismissed.

8. Unless agreed, the compensation the Respondent must pay to the Claimants for unfair dismissal shall be determined at a Remedy Hearing in accordance with the **Polkey** finding set out below, namely that the Claimants would have remained in employment beyond 19 August 2020 but would have been fairly given notice of dismissal by reason of redundancy in any event by 15 October 2020.

9. The claims of both Claimants for accrued but untaken holiday on termination pursuant to Regulations 14 and 30 of the Working Time Regulations 1998 succeed. The Respondent owes each Claimant 18 days' pay. The amount the Respondent must pay shall be determined at a Remedy Hearing unless agreed.

10. The Respondent was in breach of its duty to give the Claimants written statements of their initial employment particulars and written statements of particulars of change to their employment particulars. The Tribunal awards each Claimant two weeks' pay pursuant to section 38 of the Employment Act 2002. The amount the Respondent must pay shall be determined at a Remedy Hearing unless agreed.

REASONS

INTRODUCTION

1. By way of two identical Claim Forms presented on 9 December 2020, the Claimants presented various claims against the Respondent, namely:

    a. Ordinary unfair dismissal pursuant to the provisions contained in Part X of the Employment Rights Act 1996 ("ERA");

b. Automatic unfair dismissal because of having made a protected disclosure or disclosures contrary to s103A of the ERA;

c. Automatic unfair dismissal because of having asserted a relevant statutory right, contrary 104 ERA:

d. Unlawful deductions from wages pursuant to s13 ERA pertaining to:

i. The failure to pay both Claimants wages in December 2019, January 2020, February 2020 and 1-8 March 2020;

ii. The failure to pay both Claimants the national minimum wage;

iii. The failure to pay both Claimants notice pay;

e. Breaches of the Working Time Regulations 1998 ("WTR") pertaining to:

i. The failure to pay for accrued but untaken holiday on termination;

ii. Breaches of the maximum weekly working time provisions;

f. Failure to provide a statement of employment particulars.

2. Each Claimant was referred to on the Claim Form lodged in the name of the other, albeit ET1A forms were not filed, and the Tribunal treated each Claim Form as containing two claims, thus there were four in total. The Claimants accept that the 2nd claim (containing claims 3220511/20 & 3220512/2020) is a duplicate of the first and during the course of the hearing, those claims were withdrawn and are dismissed.

3. In respect of ACAS Early Conciliation, the Claim Form that remains live refers to an ACAS Certificate issued on 11 November 2020, ACAS having been notified on 28 September 2020. Both Claimants rely on that Certificate and the Respondent accepts they can.

4. In its Response, submitted in respect of both Claimants, the Respondent denied all of the claims. The Response denied the Claimants were dismissed in law, because although there had been a dismissal on the grounds of redundancy, it was alleged there had been a successful appeal and reinstatement. It denied there had been any protected disclosures or assertion of a statutory right. The Response alleged the unlawful deductions claims, including the claim for failure to pay the minimum wage, were out of time and in any event the Claimants were in control of their own hours and their working time on behalf of the Respondent was "minimal". It admitted the Claimants were not provided with an employment contract.

5. The Claimants applied to amend following their purported reinstatement on 11 January 2021 to plead a constructive dismissal complaint in the alternative, albeit that was not their primary case. That amendment was allowed by Employment Judge Housego at a Preliminary Hearing on 2 July 2021 and he set out the issues in narrative form as they were at that time.

6. Over the course of the final hearing, certain claims have been agreed, some have fallen away and the issues have narrowed.

7. There was a detailed discussion about the issues at the start of the hearing before evidence was heard. The Claimants agreed that the claims identified above were the only live claims before the Tribunal. They confirmed the protected disclosures relied upon were those set out on p76 of the bundle with one amendment. Ms Godwins said the disclosures were also made at a Board meeting on 26 February 2020. February 2020 was referred to in the Claim Form [§16] and we allowed the Claimant to rely alleged disclosures on that date too despite the fact it was not referred to on p76.

8. On the morning of the second day of the hearing, Mr Henry confirmed that the Respondent no longer pursued a case that the express dismissal had "vanished" and that the Claimants had subsequently resigned. He accepted that the Claimants were expressly dismissed in August 2020 and not reinstated. As such, it was neither parties' case there had been an effective reinstatement and a subsequent resignation or constructive dismissal.

9. On the morning of the fifth day, the Respondent conceded that the Claimants had made the protected disclosures relied upon but continued to deny causation.

10. During closing submissions, Mr Henry also accepted that the Claimants had not been paid:

    a. for the period 1-19 August 2020;

    b. any notice pay

    c. accrued but untaken holiday on termination. The Respondent accepted the Claimants had not taken any holiday at the point of termination and so Mr Henry said the Respondent accepted that 18 days' pay was due (based on 33/52 of the 5.6 week annual entitlement having accrued).

11. The quantum of these claims has not yet been agreed.

THE ISSUES

12. As such, the live issues that remain for the Tribunal to determine on liability are as follows:

    1. **Time limits**

        1.1 Given the date the Claim Form was presented and the dates of early conciliation, any complaint about something that happened before 29 June 2020 may not have been brought in time.

        1.2 Was the unauthorised deductions from wages complaint made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

1.2.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a further reasonable period?

2. **Automatic Unfair Dismissal**

2.1 The Claimants made protected disclosures, within the meaning of section 43B of the Employment Rights Act 1996, to their employer as follows:

2.1.1 On 30 July 2019 and 26 February 2020, disclosures that the funding of £10,000 for the Ageless Teenagers group was neither held, distributed nor accounted for transparently, correctly or as agreed;

2.1.2 In October 2019, on 17 December 2019 and on 26 February 2020, disclosures that the Respondent's bank account signatories facilitated payments from a third party, Camdon Boiler company, twice in the sums of £29,760 and £29,784, both of which were paid by CHAPS back to the company after four or five days allegedly in order to give the false impression to a finance company that the respondent was in a position to take on debt even though it had been running at a loss for many years;

2.1.3 In October 2019, on 17 December 2019 and on 26 February 2020, disclosures that EU public funding received by the Respondent was not used for the specified purposes but instead for a boiler and heating system and to pay outstanding bills for the club including a debt of £5000 being recovered by a bailiff.

2.2 Did the Claimants assert a relevant statutory right, namely the right not to have their wages unlawfully deducted, at Board meetings between 2017 – March 2020?

2.3 What was the reason or principal reason for the dismissals?

2.3.1 Was the reason or principal reason for dismissals that the Claimants made protected disclosures as set out above at

§2.1? If so, the Claimants will be regarded as unfairly dismissed by reason of s103A ERA.

2.3.2 Was the reason or principal reason for dismissals that the Claimants alleged that the Respondent had infringed a relevant statutory right as alleged above in §2.2. If so, the Claimants will be regarded as unfairly dismissed by reason of s104 ERA.

2.4 If neither of the above, has the Respondent established the reason was a potentially fair reason? The Respondent says the reason was redundancy or some other substantial reason, namely a business reorganisation.

2.5 If so, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimants? The Tribunal will consider whether:

2.5.1 The Respondent adequately warned and consulted the Claimants;

2.5.2 The Respondent made a reasonable selection decision;

2.5.3 The Respondent took reasonable steps to find the Claimants suitable alternative employment;

2.5.4 Dismissal was within the range of reasonable responses.

3. **Unauthorised deductions**

3.1 Did the Respondent make unauthorised deductions from the Claimants' wages by failing to pay the Claimants:

3.1.1 The national minimum wage for the 2 year period prior to the presentation of the Claim Form (i.e. 10 December 2018 – 9 December 2020);

3.1.2 Wages due in December 2019, January 2020, February 2020 and 1-8 March 2020;

3.2 In respect of the national minimum wage claims, are the Claimants entitled to additional remuneration under section 17 of the National Minimum Wage Act 1998 ("NMWA") in respect of any pay reference period because they have been paid at a rate which is less that the national minimum wage rate?

3.2.1 What is the relevant pay reference period?

3.2.2 What were the Claimants paid in each pay reference period?

3.2.3 What hours did the Claimants work during each pay reference period?

a. What type of workers were the Claimants, within the meaning of Part 5 of the National Minimum Wage Regulations 2015;

b. Is it necessary to consider each Claimant separately or can both be considered together given the nature of the agreement pertaining to work?

c. How many hours did they work or are they deemed to have worked?

3.2.4 Has the Respondent established, the burden being on it under s28 of the NMWA, that the Claimants were not paid less that the national minimum wage?

4. **Failure to provide a statement of employment particulars**

4.1 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimants a written statement of employment particulars or of a written statement of a change to those particulars?

4.2 If the other claims succeed, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

4.3 Would it be just and equitable to award four weeks' pay?

THE HEARING

13. On day 1 of the hearing, the Tribunal discussed the issues and case management with the parties. It then adjourned for ½ day to read the witness statements and documents referred to therein. The parties returned at 2pm with, as requested, an agreed timetable which provided for the Claimants' evidence to finish by the close of play on day 2, the Respondent's evidence to finish by lunchtime on day 4, with the afternoon of day 4 for submissions and day 5 for deliberations.

14. Although the Tribunal was ready to hear evidence on the afternoon of day 1, Mr Henry, who had come to the case late, was not ready to cross-examine and made an application to start the evidence on day 2, indicating that would not disrupt the timetable as he could complete cross examination as planned by the end of day 2. The Tribunal agreed to the application.

15. On day 2, the Tribunal heard evidence on the Claimants' behalf from both Claimants, Aiyanna Precilla and Rebecca Sawyer.

16. On days 3 and 4, the Tribunal heard evidence from Michael Foley, Roger Chilvers, Joe Kuzsel and Anthony McGrath on behalf of the Respondent

17. We anticipated having submissions on the morning of day 5 but instead, Mr Flanagan was unexpectedly called (having not previously been available). We heard from him and then had submissions from both parties which took all of the day. We reserved our decision.

18. We have carefully considered all of the witness statements and oral evidence and the documents we were referred to in the bundle.

