



EMPLOYMENT TRIBUNALS

Claimants: Mr John Clayton
Mrs Julie Ellis-Clayton

Respondents: Mr Brian Firth, Secretary
Mr Brian Grundill
Mr Darren Hooper
Mr Richard Smith
(in their capacity as Committee Members representing the Trustees, Members and Committee of the Lowood Club, Deepcar, Sheffield)

Heard at: Leeds (by CVP) **On:** 6-8 July 2021

Before: Employment Judge Parkin (sitting alone)

Representation

Claimant: Both in person
Respondent: Mr A Williams, Solicitor

JUDGMENT

The Judgment of the Tribunal is that:

- 1) Mr Clayton was not unfairly dismissed for the reason or principal reason that he had made protected disclosures; his unfair dismissal claim is dismissed;
- 2) Mrs Ellis-Clayton was not unfairly dismissed for the reason or principal reason that she had made protected disclosures; her unfair dismissal claim is dismissed; and
- 3) The claimants' breach of contract/notice pay claims and unlawful deduction from wages claims are adjourned to be heard on 18 August 2021 by video hearing.

REASONS

1. This was the final hearing of claims by the claimants that they were unfairly dismissed for having made protected disclosures with ancillary monetary claims for shortfall in notice pay and unlawful deduction from wages. Mr

Clayton who was the resident Club Steward presented his claim on the 13 July 2020 and his wife Mrs Ellis-Clayton, a member of the bar staff, presented two claims on the 24 July 2020. For brevity, Mrs Ellis-Clayton is referred to as Mrs Clayton in these Reasons. Both claimants named individual respondents, who are named in their representative capacity as Committee Members: Mr Firth, Secretary; Mr Grundill (former Treasurer); Mr Richard Smith, Treasurer and Mr Hooper, President, on behalf of the members' club Lowood Club in Deepcar, Sheffield, which is an unincorporated association.

2. The alleged protected disclosures relied upon by the claimants were recorded by Employment Judge Wedderspoon at the first case management hearing on 18 September 2020. At the next case management hearing on 11 March 2021, Employment Judge Jones ordered that they stand as amendments to the claims. Mrs Clayton had initially brought a sex discrimination claim in respect of her dismissal but that was struck out by Judge Jones as having no reasonable prospect of success.
3. The respondents presented responses resisting all the claims and, after the first case management hearing, presented further particulars of the response specifically dealing with the protected disclosure allegations. They admitted dismissing both claimants, contending that they were both dismissed on 14 May 2020, Mr Clayton for serious misconduct in performing his duties and Mrs Clayton because her role was really only to cover her husband and she was no longer needed once he was dismissed.

4. The Issues

The starting point therefore is whether each claimant made protected disclosures within part IVA and in particular section 43B of the Employment Rights Act 1996 and then, if so, whether the respondents dismissed each claimant for the reason or principal reason that the claimant had made a protected disclosure or disclosures, which would be an "automatic" unfair dismissal for that inadmissible reason applying section 103A of the Act. This form of unfair dismissal claim does not require two years continuous service, which both claimants lacked.

The issues are taken substantially from EJ Wedderspoon's Case Management Order (with some revision and reordering).

4.1 Protected disclosures?

4.1.1 With the burden upon him to prove it, did Mr. Clayton make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996 when:

- i) On 18 March 2020 he raised a written grievance alleging that Mr. Firth had threatened to assault him on 17 March; (s.43B (1)(a)); and
- ii) On 11 May 2020 he raised concerns in his documentation for the disciplinary hearing that the fire service had not inspected the premises (open to the public) for 5 years and alleging that health and safety recommendations made by the fire service had not been followed by the

respondent and further alleged that the premises were at risk of flooding (s.43B (1)(b) and /or (d))?

Mr Clayton acknowledged that a third written grievance made on 4 June 2020 to the effect that he was being evicted from the premises contrary to Government regulations that no tenants should be evicted during lockdown could not have been a protected disclosure which was a reason for dismissal, since his dismissal was on 14 May 2020.

4.1.2 With the burden upon her to prove it, did Mrs. Clayton make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996 when:

- i) On 11 May 2020 she raised concerns in her documentation submitted as part of her husband's rebuttal of the disciplinary allegations, that the fire service had not inspected the premises (open to the public) for 5 years and alleging that health and safety recommendations made by the fire service had not been followed by the respondent and further alleged that the premises were at risk of flooding (s.43B(1)(b) and/or (d); and
- ii) again on 11 May 2020, in that documentation, when she disclosed that Mr. Firth was removing petty cash from the club without authorisation or justification (s.43B (1)(a))?