FINDINGS OF FACT

19. The following findings of fact are made on the balance of probabilities. The Tribunal has not made findings on every aspect of the evidence presented, which it carefully considered where relevant, but the facts it has been necessary to resolve to make a determination of the issues.

The Respondent

20. The Respondent is a limited company and a not for profit sports club ("the Club") with premises in Ilford. It was set up in 2001 by Ilford Football Club whose chairman was George Hogarth. He became the first chairman of the Club and remained in that role until the 2019 AGM. Mr Hogarth sadly died in 2020. According to Mr Foley, a current director, Mr Hogarth ran the club in an autocratic style, regularly failing to consult with fellow directors.

21. At the material time, the Club was used for a variety of sporting and non-sporting purposes, including community activities, and was available for private hire for events such as parties and wakes.

22. The Respondent has a Board of Directors ("the Board") responsible for overall governance, comprising volunteers who generally represented the organisations using the club. The two football clubs who use the Club, Ilford Football Club and Barkingside Football Club, generally had representatives on the Board. Over time, Board members changed. The Claimants were on the Board up to February 2015.

23. The Claimants believed there was a divide between the football clubs and other users of the Club. There was undoubtedly some conflict between the football clubs and the Claimants, with the latter believing the football clubs were not paying properly for their use of the Club and disagreements followed. However, it is not the case the representatives of the football clubs were a homogenous group. There were tensions between different individuals. For example, Mr Foley, who was a director of the Club but a committee member and former director of Ilford FC, was critical of Mr Hogarth both in the past and in his evidence. He had reported him to Sport England in 2017 as he was concerned about his running of the Club and the lack of accountability.

Commencement of Claimants' Employment and Contractual Terms

24. In April 2015, the Claimants were asked if they were interested in becoming managers at the Club because the previous co-managers, also a couple, had resigned.

25. Initially, the management of the Club was to be shared with another couple. The two couples were to be paid £17,500 each (i.e. per couple). The Claimants were to manage bookings and the other couple were to manage the bar. The Claimants agreed. The management role was part time and it allowed them to continue being self-employed. Both ran their own businesses providing fitness and karate classes, which were run at the Club. The Claimants paid the Club a hire fee to use the premises for these purposes. They were not issued with any written agreement at this time.

26. After 3 months, the other couple resigned. From July 2015, the Claimants took on sole responsibility for running the Club, including the bar and functions, alongside Mr Hogarth who attended regularly. Mr Hogarth retained responsibility for accounts and finances. He was also the primary licence holder but nominated the Claimants to run the bar in his absence. The Claimants were the only employees of the Club.

27. The Claimants orally agreed with the Board that together they would be paid £30,000 to manage the Club, with a bonus of 10% for any monthly income generated over £6,700. It was also agreed they could continue to run their own businesses providing classes at the premises.

28. They were not issued with a contract or written particulars. After requesting one on numerous occasions, they took the initiative, found a template online, adapted it based on discussions they had with the Board and sent it to Roger Chilvers on 15 December 2015. The two documents were in almost identical terms and provided:

    a. Each was employed as a "Sports Club Manager";

    b. Hours of work were "as per provided document" and "you are required to work such hours as are necessary to complete your duties and overtime is to be worked if required you may be required to work on bank and public holidays." There was however no "provided document", we accept Mrs Irwin's evidence on that. The Claimants were unsure what to put in because their hours varied depending on functions and they were not sure how to record that.

    c. Mr Irwin's salary was recorded as £20,000 p.a. and Mrs Irwin's as £10,000;

    d. The holiday year ran from January – December and their entitlement was 28 days.

29. Mrs Irwin's evidence, which we accept, was that the documents were presented to the Board at a meeting and were agreed to *in principle* but the question of

their hours was never resolved, the documents were not properly ratified or signed by either party and the Claimants were never issued with any document by the Respondent setting out their agreed terms and conditions. Paragraph 40 of the Grounds of Resistance admits the Claimants were not provided with an employment contract.

Hours of Work

30. Between them, the Claimants were responsible for the day-to-day management and running of the Club. They were required to open the Club, staff it throughout its opening hours and close it at the end of the day. The door on the ground floor remained open throughout the day and someone had to be onsite whilst it was. They were responsible for ensuring it was clean and ready for use each day.

31. The Club was open 9am – 10pm on weekdays except that up to August 2019, on Mondays and Wednesday when the football clubs had evening matches, they would not close until around 11pm as they were responsible for the bar. However, they refused to run the bar for the football clubs from August 2019 due to a disagreement about fees. Nevertheless, they still had to stay to staff the building and would stay until the last person left, the time of which would vary.

32. On Saturdays, the Club opened from 9am to 7pm and on Sundays 8am – 7pm.

33. Based on those hours, the Club was open for approximately 88 hours per week until August 19 and a little less than that thereafter.

34. It was necessary for one of the Claimants to attend work before the Club opened in order to unlock, open up and do any necessary cleaning / setting up ready for visitors that had not been done the night before. Depending on the function and use to which the Club had been put during the day, they would also have to do cleaning that could not be done during the day, and cash up, on closing.

35. It was not generally necessary for both Claimants to be at the Club. Generally, only one person needed to be there. That allowed the other to run their classes or do other things. However, if one was running the bar, the other would need to be there too. Mr Irwin said “Primarily it was *either* me *or* [Mrs Irwin], sometimes George would be at the Club” and “sometimes” they would overlap. Mr Chilvers accepted that one person needed to be on site during opening hours. The Claimants agreed between themselves how to cover the necessary hours.

36. The Claimants were nominated to run the bar when Mr Hogarth was absent. Thus, if a bar was to be provided by the Club for a function and Mr Hogarth was not there, the Claimants had to be.

37. There were regular weekend evening functions at the club which might extend the weekend evening opening to 11pm-11:30pm. Approximately 10 times per

year, the Club would obtain a late licence and finish at around 1am or occasionally even later than that. When it did, sometimes one or both of the Claimants would have stay even later than that to clear up. Not all of the functions required the Claimants to manage the bar as a significant number did not require a bar or hirers would provide their own drinks. We take into account the list of functions at 142-5.

38. Mr Hogarth generally attended on a Tuesday and a Thursday from approximately 10am – 9pm until the lockdown in 2020 according to Mrs Irwin. We accept that is likely to be accurate. This would allow, depending on what other tasks had to be completed, the Claimants to do other things such as run their own classes on the premises (and generate additional income). Mr Irwin also had a t-shirt printing business which he ran on the premises.

39. There is no record of how many hours the Claimants worked throughout their employment. Neither they, Mr Hogarth nor the Board kept any such records.

40. When Aiyanna Precilla covered the management duties of the Claimants whilst they were away, with someone called Asad, she said they ran the Club from 9am to 10pm for 2 weeks. When she explained the working hours, she said sometimes it was just her on her own, sometimes Asad on his own: it was always necessary to have someone, though just one person, there.

41. In evidence, Mr Irwin said that the Claimants "sometimes" did more than 100 hours between them, which he explained as "50 each" though he accepted he was there more frequently than Mrs Irwin and "sometimes" they would overlap. We find that only a limited amount of overlapping was required.

42. In their Claim Forms, the Claimants claimed they were working 60-80 hours a week each, 120-140 in total. We do not accept it was this much. That estimate is not based on contemporaneous records, it is their estimation, looking back after the various events described below. We conclude it is mistaken.

43. The Claimants prepared a "Regular Income Booking Sheet" [122] which was created in 2018 or 2019 and was intended to show how many hours they were generally working at the Club. It stated Mr Irwin was working approximately 56 hours per week and Mrs Irwin 36, 92 in total. The Irwins' evidence was that this, rather than their Claim Form figures, accurately represented the average number of hours they were doing.

44. The Respondent disputes the figure was this high. Its witnesses suggest in the 18 months or so before the Club closed during the lockdown from March 2020, the Claimants did only a "minimal" amount of work and were often not seen at the Club when the Board members visited. They also say the Club was performing so poorly financially the Claimants cannot have been doing long hours. We accept that was their honest view. However, the Board members did not attend the Club very frequently, did not base their assessment on their direct knowledge but rather on hearsay and did not have anything like a full picture of the Claimants' hours. Further, the Club's profit is not a reliable indicator of the

hours the Claimant's worked. We do not accept Mr Flanagan's evidence that the Claimants' conducted "little or no work" for the Club.

45. Determining how many hours the Claimants worked each week in such circumstances is fraught with difficulty. We have taken into account all of the above and in particular the total number of hours the Club was open, the fact both Claimants did not generally need to be there at once though sometimes were, the fact sometimes neither needed to be there when Mr Hogarth was in attendance, though they were sometimes there together, the fact not all evening functions required them to provide a bar and we think it unlikely they would stay to the end of every function if not responsible for the bar when others could be asked to lock up, and the fact that there were occasions when Board directors attended and neither Claimant was present.

46. Doing the best we can in the absence of reliable evidence, we find that the total number of hours worked by the Claimants together in the 2 years before presentation of their Claim Forms was in the order of about 75 hours per week, with Mr Irwin doing approximately 60% of those hours. We are not able to make any more specific findings about the hours worked each month and conclude that on average over the course of the month in the two years prior to the submission of the Claim Form, together they worked an average of 325 hours per month (75 x 52 / 12) in total.

Pay

47. Despite what the documents drafted and sent by the Claimants said about the salary of each Claimant, Mr Irwin's statement said that their joint salary was £30,000 "with me receiving £10,000 of that salary" and thus Mrs Irwin receiving £20,000, despite doing fewer hours. In other words, a reversal of the position in the written documents. None of the witness statements we were provided with explained this. When asked how this arrangement came about, Mr Irwin said they had been advised by George Hogarth that it was better for tax purposes to pay the Claimants that way. He did not know why. However, he said it did not matter as long the money was coming into "their" account. No written document was provided by the Respondent when the Claimants' pay was changed in this way.

48. P60s were produced during the hearing which in fact showed that Mr Irwin had been paid just over £12,400 and Mrs Irwin had been paid just under £17,600 in the year to 5 April 2020. When cross examined, Mrs Irwin said that "at some stage, George advised us that as a married couple, there were tax breaks and because it didn't matter where the money was going, it swapped over. I think mine was £17,900 and his was £12,000". She confirmed the reality was that the pay went into her account and she then transferred money to her husband as required.