4.1.3 In each case, did he or she disclose information?

4.1.4 If so, did he or she believe the disclosure of information was made in the public interest?

4.1.5 Was that belief reasonable?

4.1.6 Did he or she believe it tended to show that a criminal offence had been, was being or was likely to be committed or a person had failed, was failing or was likely to fail to comply with any legal obligation and/or the health or safety of any individual had been, was being or was likely to be endangered.

4.1.7 Was that belief reasonable?

4.1.8 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

4.2 "Automatic" Unfair Dismissal, for the principal reason of having made a protected disclosure, section 103A of the Employment Rights Act 1996.

4.2.1 There is no dispute that the claimants were dismissed. Was the reason or principal reason for each claimant's dismissal that he or she had made protected disclosures? The burden of proof is upon that claimant to show this.

4.2.2 If he or she does so, that claimant will be regarded as unfairly dismissed.

4.2.3 As a remedy issue, if the protected disclosure was not made in good faith, compensation could be reduced by up to 25%.

5. The hearing

The hearing was by video remote hearing over 3 days. Whilst it was originally intended to deal with all claims at the hearing, I explained to the parties before submissions on day 3 that I would initially deal only with the main unfair dismissal claims. I gave my judgment that day, with a summary of my fact-finding and my conclusions; to the extent that these written Reasons deviate in any way from the oral content on day 3, these are my full and definitive Reasons.

6. There was an extensive Bundle of documents (1-560). During the hearing, Mr Firth also provided a full copy of the Government guidance the Club received about the Coronavirus Job Retention Scheme (furlough scheme) in late March 2020. I was not generally impressed with the respondents' preparation for the hearing: three of their witness statements were exceptionally brief and (although not specifically required under the 2013 Rules) witness statements usually bear a date and signature and, when prepared by professional representatives, often a statement of truth; their statements contained none of these. Moreover, although cross-examination of the claimants was limited, at times the case put contradicted even that pleaded by the respondents and some of their own documents in the bundle.
7. The Bundle included many letters and statements from club members and former employees primarily put forward by the claimants to support Mr Clayton's case against misconduct allegations internally or more generally supporting their version of events or establishing the good running of the club and good character. Most were prepared for the Tribunal proceedings; indeed one came from a member of the Chartered Institute of Personnel and Development and read more as a written submission than witness evidence. While most were very supportive of the claimants and some (especially from a former Steward whose contract had been terminated by the club) were highly critical of Mr and Firth, this was not always the case. I was wary of this evidence and explained to the claimants that, since they came from individuals who did not attend to give oral evidence at the hearing and to open themselves to challenge and questions, the same weight could not be attached as for witnesses giving oral evidence; the claimants acknowledged this. Nonetheless, those letters and statements did provide some support for the account given by both claimants about the role of Mrs Lyn Firth (who was neither a witness nor a committee member of the club); although Mrs Firth did not attend or give evidence at the hearing, there was substantial evidence about her behaviour from which I found it both appropriate and necessary to make findings of fact.
8. During the hearing I pointed out to both claimants that they should try to maintain focus and clarity when questioning witnesses since they often failed to highlight their allegations of having made protected disclosures and the importance of those in respect of their dismissal. At times, I needed to

lead the questioning of the respondents to ensure their evidence was tested in relation to the claimants' case; earlier I had questioned the claimants too in some detail, since they were only lightly cross-examined.

9. The application to amend

9.1 Late in his oral evidence, Mr Clayton made an application to amend his claim to include fresh allegations of having made protected disclosures which caused his unfair dismissal in separate emails/letters on the same theme where he challenged the non-payment by the respondent of furlough payments for the initial period when staff were told not to attend work at the club. He relied on emails dated 10 April, 14 April, 28 April, 1 May and 4 May 2020 which were not newly discovered by Mr Clayton but are in the Bundle; on closer examination the 1 May email does not relate to pay but contains details of references and 4 May should more properly refer to Mr Clayton's full letter/statement of 5 May 2020. The respondents objected to this late application on the basis that the claimant had every opportunity to raise these matters earlier; doing so now would give rise to uncertainty and prejudice their defence to the claims and there could be no fair hearing if the application was granted.

9.2 In determining this, I had full regard to the overriding objective and the long established EAT guidance in the case of Selkent Bus Co Ltd v. Moore which showed the Tribunal's discretion to grant an amendment must be exercised judicially having regard to all the relevant circumstances not least the nature of the amendment, the applicability of any time limits and the timing and manner of the application. Whilst not seeking to introduce a new cause of action, Mr Clayton sought to rely on a new basis supporting his claim of automatic unfair dismissal, almost a year after commencing his claim and over nine months since the first case management hearing. I had no hesitation in rejecting the application made exceptionally late in the proceedings with the possibility that it may even have delayed or lengthened them. There was no explanation for the lateness and all protected disclosures relied upon should have been identified at the case management hearing on 18 September 2020 or soon after. Judge Wedderspoon had clarified then the protected disclosures relied upon with each claimant and the resulting Order expressly notified the parties that the issues to be decided (whilst still then provisional since the respondent had leave to amend its response) were set out in the order and would be treated as final unless either party thought the list was wrong or incomplete and raised that promptly by 25 September 2020. No query was raised by Mr Clayton nor was there any discussion on 11 March 2021 before Judge Jones suggesting that the protected disclosures were wrongly or insufficiently identified; instead, they were given substance by being treated as amendments to the claim forms. In those circumstances, it would be wholly unfair to the respondent to include new allegations of making protected disclosures alongside those already identified as forming the basis for Mr Clayton's claim of automatic unfair dismissal.

10. Witnesses and credibility

10.1 Both claimants and all 4 respondents gave evidence on their own behalf. I considered that both claimants were trying to give their honest account of what happened and their interpretation of it to the best of their recollection. I was not satisfied this was the case with the respondent's witnesses. In short, Mr Firth was keen to minimise his central role in decision-making and the other committee members were keen to suggest that they played a full role, which was never the case.

10.2 Mr Clayton's evidence in different forms was very significant. In oral evidence, he said: "I am saying I was dismissed because Brian Firth saw me as a troublemaker in bringing things to light about his wife and procedures" (an assertion considerably wider than saying his making protected disclosures was the principal reason for his dismissal). It was only when I pointed out to him the inadmissible protected disclosure basis of his case that he replied: "I believe that is a reason for my dismissal". Later he gave evidence: "I never mentioned the fire problems when I had my meetings about Mrs Firth and Mr Firth - I felt they were getting sorted. In my earlier evidence (under cross-examination) I was just focussing on the fire precautions, but things were going wrong between myself and Mr Firth long before that... I have given the wrong impression that the fire thing was the first thing. The fire thing came way down the line...". And: "I believe the real reason for my dismissal is that I was viewed as a trouble causer and the club would need to have been closed by the things I was bringing to light. I think I had to be silenced...".

10.3 He went on to give evidence that he had telephoned Mr Grundill when a copy of a letter dated 19 March 2020 apparently sent to him by Mr Grundill was disclosed during his Subject Access Request pursuant to the Data Protection Act, some months after his dismissal. He had recorded and transcribed the telephone conversation during which Mr Grundill had expressly denied sending him that letter and had told him he was in hospital at the time with sepsis. Mr Clayton was wholly convincing on this point and identified that the letter in the Bundle (163) purporting to be from Mr Grundill twice spelt his name wrongly. He went on: "The incident of the flood was the final nail in the coffin for Brian Firth to fire me - it had nothing to do with the fire".

10.4 In his 17-page detailed statement for the internal investigation (196-213), he wrote: "Looking back now, it seems clear to me now that this positive relationship only began to unravel based upon two key events: 1) it became evident to me after several months on the job, that the stock taker the club had employed was being unscrupulous. I brought this matter to Mr Firth's attention and ultimately the stocktaker was relieved of his duties. 2) I felt that in particular the behaviour of Mrs Firth, who is not on the club committee needed to be formally addressed as her behaviour had continued to be unacceptable despite raising our concerns with Mr Firth. This left me with no choice but to raise a formal grievance against Mrs Linda Firth." Neither of these "key events" were relied upon as protected disclosures in his claim. Similarly in his witness statement at paragraph 44, including his reflections at a time after a threatened assault by Mr Firth on 17 March 2020 and immediately before his first protected disclosure, he

wrote: "It was evident at this stage that Mr Firth had navigated a way of avoiding proper considerations of both our grievances but had every intention of coming back at us to eventually dismiss us by putting down another "marker letter" with trumped up charges that had not been investigated and was issued without giving me an opportunity to respond".

10.5 Finally, on the same point: Mr Clayton's letter dated 5 May 2020 cites many employment protection rights, but no specific mention of having made protected disclosures and being at risk of being dismissed because he had made them (183-187). The letter refers to Mr Firth orchestrating a disciplinary case against Mr Clayton through a third party (Peninsula) to dismiss him and remove him and his family from the tied accommodation; there is a brief reference to "once I started to query certain situations within the club that gave me cause for concern" and to his recent concerns about him and staff not being paid for the first 9 days of lockdown". He contended Mr Firth was acting unilaterally without the support of the committee and sought a postponement of the hearing, making strong points about the irregular procedure being adopted. The employment and statutory rights he cited were options of redress including grievance, wrongful dismissal through a tribunal or civil court, breach of contract, failure to follow ACAS guidelines and good employment practice, protection from harassment and victimisation (Legal Act 1997), wrongful eviction from his tied accommodation at a time of national crisis, failure to pay him for 9 days wages when the club closed due to the Covid-19 crisis and formal written notification to all club members of the steps that have been taken by Mr Firth to drive him out of the club. At that stage, Mr Clayton suggested that restoring his relationship with Mr Firth was still a possibility, which he would engage with the support of the committee.