49. Mrs Irwin said they had received bonuses but not very often and they were not recorded on her payslips but rather in Board meeting minutes.

50. The reality of pay was in fact more complicated because the Claimants were often not paid the sums on their payslips every month when the payments fell due. They were initially paid by a combination of cash and cheque although the cheques stopped in late 2018. After that, they received some pay by bank transfer and some in cash when the Club received cash. On occasions, directors such as Mr Chilvers had to pay them out of his own money. Handwritten notes were sometimes made by Mr Hogarth of what had been paid and what balance was still owed.

51. At some point, it is not clear when, Mr Hogarth suggested that they keep cash received by the Club and deduct it from the outstanding wages they were owed. This was an unusual arrangement but we accept that it was brought to the Board's attention and no issue was taken with the practice at the time. Mr Hogarth had an unorthodox way of dealing with the affairs of the Club and his methods often went unchallenged by the rest of the Board, as Mr Foley accepted.

52. Mrs Irwin kept spreadsheets of money coming in, the money the Claimants were due and paid. However, she accepted the spreadsheets were sometimes not updated and she had difficulty explaining the figures contained in them recording the Claimants' pay in the period December 2019 – February 2020. We found them very difficult to understand.

53. In addition, and even more unconventionally, the Claimants also received hire fees paid by users of the Club direct into their account e.g. from JMC Church. We accept Mr Hogarth had knowledge of this practice.

54. The Claimants did regularly raise in Board meetings that they were not receiving their full salary each month. These concerns were raised throughout the time they were employed by the Club. These were complaints about unlawful deductions from their wages.

55. At a Board meeting in December 2019, the Claimants also complained that their hourly rate of pay was below "the national average minimum wage", suggesting they had given some thought to that at least by that stage.

56. The Claimants do not claim unlawful deductions from their wages prior to December 2019, except in relation to the contention that their contractual pay fell below the level of the national minimum wage.

57. The Claimants aver they were not paid at all in the period December 2019 – 8 March 2020 by the Club because the cash income from the Club was negligible. The Respondent does not positively assert they were paid in that period, it says it does not know because of the way the Claimants were paid by that stage – in cash and transfers direct from users of the Club – and because of the lack of the records kept by them or Mr Hogarth. We accept that Mrs Irwin was not paid directly by the Club in this period.

58. However payments were however received into Mrs Irwin's account in the December 2019 – March 2020 period from users of the Club, thus it appears

that contrary to their case, some pay was received in this period via this route. We have not been provided with Mr Irwin's bank records, for which we have had no explanation, to determine whether any money was received into his account in this period, it being accepted that sometimes, he would receive pay into his account even if the majority of it usually went to Mrs Irwin's account.

59. The Claimants were furloughed in March 2020. During the period of furlough, the Claimants accept they were paid at 80% of their contractual salary until 1 August 2020, albeit after some initial delay. Following the lockdown on 23 March 2020, the Claimants did not return to work. The only claim of unlawful deductions from wages they make in the period March – 1 August is in respect of the alleged failure to pay them the national minimum wage which they contend would have been a higher figure than 80% of their agreed contractual wage.

Protected Disclosures

60. Mrs Irwin in her evidence said that between 2018 and 2020, she and her husband made three protected disclosures several times about alleged unlawful activity carried out by George Hogarth with the knowledge or involvement of Roger Chilvers. The specific disclosures relied upon for the s103A claim are those set out in the further particulars identified above in the Issues section.

1st Disclosure

61. The first disclosure concerned a lottery grant that the Claimants applied for to support the "Ageless Teenagers Project", a support group they had set up to benefit Windrush generation "seniors". They did not have a bank account to receive the grant money and asked George Hogarth whether the Club's reserve account could be used to pay the money into if successful. He agreed. £10,000 was paid into the Club's current account in May 2018 however only £9,000 was transferred into the Club's reserve account. In July 2018, the Claimants say they discovered Mr Hogarth had withdrawn £2,500 of the lottery grant funding for the Club's use.

62. The Claimants together disclosed this in the August 2018 Board meeting and again over the following months. It is their evidence that Mr Hogarth promised he would return the money but never did. We accept that as there no evidence to gainsay it.

63. Mrs Irwin wrote a letter to the National Lottery Community Fund on 29 July 2019 suggesting that the intentional removal of the grant money constituted "embezzlement". The letter was given to George Hogarth, Roger Chilvers and Harri Kateria (another Director) on 30 July 2019 at a monthly meeting. This is relied on as a protected disclosure and it is admitted it was. This is over a year prior to their dismissals.

64. At a Board meeting on 17 December 2019, the Claimants repeated the disclosure and again alleged that the Ageless Teenagers money had been used

unlawfully by the Club to pay for the debts of the Club and the money had yet to be returned.

65. They repeated it again at a Board meeting on 26 February 2020.

2nd Disclosure

66. In July 2018, when the Claimants were away, a finance agreement was entered into by Mr Hogarth on behalf of the Club for a new boiler system. The Claimants believed this was grossly overpriced and the Club could not afford it but that Mr Hogarth had pressed ahead because he deemed it essential for the use of the football clubs to have hot water for showers after games, lest they get fined by the FA. The Claimants believed the old boiler could have been repaired.

67. The Claimants discovered when reconciling figures in October 2018 that there were some seemingly odd transactions between the Club and the company that installed the boiler, Camdon. Camdon had paid in approximately £30,000 to the Club's account, then it was paid back to Camdon a few days later, with the same thing happening about a month later. The Claimants believed this had been done, by Mr Hogarth with Mr Chilvers' knowledge / blessing, to create a false impression of the Club's financial health to the finance company when in fact it had been running at a loss for many years. The Club secured the finance but soon started defaulting on the payments.

68. The Claimants disclosed this information and raised concerns about it regularly from 2018 onwards, including at Board meetings in October 2019, on 17 December 2019 and on 26 February 2020, which are the protected disclosures relied upon. Again, these disclosures had been on-going for some time, long before their dismissals.

3rd Disclosure

69. In around November 2018, Mr Hogarth applied for a European regional development grant of £5000.

70. In October 2019, on 17 December 2019 and on 26 February 2020, the Claimants made a further protected disclosure when they raised, during Board meetings, that this money was not used for the specified purposes but to pay outstanding bills.

February 2020 Board Meeting and Thereafter

71. After the protected disclosures were repeated at the Board meeting on 20 February 2020, the new Club Secretary Alicia Sterling said she would like to raise a vote of no confidence in both Mr Hogarth and Mr Chilvers. She had taken over that role following the AGM in November 2019 and Marcia La Rose had taken over as a new Chair. She seconded the motion. A decision was taken to remove both men as signatories to the account.

72. Issues relating to the boiler continued to be raised well into 2020. There was a Board meeting on 9 June by Zoom where it seems Mrs Irwin continued to raise

concerns about Mr Chilvers' involvement with the finance deal for the boiler, which caused Mr Chilvers to send an email the next day to Marcia La-Rose, complaining and denying his involvement. Mr Chilvers said he was "considering referring the whole matter to a solicitor as this may be defamation of character". There was nothing about this alleged disclosure in the Claimants' witness evidence and it is not relied upon as a protected disclosure for the purposes of the s103A claim but it appears to be a repetition of the earlier disclosure of information and/or allegation.

73. On 6 July 2020, Ms La-Rose informed Mr Chilvers that until an investigation had taken place into the vote of no confidence, neither he nor Mr Hogarth would be able to vote. On 7 July 2020, Mr Chilvers, in email to Board members stated that there was ''too much involvement from the Irwins. Every meeting is about Janice and she is not entitled to be there''.

Involvement of Sport England

74. In September 2019, James Buller of Sport England wrote to the Respondent raising certain concerns. We have not seen the letter but later correspondence suggests it was concerned the Respondent may be in breach of the terms and conditions of an "Award Agreement" in place. Sport England had agreed to provide funds for a new clubhouse a number of year prior. Some information was provided by the Club in response in February 2019 but Sport England informed the Club in a letter dated 5 June 2020 that they had not provided sufficient information and they were regarded as being in breach of the Award Agreement. In that letter, Sport England said the information they had been presented with raised a number of concerns which put the Sport England investment at risk. We do not know what information they were provided with nor the extent to which it mirrored the protected disclosures made by the Claimants.

75. The concerns articulated by Sport England included "the on-going governance of the Club, the current financial situation of the Club, the acknowledgement that public funding had been mis-used". It is not clear from the letter precisely what those concerns related to nor whether it was the same concerns raised by the Claimants. Sport England reminded the Club that it could request repayment of its investment.

Background to Dismissals

76. It is not in dispute the Club generally had very limited financial resources and had struggled financially for a long time prior to the first national lockdown. Mr Irwin accepted the Club ran "hand to mouth" a lot of the time. Accounts in the bundle show the Club made a loss of just over £13,000 in the year to April 2019 and nearly £16,000 in the year to April 2020.

77. On 26 February 2020, Mrs Irwin informed the Board that they had to dispense with the services of the Club's part-time administrator, Neave, because they could no longer afford to keep her on as an employee. The money for her salary was being paid out of Mr Irwin's personal account, with the monies owed to

them then taken in cash if the Club got enough cash in, which further complicates the pay situation.

78. Following the national lockdown in late March 2020, the Club was no longer able to take bookings for use of the premises or operate a bar and so lost its income stream, which inevitably aggravated its pre-existing financial difficulties. The Club was able to utilise the furlough scheme to pay the Claimants 80% of their contractually agreed wage, but its finances were not getting any better and bills still had to be paid.

79. Mrs Irwin said that during the furlough period, she collected all the post of the Club and compiled a spreadsheet showing the "colossal debts that had built up including CCJs for the loan, we had been visited twice by bailiffs prior to the lockdown".

80. Over the summer of 2020, informal investigation by some of the newer directors on the Board revealed the Club had debts amounting to many thousands.