10.6 Mrs Clayton was cross-examined briefly by the respondent, to the effect that she had only signed a contract of employment in order to fill in for Mr Clayton. She denied this and gave telling evidence that although initially she had filled in casually for Mr Clayton when he drove to collect their granddaughter, from March 2019 (by which time she had a National Insurance number) the club wanted to employ her formally and did so. She saw no reason why it was inevitable for her to be dismissed if her husband was no longer in office. She sought to separate out matters of the fire and the flood and made clear that the first time she spoke about the fire was in her supplementary information for Mr Clayton's disciplinary hearing prepared on 11 May 2020. She gave firm evidence that the reference to the flood risk (page 208, within Mr Clayton's lengthy statement to the Hernandez investigation) was one of the reasons for her husband's dismissal.

10.7 I found the respondents forthright in giving evidence even when speaking about matters they sometimes conceded were outside their expertise. The extreme brevity of their statements revealed not only their inexperience of Tribunal proceedings but an arrogance of approach, very much to the effect: "We are the committee, how dare you question our decisions?" (These are my words paraphrasing the import, not the respondents' own words).

10.8 Curiously since he was the club secretary, Mr Firth was keen to give the impression of being very disorganised and did not have a copy of his final witness statement when he began his evidence. However, I concluded that much of this appearance was disingenuous and designed to obscure rather than assist me to understand the full picture; he showed himself most adept at suggesting that he was not behind planning and decisions he was indeed responsible for and in preparing minutes for committee meetings which never took place. In his witness statement, at paragraph 4, he repeated the often-alleged but incorrect contention that Mr Clayton failed to attend the (grievance) hearing on 4 February and did not provide a reason for why he was absent. At paragraph 15 he referred to “the disciplinary hearing took place, at which I was not present”, explaining that he had then written to Mr Clayton and informed him of the outcome. Only in oral evidence under my questioning did he explain that the process was very different. In fact, he had commissioned and received an external consultant’s disciplinary report which recommended dismissing the claimant, an outcome he certainly agreed with and he then telephoned committee members one at a time to ensure they also agreed; there was no disciplinary hearing other than a telephone meeting or discussion with the consultant, which was more investigatory than final, and no committee meeting (and the Minutes which suggested there had been a committee meeting were misleading). Accordingly, where there was an important factual issue between the claimants and the respondents, especially Mr Firth, I tended to accept the claimants’ version as being accurate; in the event there were very few head-on factual conflicts which needed determining. The instances where I found Mr Firth’s evidence was credible and reliable were when he gave evidence on something he had not prepared for and covered earlier (such as him being recalled after Mr Grundill’s evidence to deal with the circumstances of the 19 March 2020 draft letter which was never sent).

10.11 I could not accept the accuracy of Mr Gundrill’s evidence. He gave the affirmation to tell the truth and verified the content of his brief witness statement which included paragraph 2:

“On 19 March 2020, I wrote to (John Clayton) requesting him to attend the disciplinary hearing on 20 March 2020. The allegations against him were as follows: “Alleged rude and objectionable behaviour, namely on 17 March 2020, (you) used abusive and offensive language in the club bar area in the presence and hearing of customers visiting the company premises” ”.

Within moments of him starting his evidence, he confirmed that he did not write the letter, but that it was written by Peninsula on behalf of the club. Despite his witness statement, that was consistent with what he had told Mr Clayton after the response to the Subject Access Request (with the content of a transcribed telephone conversation Mr Clayton provided unchallenged). Whilst Mr Gundrill consistently in evidence said “I can’t remember” and explained this may be the result of the life-threatening hospitalisation he had undergone very shortly afterwards, at other times he sought to give extensive fine detail recollection of events relating to Mr Clayton's time as Steward. He was simply an unreliable historian.

10.12 Mr Richard Smith gave telling evidence that Mr Firth had saved the club about 10 years earlier. He minimised his own role as Treasurer saying he primarily just did the emptying of the “bandits”, cashing up and banking but had nothing to do with wages; he also gave surprising evidence (completely contradicting that of Mr Firth) that Mr Firth was paid to undertake his role as Secretary.

10.13 Mr Hooper portrayed himself as a somewhat remote President, who was most keen to stress that he never encouraged Mr Clayton to write a letter of grievance to the committee about Mr and Mrs Firth, merely that he had told him the process for doing so. In his statement at paragraph 4 he stated in relation to the decision to dismiss the claimant: “The committee came to the decision to terminate (Mr Clayton’s) employment and being the Chairman of the committee, I was involved in this decision” making no attempt to refer to documentation or to explain that decision-making. In oral evidence, he stated that, as the last person to be contacted by telephone by Mr Firth about the recommendation to dismiss Mr Clayton, he could not have stalled the decision in any event once the other committee members had agreed to the dismissal since it would be a majority decision. He also relied upon the same false contention that the claimant had given no reason for not attending a grievance meeting on 4 February 2020.