81. In July 2020, Ms La-Rose resigned. Mr Alex Bennie took over as Acting Chair.

82. From 1 August 2020, the furlough scheme changed. The government no longer covered the costs of employer's national insurance and pension contributions; employers were required to cover this. From 1 September 2020, the government contribution was to be reduced to 70% of wages, with employers having to make up a further 10% to bring furlough payments to 80% of wages (up to a cap of £2,500) for unworked hours.

Decision to Dismiss - Board Meeting of 11 August 2020

83. There was a Board meeting on 11 August 2020. In attendance were the following, with their others interests in brackets: Alec Bennie - Acting Chair (who used the Club for martial arts), Alicia Sterling - Secretary, Michael Foley (Director and former Chair of Ilford FC), Jimmy Flanagan (Barkingside FC Chair), Tony McGrath (Barkingside FC), Roger Chilvers (Barkingside FC Vice Chair), Joe Kuzsel (Secretary of Ilford FC), Steve Mahoney (associated with Ilford FC), Joan Duncan (Athletics), Emmanual Dzapasi (a church group) and a Mr Williams (associated with the Ageless Teenagers group).

84. By this time, the Club had virtually nothing in the bank. The meeting was told by Alec Bennie the current account had 30p in it and the reserve account had 43p. Debts were in excess of £20,000. The debtor's list was discussed in the meeting.

85. There was a discussion about the issues raised by the Claimants in relation to the boiler. Mr McGrath said that having gone through all of the documents relating to the purchase of the boiler, he believed the original documents were signed by the directors in good faith. He said he had been through the contract and let his lawyer have a look and in his opinion it was watertight. "*Therefore I see little point in having any further discussions regarding the boiler as it is*

brought up at every meeting and this now needs to stop." As such, he sought to close the issue down.

86. Alicia Sterling, the Secretary, asked whether there needed to be further investigation relating to the money paid into and out of the account to facilitate the purchase of the boiler. Mr McGrath responded that he had been told by Camdon that it was "normal business practice" and he did not see any sense in pursuing it further. Mr McGrath appears to have been concerned about whether the Club had any recourse to Camdon about the boiler rather than whether there had been any wrongdoing in relation to the transfer of monies in and out of the account.

87. Mr McGrath then put forward a motion that the legacy of the boiler would not be brought up at any future board meeting. Mr Flanagan added that the issue had to stop being connected to football too, given the boiler was for the benefit of all. There was a clearly a perception that by raising the issue, the Irwins were attacking the football clubs. The motion was carried unanimously.

88. Mr Bennie told the Board that he had applied to Redbridge Council for a "government aid grant" which should have been paid within 6 days but he still had not heard anything. Mr Flanagan said "the lady working on getting us a grant is still trying to do so". By "us" he meant Barkingside FC though he said in evidence he was referring to a different type of grant. Whilst that is not obvious from the notes, we accept that is what he meant.

89. There was then a discussion about what the Club needed to do to reopen with "the minimum amount of expenditure needed". From the discussion, it is clear the Club was contemplating reopening in September 2020 if it was safe to do so. A sub-committee was to be set up to discuss what was needed in order to get the club open.

90. We remind ourselves that in August 2020, the Covid situation was looking a little brighter. On 14 August, the government had announced the easing of lockdown restrictions including the reopening of some indoor facilities. That is no doubt why the Club was planning for some kind of reopening.

91. Mr McGrath then put forward a motion that the existing staff – the Claimants – be made redundant because *"in our current circumstances we wouldn't be able to pay staff to open the club as there are no funds available*". It does not appear this proposal was on the agenda for the meeting. This was on the face of it an odd time to make such a proposal given the Club was discussing reopening. Naturally enough, the question was asked about how the Club could open with no employees. Mr McGrath said that each user would have to have a set of keys to use the facility when they required it. He continued "*We don't have the money, we can't even pay the debt we have*".

92. Emmanual Dzapasi suggested there must be another solution, without suggesting what that might be. Mr Bennie thought it was "harsh" given the work the Claimants had done but did not suggest an alternative.

93. The motion put forward was that the "existing staff are given notice of redundancy from Monday 17 August 2020". It was carried 6 for, 3 against with all those voting in favour being the football club representatives. Mr Bennie agreed to "tell" the Claimants.

94. Mr Chilvers attended the meeting on 11 August with a proxy vote for Mr Hogarth, albeit in the event it was not used.

95. Mr McGrath added that if the Club was in the position in the future to pay someone to manage the Club, the Claimants would be offered it first.

96. In evidence, Mr Irwin said he could not dispute that there was no money to pay staff but emphasised there had been no discussion with the Claimants before, or indeed after, the decision was taken.

97. It is not entirely clear whether Mr Bennie spoke to the Claimants after this meeting and if so when and what he said. Mr Bennie resigned on 18 August 2020 claiming the Club was being run an unfair, dishonest and hostile manner with decisions rushed through for the benefit of the football clubs. He said he refused to be responsible for the Claimants' redundancy.

98. Mr Foley informed the Claimants by email 19 August that a decision was made by the Board meeting on 11 August to make their posts redundant and that the Club had not been able to identify any suitable alternative work. They were given 4 weeks' notice to commence 20 August but they were not required to work it and did not do so. They were told they were entitled to a statutory redundancy payment but this was not paid by the Club.

The Grant Application

99. The evidence from the Respondent relating to the grant application referred to in the meeting on 11 August by Mr Bennie was unsatisfactory.

100. Mr Kuzsel's witness statement said when he took over as treasurer at some point after the Claimant's dismissals he wrote to the council to ask what had happened to the grant application and was told they had not received an application from the Respondent and that the scheme had now closed meaning the money could no longer be obtained. It said no more.

101. However, an email in the bundle from the London Borough of Redbridge dated 28 September 2020 stated that the "business grant" was in fact paid on 12 May 2020.

102. Mr Kuzsel was asked about that and said the grant money – some £25,000 - was in fact received in February 2021 after there had been a mix up. He said that grant money was paid in May 2020 but was paid by Redbridge Council to Barkingside FC by mistake. Barkingside FC, in fact the Chairman Mr Flanagan, had apparently applied for a grant too and had put the Club's address down on their application as their home ground.

103. The Claimants did not accept that explanation. They averred that the grant money was concealed in a different account deliberately to hide it from them, to artificially deflate the Club's finances in order to provide a reason for their dismissals, a fig leaf, when in fact there were actually for other reasons.

104. Although the Club's evidence was unsatisfactory, in particular the failure to explain any of above in their witness statements, we do accept the grant money was paid to Barkingside FC by the Council by mistake in May 2020 and it only made its way into the Club account in February 2021 after the Claimant's dismissals. Emails between Mr Kuzsel and the Council, disclosed late during the course of the hearing, supported his oral evidence. At the time of the dismissals therefore, the Club did not have this money but there was an extant application.

105. We were surprised that the mistake was not been picked up by Mr Flanagan. His explanation was that whilst he was surprised when the money landed in the Barkingside FC account in May 2020, that was not because he didn't think Barkingside was entitled to it, but because there had been no notification the application had been successful. It did not occur to him that this was money intended for the Club. We accept that evidence, albeit it somewhat unfortunate.

Appeal

106. The Claimant's appealed against the decision to make them redundant on 25 August 2020. Lauren Clohessy, a consultant from Face2Face who provide HR functions to the Respondent, was appointed to conduct the appeal. She concluded that the Claimants were dismissed without due process having been followed and without consultation. She recommended the Club consider re-employing the Claimants "with a view to implementing the correct Redundancy Consultation process…".

107. The appeal also upheld the allegation that the Claimants had not been paid the amounts on their payslips for the months December 2019 – February 2020.

108. The Claimants were sent letters by Mr Foley on 11 January 2021 informing them that a decision had been taken not to uphold the dismissals because "the person charged with conducting the initial consultation had failed to follow the 3-point procedure…". It suggested the Claimants were reinstated with effect from 12 January 2021 and then went on to say that due to "grievances over your previous conduct the Company will require an immediate, substantial and sustained level of improvement which will involve reporting to a dedicated member of the Board on a daily basis". The Claimants objected to this, unsurprisingly given there not been grievances over their previous conduct and Mr McGrath had said that if there was money to pay the Claimants, they would be the first to be offered reemployment. In any event, as set out above, by the time of the Tribunal hearing, it was neither side's case that there had been a valid reinstatement in law.

Operation of the Club Post Dismissal

109. Following the Claimants' dismissals, the Club did not in fact open in September. We take judicial notice of the fact by September, the government imposed further Covid related restrictions. On 14 September the "Rule of Six" came into effect, on 22 September new restrictions were announced including a 10pm curfew in the hospitality sector, on 14 October a three-tier system was implemented and on 31 October 2020, the second national lockdown was announced, which came into force on 5 November.

110. The Club did not, and has not to date employed anyone to replace the Claimants. It remained closed for a period but when it reopened after the government restrictions were lifted, it relied on its unpaid board members to carry out the basic tasks necessary to keep the Club open.

111. The Club discovered after the Claimants were dismissed that its debts were even bigger than it had realised. By the summer of 2021, its debt had risen to over £50,000.

Presentation of the Claim

112. There was no explanation in the Claimants witness statements of why they had not presented Claim Forms sooner than they did.

113. Mr Irwin was cross examined on why he had not presented claim for unlawful deductions from wages earlier than he did, and in particular why he did not do so during the time he was furloughed. He said "*We were still employed, why would I make a claim"*. When asked why he had not lodged a claim about the failure to pay him properly up to March, he said that he and his wife were not made redundant until August and were offered a right of appeal so putting in a claim was the furthest thing from his mind. It was put to him that he could have claimed before then and he replied that he and his wife were "*going through the process"*, although it is not clear what process he meant. Ultimately, it was put to him that there was nothing preventing him raising the claims of unlawful deduction of wages earlier, and he agreed there was not. He did not mention his cancer diagnosis as a reason for late presentation.

114. It was put to Mrs Irwin that there was nothing preventing her making a claim about her wages in the period March – December 2020. She said "we constantly made complaints about it" but then referred to the fact her sister was diagnosed with lung cancer in February 2020 and in March 2020 Mr Irwin was diagnosed with prostate cancer. It was no doubt a very difficult time. Mrs Irwin said that following the lockdown on 21 March 2020, she then had 4 children to take care of at home and going to the Tribunal at that stage was not at the front of her mind. She said she was not aware of her ability to bring a claim to the Tribunal and did not do any research about it. She referred to the number of hours she was working and the fact she had a family to care for. She also thought when a new board was formed, things would change. However, the new board was voted upon in December 2019 and she avers the failure to pay her persisted thereafter. She said she was not able to research bringing a claim

because her husband's cancer was spreading, and she spent a lot of time trying to get through to consultants and was completely stressed.

THE LAW

Minimum Wage

115. The National Minimum Wage Act 1998 ("NMWA"), section 1 provides that

(1) "A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

(2) A person qualifies for the national minimum wage if he is an individual who

a. is a worker;

b. is working or ordinarily works in the United Kingdom under his contract; and

c. has ceased to be of compulsory school age.

116. The definition of a worker is that set out in section 54(3) "…an individual who has entered into or works under (or where employment has ceased, worked under)…" a contract of employment or contract to personally perform work for another whose status is not that of client or customer.

117. Section 17 of the NMWA provides that a worker paid less than the minimum wage is entitled to "additional remuneration" calculated in accordance with s17:

(1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time ("the time of determination") be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, whichever is the higher of—

a. the amount described in subsection (2) below, and

b. the amount described in subsection (4) below.

(2) The amount referred to in subsection (1)(a) above is the difference between—

a. the relevant remuneration received by the worker for the pay reference period; and

b. the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.

(3) In subsection (2) above, "relevant remuneration" means remuneration which falls to be brought into account for the purposes of regulations under section 2 above.

(4) The amount referred to in subsection (1)(b) above is the amount determined by the formula—

(A / R1) × R2

where—

A is the amount described in subsection (2) above,

R1 is the rate of national minimum wage which was payable in respect of the worker during the pay reference period, and

R2 is the rate of national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.

118. In short, a worker not paid in accordance with the NMWA is entitled to additional remuneration based on whatever is the higher, the relevant rate at the time of the reference period or the rate at the time of the determination. This provision is of some import given the recent increases in the rate as a result of inflation.

119. Section 28 of the Act provides for a reversal of the burden of proof. It provides:

(1) Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established.

(2) Where—

a. a complaint is made—

i. to an employment tribunal under section 23(1)(a) of the Employment Rights Act 1996 (unauthorised deductions from wages)…and

b. the complaint relates in whole or in part to the deduction of the amount described as additional remuneration in section 17(1) above,

it shall be presumed for the purposes of the complaint, so far as relating to the deduction of that amount, that the worker in question was remunerated at a rate less than the national minimum wage unless the contrary is established.

120. The National Minimum Wage Regulations 2015 (SI 2015/621) ("NMWR") set out the relevant minimum wage rates and explain how to identify the pay reference period and how to determine whether the NMW has in fact been paid

121. The applicable hourly rate is set each year. The applicable hourly rates for those of the Claimants' age are:

    a. From 1 April 2023: £10.42

    b. 1 April 2022 – 2023:£9.50

    c. 1 April 2021 – 2022:£8.91

    d. 1 April 2020 – 2021:£8.72

    e. 1 April 2019 – 2020:£8.21

    f. 1 April 2018 – 2019:£7.83

122. In order to determine whether an individual is being paid the national minimum wage, it is necessary to ascertain their hourly rate of pay. That necessitates findings about:

    a. the total pay received in the relevant pay reference period, and

    b. the total number of hours worked during that period.

123. Therefore, the first matter to be determined is what constitutes the 'pay reference period'. Regulation 6 of the NMWR states that the pay reference period is a month or, if the worker is paid by reference to a period shorter than a month, that shorter period. In this case, the pay reference period is a month.

124. Regulation 7 of the NMWR states that a worker's hourly rate in a pay reference period is to be determined by taking the remuneration (calculated in accordance with Part 4) and dividing it by the hours of work (calculated in accordance with Part 5).

125. Reg 9(1)(b) of the NMWR provides that any payments that are earned during one pay reference period (period A) but are received in the following period (period B) are to be allocated to the period in which they are earned (i.e. period A).

126. Not all elements of pay received by a worker count towards NMW pay. Similarly, not all deductions from a worker's pay made by the employer are taken into account when calculating whether a worker has been paid the NMW. The Regulations contain detailed provisions on how to calculate this. In general, NMW pay is gross pay, which includes inter alia basic salary and bonus payments, less any elements of gross pay that are excluded. Neither party avers there are any such deductions to be made in this case.

127. Part 5 provides how the hours worked in the period are to be calculated. This depends on what category the worker falls into (salaried hours work, time work, output work or unmeasured work).

128. For work to be salaried work, the worker must be entitled to a salary (in respect of a number of hours in a year, whether those hours are specified in or ascertained in accordance with their contract ("the basic hours") (Regulation 21(3)). Unmeasured work is dealt with in Regulations 44-50. That is work that is not time work, salaried hours work or output work. The relevant part of Regulation 45 stipulates that:

> *The hours of unmeasured work in a pay reference period are the total number of hours—*
>
> *(a) which are worked (or treated as hours of unmeasured work in accordance with regulations 46 and 47) by the worker in that period.*

129. Lastly, Regulation 59 NMWR provides that an employer of worker who qualifies for the NMW must keep, in respect of that worker, records sufficient to establish that the employer is remunerating the worker at a rate at least equal to the NMW. The records must be in a form which enables information to be produced in a single document (Reg 59(2).

130. A claim for failure to pay the national minimum wage can be brought as a claim for unlawful deductions from wages under section 13 of the Employment Rights Act 1996, as this claim is, since the worker is entitled to be paid the applicable hourly rate for each hour worked, and paying the worker less than this results in an unlawful deduction from the wages due. In other words, the sum properly payable under a worker's contract by way of wages is the national minimum wage rate and a failure to pay this is a breach of section 13 of the 1996 Act.

Unlawful Deductions

131. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

132. The time limit for such claims under s23(2)(a) is 3 months beginning with the date of payment of the wages from which the deduction was made (with an extension for the early conciliation provisions). If the complaint is about a series of deductions or payments, the 3 month time limit starts to run from the date of the last deduction or payment in the series: S.23(3) ERA.

133. There is no statutory definition of a "series" of deduction. Langstaff P in **Bear Scotland v Fulton** [2015] IRLR 15) held:

> *"Whether there has been a series of deductions or not is a question of fact: "series" is an ordinary word, which has no particular legal meaning. As such in my view it involves two principal matters in the present context, which is that of a series through time. These are first a sufficient similarity of subject-matter, such that each event is factually linked with*

> *the next in the same way as it is linked with its predecessor; and second, since such events might either be stand-alone events of the same general type, or linked together in a series, a sufficient frequency of repetition. This requires both a sufficient factual, and a sufficient temporal, link."*

134. As far as a temporal link is concerned, Langstaff P held that a gap of more than 3 months between any two deductions will break the "series".

135. If a Tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the 3 month period it may consider the complaint if it is presented within such further period as a tribunal considers reasonable (s23(4)).

136. The onus of showing it was not reasonably practicable to bring the claim in time is on the Claimant (**Porter v Bandridge Ltd** [1978] IRLR 271, [1978] ICR 943, CA).

137. Judge LJ in **London Underground Ltd v Noel** [1999] IRLR 621 held that (in relation to a claim of unfair dismissal, which has the same test)

> *"The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, 'in all the circumstances', nor when it is 'just and reasonable', nor even where the tribunal, 'considers that there is good reason' for doing so."*

138. Per Browne-Wilkinson J in **Bodha v. Hampshire AHA** [1982] ICR 200, 204

> *"The statutory test remains one of practicability … The statutory test is not satisfied just because it was reasonable not to do what could be done'-*

139. Cavanagh J in **Cygnet Behavioural Health Ltd v Britton** [2022] EAT 108 emphasised that the test is a strict one and there is no valid basis for approaching the case on the basis that the ET should attempt to give the "not reasonably practicable" test a liberal construction in favour of the claimant.

140. If an employee is ignorant or mistaken about their right to claim or how it should be pursued, the circumstances of the ignorance or belief and the explanation for the same will be relevant as it is necessary to consider whether the ignorance or mistake is reasonable: "What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?" (**Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53, CA. If ignorance is not reasonable, then it is likely to have been reasonably practicable to get the claim in on time (**Riley v Tesco and others** [1980] IRLR 103 and **Wall's Meat Co Ltd v Khan** [1978] IRLR 499].

141. In **Porter v Bandridge Ltd** [1978] ICR 943, the Court of Appeal held the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them. In that case, the claimant took 11 months to

present the claim (one of unfair dismissal) and the finding, upheld on appeal, was that he ought to have known of his rights earlier, even if in fact he did not.

142. In **Avon County Council v Haywood-Hicks** [1978] ICR 646, the claimant was 6 weeks late in presenting an unfair dismissal claim and was ignorant of his right to claim during that period. Ignorance was not an excuse. The EAT held that an intelligent and well-educated man ought to have investigated his rights within the time limit and claimed in time.

143. Although it may be necessary to focus on the latter part of the limitation period, the whole of the period is relevant (**Schultz v Esso Petroleum Ltd** [1999] ICR 1202). So in **Agrico UK Ltd v Ireland** (EATS/0042/05), the EAT held it was perverse of a tribunal to hold that it had not been reasonably practicable to present the claim in time where the Claim Form had been left by the claimant's solicitor for his secretary to complete on the last day and she had fallen ill. The tribunal erred by focusing exclusively on the end of the three months, and not consider the practicability of the claim having been presented earlier.

144. There is now a cap of two years' back pay on such claims under the Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322). The 2 years runs back from the date of the presentation of the claim.