11. The facts

From the oral and documentary evidence, I made the following findings of fact on the balance of probabilities:

11.1 The respondents were committee members of the members club Lowood Club, an unincorporated association in Deepcar, Sheffield. According to its undated Rule Book, it is a Working Men’s Club audited in accordance with the Friendly Societies Act 1974, with lady members permitted to join but not hold office. There were nine or ten men on the committee.

11.2 The club was substantially run on behalf of the committee by its Secretary, the respondent Mr Brian Firth, who attended the club frequently. His wife, Mrs Lyn Firth, was not a committee member but regularly attended and also involved herself in the running of the club.

11.3 Members and committee members felt a huge debt of gratitude to Mr Firth who had succeeded the previous Secretary in or about 2010 and, in the words of the Treasurer, Mr Richard Smith, “had saved the club” which was in great financial difficulties under the previous Secretary.

11.4 Mr John Clayton was appointed from 5 October 2018 as resident Steward occupying premises (“the flat”) above the club, with his wife Mrs Julie Ellis Clayton and young granddaughter. He was a former

policeman, with experience of the hospitality and licensing trade. Mrs Clayton, who is American, did not initially work for the club as an employee and did not have a National Insurance number at first.

11.5 Mr Clayton's Statement of Main Terms of Employment of his contract of employment (120-121) signed on 17 October 2018 set out that he was entitled to one month's notice of termination on successful completion of his probationary period. It stated: "You are employed as Steward and your duties will be as advised by the Secretary...". Under Place of Work, although the statement set out: "You will normally be required to work at 11 Station Rd, Deepcar, Sheffield... you will not be required to work outside the United Kingdom", it was a requirement of the position that he live in the flat for the better performance of the steward's duties. The Statement cross-referred to the Employee Handbook in particular for the Disciplinary and Grievance Procedures. As well as organising the liquor and drink supplies for the club, bar staff and shifts, he was responsible for security, such as shutter opening and closing and alarms. Mr Clayton was required to pay a £1,000 stock bond on commencing employment.

11.6 Much of the running of the club operated on practice and procedures which had been followed for many years. Although its Employee Handbook (125-137) ran to over 30 pages, including the disciplinary and grievance procedures and with a page entitled "Whistleblowers", there was a lack of clearly written procedures to be followed in respect of the work of the Steward, such as what to do in the event of an emergency at the premises or need for repairs to the premises or a list of approved contractors to be called out. The Secretary's clear expectation was that he should be consulted by the Steward for authority on all major decisions within the club; although he said the Steward needed the Committee's authority, in reality that meant his own authority since the committee met fortnightly and meetings were sometimes cancelled. The Whistleblowing procedure (129) also set down that in the first instance the employee should report any concerns to the Secretary.

11.7 Mr Clayton made a good start to his role and he and Mrs Clayton became popular with club members, with an increase in custom. Whilst initially relations between Mr Clayton and Mr Firth were good, within a fairly short time after Mr Clayton's probationary period ended in April 2019 they began to deteriorate for a number of reasons. One was that Mr and Mrs Firth may have been jealous of the popularity of the new Steward and his wife. Another was Mr Clayton's reporting of the unscrupulous stocktaker. Yet another was that Mr Firth who was used to having his own way in the running of the club and did not appreciate Mr Clayton seeking to bring in different ways of doing things, later using the expression to Mr Clayton's face that he was a "trouble causer".