Automatically Unfair Dismissal

145. Per s103A ERA 1996:

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

146. Under s104 ERA 1996:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee— …
>
> > (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
>
> (2) It is immaterial for the purposes of subsection (1)—
>
> > (a) whether or not the employee has the right, or
> >
> > (b) whether or not the right has been infringed;
> >
> > but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
>
> (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an [employment tribunal]…

147. In a case where an automatically unfair reason is relied upon, the employee has an evidential burden to show — without having to prove — that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason advanced. Once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal — **Maund v Penwith District Council** [1984] ICR 143, CA.

148. Unlike in discrimination claims, if an employer cannot show that the reason was as it asserted, a tribunal is not obliged find the reason is that as asserted by the employee. It is open to a tribunal to find on a consideration of all of the evidence that the true reason was one not advanced by either side, see in particular §§59-60 of **Kuzel v. Roche Products Ltd** [2008] EWCA Civ 380.

149. In order to determine the reason for dismissal, it is necessary to look at the mental processes of the decision maker or decision makers if there is more than one (**Royal Mail Ltd v Jhuti** [2018] ICR 982).

Unfair Dismissal

150. The relevant statutory provisions are contained in sections 94 and 98 of Employment Rights Act 1996.

151. It is for an employer to show the reason or principal reason for dismissal and that is a potentially fair reason under s98(2).

152. Redundancy is a potentially fair reason for dismissal under s98(2)(c). The definition of redundancy is found in s139(1) ERA and include a situation where the requirements of a business for employees to carry out work of particular kind have ceased or diminished or are expected to cease or diminish.

153. Under section 98(4)

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

154. In applying the statutory test, the Tribunal must not substitute its view for that of the employer and must apply the band of reasonable responses test. It must consider whether dismissal lies within a range or band of decisions which a reasonable employer could have adopted.

155. The well-known guidance in the case of **Williams v Compair Maxam Limited** [1982] ICR 156 suggests, in summary, the following is good industrial practice when dealing with redundancies:

    a. Early warning;

    b. Consultation, which may be with a recognised union if there is one;

    c. Fair selection criteria which do not depend solely on subjective opinion;

    d. Fair selection in accordance with the criteria and consideration of representations about the selection;

    e. Consideration of alternative employment.

156. Failure to follow one or more of the **Williams** steps does not necessarily to lead to a finding of unfair dismissal (**Grundy (Teddington) Ltd v Plummer** [1983] ICR 367). The guidance is not to be treated as a list of mandatory criteria (**Rolls-Royce Motors Ltd v Dewhurst** [1985] ICR 869. However, as Lord Bridge said in the well-known case of **Polkey v AE Dayton Services Ltd [1988] ICR 142***:*

> "the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation."

157. The reference to "normally" is because the House of Lords accepted there may be exceptional cases where a reasonable employer might conclude that following what would ordinarily be regarded as a fair procedure would be "utterly useless" or "futile".

158. In **Langston v Cranfield University [1998] IRLR 172,** the EAT held that whilst the burden of proof in s.98 is neutral, an employer could normally be expected to lead some evidence as to the steps it had taken to select an employee for redundancy, to consult and to seek alternative employment.

159. The classic formulation of the duty to consult comes from **R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and ors** [1994] IRLR 72, Div Ct. Glidewell LJ said that consultation:

> "involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely".

160. This generally requires consultation at a time when proposals are still at a formative stage, the provision of adequate information on which to respond, adequate time in which to do so and a conscientious consideration of the response.

161. The issue of whether there ought to be a **Polkey** deduction if the Claimant is successful, the Tribunal is mindful of the guidance given by the EAT in **Software 2000 Ltd v Andrews and ors** [2007] ICR 825 which includes that a tribunal should have regard to any material and reliable evidence that might assist in assessing just and equitable compensation, even if there are limits to the extent it can be confident about the world as it might have been; a degree of uncertainty is an inevitable and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the available evidence.

162. The burden of proving that an employee would have been dismissed even if a fair procedure had been adopted is on the employer (**Britool Ltd v Roberts and ors** [1993] IRLR 481).

Failure to Provide a Statement of Employment Particulars

163. Under Section 38 of the Employment Act 2002, where a tribunal finds in favour of a worker in any complaint set out in Schedule (which includes claims for unlawful deductions from wages and unfair dismissal) and the tribunal finds that when the proceedings were begun, the employer was in breach of the duty owed to the worker under s1(1) or 4(1) of the Employment Rights Act 1996 – the duty to give a written statement of initial employment particulars or particulars of change, the tribunal must, unless there are exceptional circumstances which would make an award or increase unjust or inequitable, increase the award by an amount equal to two weeks' pay and may, if it considers it just and equitable in all the circumstances, increase the award by an amount equal to four weeks' pay.

164. The s1(1) ERA statement must contain the particulars set out in s1(3) and s1(4) in a single document. Those particulars include the scale or rate of remuneration or the method of calculating remuneration and any terms and conditions relating to hours of work.

PARTIES' SUBMISSIONS

165. The Claimants relied upon written submissions, supplemented by oral submissions and the Respondent made oral submissions. We considered them carefully and have dealt with aspects of them when setting out our findings of fact and in our Conclusions section below.

CONCLUSIONS

Unlawful Deductions Claims

Time Limits

166. The claim of unlawful deductions from wages allegedly underpaid in the period December 2019 – 8 March 2020 appears to have been brought outside of the 3 month time limit applicable for such claims. The Claimants contended however that the deductions formed part of a series of deductions because:

    a. Deductions continued to be made in the March – August 2020 period because during that period, they were not paid the minimum wage, even though they were otherwise properly paid a furlough rate of 80% of their contractual salary (there being no issue raised about whether such a rate had been contractually agreed);

    b. Further (admitted) deductions were made in August 2020 because the Claimants were not paid at all in that period and these were deductions from wages just like those in the December 2019 – 8 March 2020 period, albeit they were deductions from their reduced furlough wage.

167. The difficulty with the latter argument is that there is a gap of more than 3 months between 8 March 2020 and 1 August 2020. The gap is nearly 5 months. Applying **Bear Scotland,** a gap of that length will break the series.

168. The former argument rests on a contention that the failure to pay the national minimum wage persisted throughout the period of furlough. It is thus first necessary to consider that point. However, even if that were right, we would still need to consider whether there was sufficient similarly of subject matter between the deductions to constitute a series.

169. It is agreed the Claimants were placed on furlough in March 2020 but the evidence did not reveal exactly when. Thereafter, they did not work any hours for the Respondent. They contend their furlough wage was based on 80% of their normal contractual wage which was less than the national minimum wage. In those circumstances, they maintain they were not paid the minimum wage whilst on furlough.

170. The Claimants aver that they were doing “salaried hours work” within the meaning of Chapter 2 of the NMWR 2015. They accept that the hours they were required to work in a year were not specified in their contracts but they aver the hours could be “ascertained in accordance with their contract”. The reason for this, they contend, is that their hours could be ascertained by reference to the rota on p122 of the bundle, which reflected the shifts they worked and the Club’s opening and closing hours. The Respondent’s position was somewhat cryptic, noting that whilst they were salaried the position as to what category they fell into was unclear.

171. We do not agree with the Claimants’ categorisation. The rota on p122 is not a contractual document nor is it a document referred to within the closest thing there was to a contract, the document the Claimants presented to the Board but never finalised. The document does not specify the number of hours the Claimants were to work, indeed deliberately so, because they did not know how to articulate it because it varied week on week. Page 122 is a document the Claimants produced at some later stage simply to illustrate to the Board the

hours they were generally working. However, even then, it did not specify the number of hours they were actually working because it did not include evening events on a weekend or the time they spent cleaning after events.

172. There was no oral contract in which the number of hours they were to work was specified or from which the number of hours could be ascertained. Even if the agreement was that they would work all the hours necessary to keep the club open, that varied depending on functions and the number of hours Mr Hogarth was in attendance.

173. In short, their combined working hours varied week on week and also as between the two of them, depending on the Club's requirements in that week, their own commitments and how they decided to divide up the work between them. We conclude they were engaged in "Unmeasured Work" within the meaning of Chapter 5 of NMWR.

174. In order to determine whether a claimant engaged in "unmeasured work" was or was not paid the minimum wage in a pay reference period, it is necessary consider the total number of hours worked in that period (unless there is a daily average agreement, which there was not here). The problem for the Claimants is that during their period of furlough, they were not working *any* hours. They had a right to the minimum wage for every hour worked, but they were not working. As such, they cannot have been paid less than required by the NMWR.

175. The last date on which they *might* not have been paid the minimum wage was the last day they actually worked. It is not entirely clear when that date was, though it is agreed it was some time in March and may have been the 8th, the last date on which the Claimants claim they were not paid in accordance with their contract.

176. That being the case, it cannot be that the deductions from wages in the period December 2019 – 8 March formed part of a series of deductions with deductions in the period March – 1 August, because there were no deductions in that period.

177. In any event, even if there had been a failure to pay the minimum wage in the period March – 1 August, we would have concluded the subject matter of the deductions was sufficiently different such as to mean there was no series. The deductions in the period December 2019 – 8 March are alleged to be deductions from the contractually agreed rate of pay. The deductions from 8 March – 1 August are different. The Claimants accept they were paid in accordance with their contracts but aver that the *statutory* minimum wage provisions mean they were paid unlawfully.

178. We therefore conclude the unlawful deductions from wages claims (aside from the period Aug 1-19 2020 and the claim for notice pay) have been brought outside the primary time limit specified in s23 ERA.

Extension of Time?

179. We must first consider whether it was reasonably practicable for the Claimants to have brought the claims within time. That means they would need to have brought proceedings, or contacted ACAS in order to stop the limitation clock, by no later than 7 June 2023.

180. In their favour, the period of March – June 2020 was an extraordinary one, and even more so for them given Mr Irwin's cancer diagnosis in March 2020 and Mrs Irwin's sister's cancer diagnosis a month earlier. The first national lockdown was announced on 23 March 2020. Suddenly, they had four children at home and were no longer working or running their classes and had to contend with Mr Irwin's recent diagnosis and all that entailed too. It must have been a very difficult time. Mrs Irwin said they were not aware of their right to bring a claim for unlawful deductions to the Employment Tribunal in this period and given the aforementioned events, it was not at the forefront of their minds to investigate what to do about the fact they had been underpaid.

181. However, Mr Irwin did not once mention his diagnosis or illness as a reason for not getting a claim in earlier. He said the reason for not bringing a claim sooner was that they were "still employed". That may be a pragmatic reason not to claim, or to investigate brining a claim, but it does not prevent it being reasonably practicable to do so. He also referred to there being an on-going process they wanted to complete first, though it is not clear what he meant by that. If it was the appeal process post dismissal, which he appeared to mean, that did not commence until after the dismissal on 17 August 2020. It would not explain a delay prior to then. When pressed, he accepted that there was nothing preventing an earlier claim.

182. This is echoed in the Claimants' closing submissions: "It was not until Cs dismissal that seeking legal resolution for unpaid wages became an issue and it was not until after internal appeal to resolve issues that Cs saw necessity of bringing tribunal claim." That may well be so, but the test is not whether a claimant saw the necessity of bringing a claim but rather whether it was reasonably practicable for them to do so within time.

183. We have not been provided with any medical evidence to support a contention that Mr Irwin was so ill as to be unable to claim or investigate a claim, or even to explain what was happening in this period that took so much of their time and made it not reasonably practicable for either Claimant to take the limited steps necessary to find out how to make a claim, and then to do so. Both Claimants were well aware they had not been properly paid and had been prepared to make regular complaints about that to the Board.

184. Another reason they relied upon was the number of hours they were working. However, from March, they were not working any hours at all and indeed were subject to a national lockdown like the rest of the country. Whilst they suddenly had 4 children at home, we have no evidence about the demands that placed on them, nor indeed the ages of their children, that would lead us to conclude it was not reasonably practicable for them to investigate bringing a claim or to

lodge one during this period. We accept both Claimants will have felt stressed during this period, but being stressed does not make it not reasonably practicable to bring, or investigate bringing, a claim.

185. It is not difficult to find out how to bring a claim for unlawful deductions from wages by a quick internet search. Both Claimants are intelligent and run their own separate businesses. It is clear Mrs Irwin at least was computer literate. From their evidence we conclude they took no steps at all to find out about bringing a claim. The reason for that was not because it was not reasonably practicable for them to do so but rather because there was an historical acceptance by them of a really rather shambolic way of managing their pay and a reluctance to do anything formal whilst they remained employed. It had always been like that and as they remained in employment, they hoped it would get sorted out in due course particularly now that there were more friendly faces on the Board. Those faces had however in place since December 2019.

186. We conclude it was reasonably practicable for them to bring a claim in time.

187. If we are wrong about that, we conclude they did not bring their claim within such further period as was reasonable. Time expired on 7 June. They did not contact ACAS until 28 September, over 3 ½ months later. Certificates were issued on 11 November but claims were not lodged until 9 December. They were dismissed on 19 August 2020 and so continuing employment was no longer a reason not to investigate bringing a claim. They did appeal promptly and included within their appeal reference to unpaid wages "for January and February plus monies owed by the club as documented in December." From this point there was an on-going appeal process but they had little confidence in it and the fact it was on-going did not mean it was not practicable or reasonable for them to bring the claim sooner than they did. By this stage, they had had some time to digest Mr Irwin's diagnosis and in any event, we have no evidence providing any detail about his illness or the steps that were being taken to manage it. They were still not working, having previously done 75 hours a week, and so had the time to take the steps necessary to lodge a claim.

188. As such, we conclude the claim for unpaid wages in the period December 2019 – 8 March 2020 was brought out of time. It was reasonably practicable to bring it within time and it was not brought within such further period as was reasonable.

189. For similar reasons, we conclude the claim that the Respondent failed to pay the Claimants the national minimum wage is also out of time. The last deduction of this nature can only have taken place on the last day they worked, in March 2020. They believed by that stage that they had not been paid the correct minimum level of pay but took no steps to find out how to bring a claim to enforce that right. We do not accept their ignorance of the right to bring a claim for unlawful deductions was reasonable. We conclude it was reasonably practicable to bring this claim within time and it was not brought within such further period as was reasonable.

The Merits of the Unlawful Deductions Claims

190. Had the claim for unlawful deductions of pay for the period December 2019 – 9 March 2020 been in time, we would have concluded on the balance of probabilities that the Respondent did not pay the Claimants their full contractual wage for that period. Although we have not been provided with Mr Irwin's bank account records, we accept the Claimants oral evidence that they were not paid the full amount of their pay in this period. We take into account that when the Claimants appealed against their dismissals, they raised this failure to pay them and the Clohessy appeal report concluded, seemingly having seen "their bank statements" that no payments had been received from the Club. Their appeal on this point was upheld, the Club not positively contended that they were paid.

191. We do not accept however the Claimants' case that they were paid *nothing* in this period. Some direct payments from users of the Club were received into Mrs Irwin's account and as we have had said, we have not seen Mr Irwin's bank statements. Had the claim not been found to be out of time, we would have had to assess the extent of the underpayment at a remedy hearing.

192. In terms of the failure to pay the national minimum wage, had the claim not been out of time, we would have upheld it on the following basis. Given we conclude it is out of time, we set out briefer reasons than we otherwise would have.

193. Although the NMWA talks about "a person" being entitled to a minimum level of remuneration and a person is an "individual" who is a worker, rather than two (or more) workers, on the facts of this case we could not approach the work done by each Claimant separately. They agreed to cover the hours necessary to keep the Club open and to run it together. It was up to them how they divided up the hours each week. They agreed to do that for a combined wage of £30,000 p.a. Although there was a separate agreement, which changed at some point, about how that pay would be divided on the payslips, that bore no relation to the hours each was in fact doing nor indeed the pay that each received. Mrs Irwin received the bulk of it into her account and it was treated as family money. The Claimants said it didn't matter which account it went into because it was paid and received as their joint money. The division of pay, with more going to her, was said by Mr Hogarth to be a tax efficient device and they agreed to for pay to be structured that way believing what he said to be true, even though they could not explain why.

194. In those circumstances, it would be completely artificial and unjust to assess the number of hours each did individually in a reference period and then work out whether the pay each individual received was above or below the NMW. The reality of the agreement was that together, they would cover the hours required for £30,000 per annum. Indeed, if we had been required to assess it individually, we would have found that impossible absent more detailed evidence from them about the number of hours each worked in each reference period. The parties have approached the case on the basis the agreement in relation to pay and hours was a collective one and it was approached that way in reality.

195. We have concluded that the Claimants worked collectively on average about 75 hours per week or 325 hours per month. They were paid for that work the sum of £30,000 per annum or £2,500 per month. In a monthly reference period, that equates to £7.69 per hour. In the two years prior to December 2020 when the Claim Form was received, they were thus paid less than the NMW:

    a. In the period 10 December 2018 – 1 April 2019, the NMW was £7.83 thus they were paid £0.14 per hour less than they ought to have been;

    b. In the period 1 April 2019 – 31 March 2020, the NMW was £8.21 per hour, thus they were paid £0.52 per hour less than they ought to have been;

    c. In the period 1 April 2020 – 9 December 2020, the NMW was £8.72 per hour, thus they were paid £1.03 per hour less than they ought to have been.

Unfair Dismissal

Reason for Dismissal

196. It is necessary for us to assess what the sole or principal reason for dismissal was.

197. We conclude that the Claimants have adduced evidence which is capable of establishing that their dismissals were for the sole or principal reason that they had made protected disclosures.

198. The Claimants made and repeated on a number of occasions three different protected disclosures. The information disclosed, particularly about the Ageless Teenagers grant and the way in which the boiler was procured, was critical of and reputationally harmful to Mr Hogarth and Mr Chilvers, who was a close ally of Mr Hogarth. Indeed, the latter's threat in June 2020 of bringing defamation proceedings against the Claimants is acknowledgement of that. At the Board meeting in February 2020, the Claimants had gone over the protected disclosures again making accusations of impropriety against Mr Hogarth and Mr Chilvers, there was a vote of no confidence in both and they were removed as signatories on the Club's account. Both had reason to feel badly disposed to the Claimants and to want to see the back of them.

199. The protected disclosures made by the Claimants started a long time before their dismissal and there is no evidence of any move to dismiss them until August 2020. The last disclosure relied upon was made in February 2020, some 6 months before they were dismissed. This makes it less likely they were the sole or principal reason for dismissal. However, we take into account that it is possible that although the Respondent was prepared to tolerate the disclosures initially, there came a tipping point or, to borrow wording from constructive dismissal law, a last straw. The fact they started a long time ago and the Respondent did not move to dismiss at that point does not defeat the claim. That is particularly so given pandemic intervened from March 2020 and

essentially brought the Respondent's business to a halt. As such, we are mindful we have to be careful if we are to take the view that the passage of time in this period reduces the causative potency of these disclosures.

200. Further, it is clear the aftermath of their disclosures had not dissipated, because the finance deal for the boiler was still being discussed in June 2020 when Mr Chilvers was obviously still annoyed by the Claimants on-going repetition of the information and allegations. We also accept that with Sport England investigating, there was the potential for the protected disclosures made by the Claimants to harm the Club as well as the football clubs using it, though that would apply to any users of the Club.

201. At the very meeting the decision to dismiss was taken, on 11 August 2020, a vote was called to stop discussing the boiler issue. This essentially was a vote to close down the discussion generated by the Claimants' protected disclosure about the boiler and it was successful (unanimously). The Board had clearly had enough of the Claimants raising that issue.

202. Although Mr McGrath told us that he had investigated the issues raised by the Claimants and found that the allegations of fraud were unfounded, we have seen no evidence of any such investigation. Indeed, the extent of it seems to be that he asked and was told by Camdon that what had happened was "standard practice". It is not clear precisely what is said to be "standard practice" and no corroborative evidence was ever adduced. It is not surprising the Claimants continued to be sceptical. In short, the Respondent appears to have given the Claimants' disclosures short shrift and at least some of the Board appeared irked by them.

203. Further, the decision to dismiss on redundancy grounds was rushed, to say the least. The proposal was made on 11 August and the decision taken in the same meeting. There was no attempt at consultation or reflection. This is also a factor that may point to there being another reason for the decision.