- 11.8 Mr Firth but especially Mrs Firth, who was also regularly at the club, actively began to undermine Mr Clayton's work as Steward, such as by running him down behind his back as being "useless" in front of other customers (usually in stronger terms than this and with an accompanying expletive). Mr Firth took to very close supervision of Mr Clayton or "micro-management" of his work and also to arranging matters such as supplier visits to the club when Mr Clayton was not on shift and without his knowledge.
- 11.9 In about January 2019 Mr Clayton had reported his concerns to Mr Firth about the club external stocktaker, who was effectively asking for "backhanders" to ensure the stock record returns were satisfactory. Mr Clayton would not condone this practice. Whilst it took a few months, by April/May 2019, that stocktaker had been dismissed from his role. There was not a significant delay in doing so by Mr Firth; I accepted his unchallenged evidence that he put the matter to the committee at the next meeting and then took it to the club's major supplier for advice. He was to employ a separate independent stocktaker to carry out a stocktake straight after the regular stocktaker had done one; he did so and dismissed the regular stocktaker once discrepancies were found. Whilst this was not a protected disclosure relied upon, it was important because it showed Mr Clayton challenging Mr Firth's way of doing things in the way they had always been done, which Mr Firth did not appreciate; it also meant that Mr Clayton started to question in his own mind whether Mr Firth was always acting promptly and in the best interests of the club and its members.
- 11.10 As the Steward's wife, from an early stage Mrs Clayton had stood in casually for Mr Clayton especially if he was absent picking up their granddaughter (since she did not drive) and this became more frequent and formalised. From 18 March 2019, by which time she had a National Insurance number, she was employed as member of bar staff for 8 hours a week and special events. Her Statement of particulars provided for one week's notice of termination after a month's service and up to two years, with statutory minimum one week for each completed year of service to a maximum of 12 thereafter (122-123). Her Statement recorded: "You are employed as bar person and your duties will be as advised by the Stewardess...". This more formal arrangement was at the request of Mr and Mrs Firth and was unusual since it had not been the Club's practice to employ partners of the Steward before this. Indeed, other committee members were unaware of the more formal employment of Mrs Clayton from March 2019, confirmed in mid-September 2019 when her statement of terms was signed.
- 11.11 Unfortunately, by late 2019, Mr and Mrs Clayton were very troubled about the actions of Mr Firth and Mrs Firth, which by then included explicit criticism of Mr Firth in front of club members by Mr Firth as well as repeated running down of him to club members by Mrs Firth and her instructing staff not to take any notice of him as he "did not know what he was doing". Mrs Clayton was even aware of explicit disapproval

spoken about by Mrs Firth to others about the upbringing of their granddaughter. Mr Clayton tried to raise his concerns about Mrs Firth's comments with Mr Firth but he dismissed the concerns.

11.12 Mr Clayton then raised his concerns with Mr Hooper, the President, about the way he and his wife were being treated by Mr and Mrs Firth. Although this was far from the real position, Mr Hooper told him that Mr Firth "wasn't his boss" and "the committee was" and, if he was to make a grievance, he should put it in writing to committee.

11.13 At least from January 2020 onwards, Mr Firth was able to call upon the services of Peninsula Business Services, an HR and employment consultancy, on behalf of the Club for advice in particular about the position of Mr Clayton.

11.14 On 25 January 2020, with some trepidation and feeling this was a last resort, Mr and Mrs Clayton made a grievance against the comments and behaviour of Mrs Firth (149):

"Please be advised we have written this letter to form a formal complaint about one of your members, Mrs Linda Firth. This letter comes after much thought and several less formal attempts to remediate a situation we have come to view as unacceptable.

To put it as simply as possible, we can no longer stand by and allow Mrs Firth to publicly and continuously malign John in his role as steward of the Lowood Club.

In the past it has come to our attention from various sources that Mrs Firth has commented negatively about how we keep our home, who we have visit our home and how John manages the bar at the Lowood. Until quite recently we to chose to "take the High Road", ignoring these comments or laughing them off; but we are currently hearing about more and more of these episodes from customers and or guests, who reach out to both of us, out of genuine concern for our well being as well as frustration rather than coming to the club to relax and enjoy a drink, they are instead exposed to an evening of complaints about John and his ability to steward from Mrs Firth.

We are both upset so upset by this turn of events: we ... love living and working at the low wood and have been overwhelmed by the kindness and camaraderie we have received from the staff, members in the committee. Rather than allow this one unpleasant element ruin what we hope has been a mutually rewarding situation, we come to you as a last resort, hoping that this problem may be remedied as quickly and calmly as is possible. We both thank you in advance for your attention to the above".

Mr Clayton passed the letter direct to the President, Mr Hooper. This was not relied upon as a protected disclosure within these proceedings.

11.15 On 28 January 2020, there was an agreed action plan for fire safety at the Club, following a fire inspection on 22 January 2020. During the inspection, the fire safety officer told Mrs Clayton not the flat had

never been included in previous fire safety inspections, which had not been held for several years. Afterwards when Mr Firth raised it, the committee readily agreed to the fire alarm and heat sensor requirements which involved fitting rewiring in the flat and this work was complete by late April/May 2020. In the event, Mr and Mrs Clayton did later experience problems with the heat sensor during their occupation of the flat following dismissal.

11.16 Mr Firth was made aware of the grievance complaint and Mr Hooper brought it to a committee meeting on 28 January 2020. By this time, Mr Firth was receiving employment advice from Peninsula (as he told Mr Clayton and as is reflected by a notation on p.152). Rather than move it away from Mr Firth since it concerned his wife, Mr Firth was permitted by the committee to take on the grievance and deal with it.