204. There being evidence capable of establishing that the Claimants' whistleblowing was the sole or principal reason for the dismissal, the burden is on the Respondent to establish that the sole or principal reason was in fact redundancy. If it does not, it is open to us to find it was automatically unfair under s103A.

205. Although we found this a difficult issue, we have concluded that the Respondent has established that the sole or principal reason for the dismissal was redundancy and not the protected disclosures the Claimants had made.

206. We must consider what was the reason for the decision makers in this case. Those who made the decision to dismiss were those who voted in favour of dismissal at the meeting on 11 August 2020. The decision was a collective one, not an individual one.

207. As at 11 August 2020, the Club essentially had no money at all and no money coming in. It had been closed since March. It was in a lot of debt. From 1 August,

keeping the Claimants on the payroll had started to cost the Respondent, albeit not significant sums, and those costs were going to increase from 1 September and again thereafter when a contribution to salary was going to be required. The Club had no money to fund even that small contribution. Although it was discussing opening in September, it was not clear to what extent it would be able to do so nor what revenue it may be able to generate. Discussion about the bank account balances and current debt dominated the discussion on 11 August. The conclusion of that discussion, and what was undoubtedly in the mind of those at the meeting, was that the Club could no longer afford to pay the Claimants or indeed any of its bills or debts which were believed to stand at over £20,000, though were in reality were more. Although there were objections, no-one objecting was able to articulate a suitable alternative to redundancy.

208. The only other member of staff had already been dismissed in February, because the Club could not afford to pay her.

209. Although it is clear there was some ill feeling towards the Claimants arising out of their protected disclosures, in particular from Mr Chilvers, we conclude that had been overtaken and superseded by something more fundamentally important, namely the Club's apparent insolvency. There is no evidence that Mr Chilvers or Mr Hogarth for that matter had discussed the Claimants' whistleblowing with the other Board members and no cogent evidence it, rather than the more pressing financial situation, that was at the forefront of their minds.

210. The Club had functioned on limited income and savings for some time. This had resulted in the Claimants being irregularly and sometimes improperly paid. However, the onset of Covid effectively tipped it over the edge. It could no longer afford to keep the Claimants.

211. We accept that Mr McGrath's proposal was a genuine one made in good faith born out of the belief that the Club could no longer continue to afford to pay the Claimants even though the majority of their pay was coming from the government, and that it could survive without paid employees. When the Club did eventually reopen, whenever that was to be, the proposal was that the Club would survive on the goodwill of its unpaid directors and members. As such, the proposal was premised on the basis that the Club's requirements for employees to carry out the work that the Claimants have been doing - managing the Club - had ceased or diminished. That is in fact what happened in practice, the Claimants were not replaced.

212. The vote to stop discussing the boiler issue was taken because it was something that had been raised on numerous occasions at numerous Board meetings without real progress or resolution and was continuing to occupy the Board. Further, once there was a unanimous vote for it to be put to bed, there was no need then to take the draconian step of dismissing the Claimants to ensure the same.

213. During the hearing, it was suggested by the Claimants' representative that their dismissals may have been connected to this Sport England investigation. It was suggested that if the Claimants repeated their disclosures to Sport England, that would be potentially damaging to the Club and in turn to the football clubs. The football club representatives therefore had a reason to want to dismiss the Claimants to avoid that happening. There are a number of problems with that theory:

    a. Although the other football club representatives may have had a reason to want to see the back of the Claimants too, there is no cogent evidence that they in fact did take the decision to dismiss on that basis rather than the more obvious and pressing reason being the Club's dire financial situation. The Claimants' case is based on supposition, not cogent evidence;

    b. the Claimants' s103A case is that they were dismissed because they made protected disclosures to their employer in the past, not because the Respondent feared they would make different protected disclosures to Sport England in the future;

    c. As Mr Chilvers said, if the Claimants were no longer employees, they would be more likely to say damaging things about the Club than if they remained employed by it so dismissing them would be a poor way of silencing them;

    d. We do not accept the football clubs acted as a cohesive whole. There were different individuals with different interests. Mr Foley himself had previously reported Mr Hogarth to Sport England in relation to alleged mismanagement of the Club. It is unlikely he would have agreed to dismiss the Claimants, the only employees, in order to scupper an investigation by Sport England into Club mismanagement;

    e. Mr Hogarth, who had perhaps the most obvious reason to want to dismiss the Claimants because of their protected disclosures, did not vote at the meeting and his proxy vote was not used by Mr Chilvers.

214. We do not consider the Claimants have established sufficient evidence to be capable of showing that their assertion of the statutory right not to have their pay deducted was the sole or principal reason for dismissal. They had been complaining about this for some time and it was accepted that they had not been paid properly by Mr Hogarth because finances did not permit them to be. The assertion of this statutory right had fewer negative implications for the Club and individual Board members, there was less of a reason for them to be motivated by it to dismiss. The Claimants' complaints about their pay did not feature in the same way as their protected disclosures in the February and August meetings. This was not the sole or principal reason for dismissal and as such, the s104 ERA claim fails.

215. We conclude that the sole or principal reason for dismissal in the minds of those who voted for it in the 11 August 2020 meeting was redundancy.

Fairness of Dismissals

216. We are in no doubt that the dismissals were unfair. The decision to dismiss was taken on 11 August 2020. It was not a provisional decision pending consultation, it was a decision to issue them with notice of redundancy from 17 August. In the event, the Claimants were not formally notified that they were being redundant until 19 August 2020, by Mr Foley.

217. There was no warning, no consultation and no discussion or meaningful consideration of alternatives. The proposal and decision was made after only limited discussion in the meeting on 11 August.

218. On appeal, the unfairness was recognised in Ms Clohessy's report and there was a recommendation to reinstate the Claimants and follow a correct redundancy process.

219. We reject the submission somewhat tentatively made by the Respondent that following a fair procedure would have been futile or useless in this case. This is not an exceptional case where the complete absence of any procedure can be regarded as reasonable. The Respondent's pleaded case was not that consultation was futile but rather it was carried out by Mr Bennie.

220. Although the Club had no money, it was considering opening again on a limited basis. As such, some albeit perhaps limited income could have been foreseen in the foreseeable future together with a need for some Club management work. The Respondent only had to finance a small part of the Claimants' salary. It may have been that consultation resulted in them being willing to reduce their hours / pay. Consultation could perhaps have been given to only one of them being made redundant if limited hours were required. Further, the grant application still had not been, from the Club's perspective, determined and consultation could and should have taken place whilst that was investigated and resolved. Had it been known that the Club in fact had been awarded £25,000, as Mr Kuzel said: "how we went about things might have been different". No decision ought to have been taken until that was resolved.

221. We therefore conclude the dismissal of both Claimants was unfair.

The Polkey Issue

222. The parties agreed that although a remedy issue, we ought to make findings on **Polkey** at this stage. We must consider what would likely have happened had the Respondent acted fairly.

223. On 11 August 2020, the Board was discussing what it needed to do to get the Club open with the minimum amount of expenditure. At that time, the national Covid situation was looking brighter. The Eat Out to Help Out scheme had recently begun and on 14 August 2020, only a few days later, lockdown restrictions were eased. The possibility of an income stream, even if limited, was on the horizon. Moreover, the Board was told an application for a grant had been made and the Club was waiting to hear about it. No-one had yet

investigated what had happened to that application for what would have been a lot of money for the Club - £25,000.

224. We are satisfied that had the Respondent acted fairly, on 11 August 2020 it would have gone no further than agreeing to start a period of redundancy consultation with the Claimants. At the same time it would have begun to investigate the position in relation to the missing grant response. That would likely have taken a number of weeks to resolve. Had the Respondent done so, it would have discovered that it would shortly acquire £25,000 more than it believed it had. Although it had substantial debts, the contribution to the Claimant's salaries that was required from 1 September 2020 was only 10% i.e. £250 a month. Had it acted fairly, we conclude it would have retained both Claimants whilst the prospect of an imminent opening remained viable. Mr Kuzel accepted that had the Club been aware it was £25,000 better off than it had appreciated, things may have worked out differently.

225. However, as time went on, Covid rates began to rise and further restrictions were introduced. The Rule of Six was introduced on 14 September and further restrictions were announced in England on 22 September. On 30 September, the Prime Minister announced the UK was at a critical moment and he would not hesitate to impose further restrictions. The direction of travel was clear.

226. Further, during this period, we think it likely the Club would have discovered, as it did, that its debts were even greater than it had first appreciated and greater than the £25,000 grant sum.

227. In our judgment, all of this would have ultimately caused the Respondent to conclude, after an extended period of consultation and investigation, that it could not afford to retain the Claimants and indeed that there was no longer a need for them as the Club's opening and management ought to be covered, as best it could be, by unpaid Board members giving up their time, which is what happened.

228. Doing the best we can, we conclude that had the Respondent acted fairly it would have retained both Claimants throughout August and September but the redundancy consultation process would have concluded in mid-October, following Covid developments, the resolution of the grant issue and the discovery of additional debts, with the Claimants being issued with notice of redundancy. As such, had the Respondent acted fairly the Claimants would have remained employed for a little over two further months and then would have been issued with notice of dismissal.

S38 Employment Act 2002

229. The Respondent was in breach of its duty to give the Claimants written statements of their initial employment particulars and written statements of particulars of change to their employment particulars. The draft documents prepared by the Claimants was never finalised or formally issued to them. When the pay arrangements changed (albeit not the overall sum), no further documents were issued.

230. In our judgment, there are no exceptional circumstances that would make it unjust or inequitable to award the Claimants the minimum sum, two weeks' pay. Equally, it is not just and equitable to award the higher sum of four weeks' pay.

231. Although they were not issued with a written statement of employment particulars, the document they had prepared was agreed in principle and they worked to it. The Respondent is a small sports club with no HR function and a Board comprised of volunteers. The Claimants were the only employees who had shared responsibility for management of the Club.

232. The Tribunal awards each Claimant two weeks' pay pursuant to section 38 of the Employment Act 2002.

Employment Judge Sugarman
Dated: 5 June 2023