11.17 On 30 January 2020, Mr Firth told Mr Clayton he (Mr Firth) would be dealing with the grievance against Mrs Firth. Mr Clayton questioned the conflict of interests which was apparent to him and reluctantly agreed to attend a meeting with both Mr Firth and Mr Hooper later that day, but Mr Hooper did not attend. Mr Firth told him Mr Hooper could not attend and called the claimant a “trouble causer”. He suggested that Mr Clayton should himself have the responsibility of speaking with those members who had reported Mrs Firth’s comments to him, obtaining statements from them and bringing them to a meeting before the committee.

11.18 At the end of the 30 January meeting, Mr Firth went on: “You had better read this” and handed Mr Clayton a letter dated 30 January 2020 (151-152). This letter, expressly described as not a formal warning or part of the disciplinary procedure but to be kept in Mr Clayton’s personnel file, results from a concern raised that he had been drinking whilst he was working on shift. Mr Clayton rightly viewed it as a significant warning letter/pre-disciplinary letter. It had been written for Mr Firth by Peninsula or with Peninsula support when he was taking advice, following a comment by a member about Mr Clayton going back to serve behind the bar on a Sunday afternoon/evening after earlier drinking with family whilst not serving. It was a firm rule of the club that bar staff should not serve when they had been drinking alcohol. The letter included:

“This letter is only advisory to ensure we are all working from the same page, but the offence of working under the influence of alcohol is classed as gross misconduct. on this particular occasion I have decided not to proceed with formal disciplinary action...”.

11.19 The concern raised by a member (a former employee) was seized upon by Mr Firth, although that employee later on 10 February 2020 wrote a note (153) explaining that her comment had been “taken out of context as an official complaint” against Mr Clayton. If any initial letter from the member was received amounting to a complaint about Mr Clayton serving at the bar after he had been drinking, no such letter was produced in evidence and I concluded that either it never existed or there was a breach of disclosure by the respondents. There was no change of

direction by the respondents once the individual wrote and made clear that she was not making an official complaint. In any event, Mr Firth's actions were an obvious reaction to the claimant's letter of grievance about Mrs Firth.

11.20 On 31 January 2020, the claimants wrote to the committee (152a-b) describing themselves as baffled by Mr Firth's actions. They said they had tried several times verbally to raise their concerns about Mrs Firth's behaviour and then, when it escalated, written a formal complaint to the committee and that Mr Firth appeared to be acting more as a "defensive husband than the Secretary of the club". Whilst this is not relied upon as a protected disclosure, it again shows the claimants standing up for themselves.

11.21 When the grievance meeting was re-arranged for 4 February 2020, Mr Clayton was unable to attend because he and Mrs Clayton had a pre-booked engagement, which he promptly told Mr Hooper about, as was accepted by the respondents (157). Nonetheless, Mr Gundrill and Mr Hooper attended and professed themselves disappointed at the claimant's absence on this occasion. Indeed, his non-attendance was expressly criticised by Mr Firth and Mr Hooper in their witness statements and then in the respondent's response.

11.22 It was arranged that Mr Clayton would attend a full committee meeting on 11 February 2020. He understood it would deal with his and Mrs Clayton's grievance about Mrs Firth, his concern at the "non-warning" letter and the fact that it was being said by Mr Gundrill that he had failed to attend on 4 February. He took as a witness a member, Mr Phil Smith (156). The meeting was wholly unsatisfactory, followed no meaningful process and Mr Smith and Mr Clayton felt some Committee members were drunk. When the claimant started to talk about more general concerns about the running of the club (separate from the conduct of Mrs Firth), Mr Firth declared: "I don't have to listen to this..." and Mr Grundill who was chairing the meeting told the claimant he was only entitled to raise his complaint about Mrs Firth. The committee were not prepared to listen to his concerns, although some appeared supportive and one member even declared; "John, we luv ya". Mr Andy Rose, Vice-President, announced that the committee were very happy with Mr and Mrs Clayton.

11.23 On 3 March 2020, Mr Clayton attended another committee meeting, this time accompanied by Mrs Clayton. Again the meeting, which Mr Gundrill chaired, was unstructured but Mr Clayton understood that it would result in an official letter from the committee to Mrs Firth about her behaviour. In the event, a form of words was agreed which Mr and Mrs Clayton and Mr Firth all signed. The re-written formulation sets out:

"At this meeting (3 March) progress was made. A resolution to this matter was agreed and that Brian Firth would speak to Linda Firth

and request all complaints must go directly to the committee on both John and Julie Clayton must bring to the committee's attention any comments they hear straight away so that problems can be resolved and do not escalate. Both parties have been contacted and agreed this is the way forward". The revised version is dated 6 March 2020. (157).

The claimants signed hoping to have achieved closure and an end to the undermining of Mr Clayton.

11.24 On the contrary, Mr Firth was watching every step Mr Clayton made and looking to highlight any failures on his part. Within 4 days, his report to the committee's meeting on 10 March 2020 included "problems running out of beer etc something most weeks no improvement BF to inform Peninsula (advise)" and "a report on John drinking and working the bar was made BF was left to sort it out. After this report a letter from John brought by DH for the committee's attention regarding Lyn" (158). This pre-dates Mr Clayton's first alleged protected disclosure.

11.25 On 12 March 2020, with Peninsula input, Mr Firth prepared a further letter of concern for Mr Clayton, about running out of drinks: tonic and white wine on 18 January; Newcastle brown ale on 2 February; Magners on 29 February; white wine on 8 March; Corrs Light on 10 March and diet Coke on 14 February 2020. Once again, the letter indicated he had decided not to proceed with formal disciplinary action, but was issuing a reasonable management instruction and should there be any repeat or any misconduct in general he may be subject to formal disciplinary action (160). However, the letter was not delivered until 17 March 2020.

11.26 On 17 March 2020, at the bar, Mr Firth handed the 12 March letter to Mr Clayton. He chose to deliver it where there were witnesses including Mr Richard Smith, the Treasurer, and numerous other members present. Mr Clayton rightly saw it as pre-warning of disciplinary action and was greatly shocked at this letter delivered so soon after the apparent resolution of difficulties. He became very cross and in his emotion spluttered and sprayed spittle on Mr Firth's shirt. Mr Firth then accused him of spitting and said: "You do that one more time and I'll knock your fucking block off". Mr Clayton misunderstood the expression "spitting" when Mr Firth had really meant spluttering and leaving spittle on him. Both men were very fired up and not going to back down following the incident.

11.27 Mr Firth desired an investigation or disciplinary hearing for Mr Firth, whose behaviour he considered rude and aggressive and sought advice on this (161). Mr Firth was advised to have another committee member deal with it. Although the advice may have been to call Mr Clayton to an investigatory meeting, the draft letter dated 19 March 2020, which was drafted by Peninsula for Mr Grundill to send (163), referred to a disciplinary hearing on 20 March 2020 and included that it

may result in termination of employment in accordance with the disciplinary procedure. Mr Grundill's name was misspelt in two places. Although pleaded in the response by the respondents as having been sent, the letter was never sent for a combination of reasons: Mr Clayton's own letter of grievance was received and Peninsula advised not to proceed with any disciplinary aspect until the grievance was dealt with and the intervening events of both the Government lockdown and Mr Grundill's urgent hospitalisation for a life-threatening condition.

11.28 For their part, Mr and Mrs Clayton wrote a formal letter of complaint to the committee on 18th March 2020:

"In short, after presenting John with yet another letter from himself, with no reference to the committee, and, after having been told by John that said letter had upset us both, Mr Firth accused John of spitting at him and said if he did it again, "I'll knock your fucking head off" in an extremely aggressive manner.

As the committee it is your responsibility to John, as your employee, to guarantee protection from threats of this nature. We need, in writing, in a timely manner, a response and protocol to move on from this unfortunate event. As it stands now, John does not feel comfortable serving Mr Firth or having any communication with him on or off the premises.

Please note we have contacted the police to report this matter and an investigation will take place..."

This is the first alleged protected disclosure relied upon by Mr Clayton.

11.29 Mr Clayton had indeed contacted the police and made a complaint of a threatened assault by Mr Firth towards him. Later the police interviewed Mr Firth and other potential witnesses including Mr Richard Smith but hastily assured Mr Firth that there was no question of any criminal prosecution against him.

11.30 On 29 April 2020, there was another incident at the club premises. Mr Clayton effectively refused Mr Firth access to the club, with Mr Richard Smith in attendance, using words to the effect: "I do not recognise you as my line manager, you are not trustworthy", which was confrontational and seized upon by Mr Firth.

11.31 Following that and acting upon advice, Mr Firth prepared letters dated 1 May 2020 taking the claimant off furlough arrangements (179) and giving formal notice of a telephone disciplinary hearing, which were provided to the claimant on 4 May 2020 (180-181):

"You are now required to attend a formal disciplinary hearing on Wednesday 6 May 2020...The hearing will discuss the following matter of concern:

1. Alleged rude and objectionable behaviour namely that on 18 March 2020 used abusive and offensive language in the club bar area in the presence and hearing of customers visiting the company premises.

2. Alleged failure to follow a reasonable management instructions issued to you verbal as well as in writing, further particulars being
 - a. a) Your refusal to follow procedure after switching off the alarms, then to open sliding shutter door so that staff can access the club and office,
 - b. b) Your refusal to acknowledge Brian as your line manager,
 - c. c) Last time we met you said Brian was untrustworthy in front of both Richard Smith and Jeff McHale.
3. Alleged failure to follow company procedures namely that you contacted Daniel to conduct some repairs however this was not the designated repair man for that particular issue, when queried by Brian, you stated that "I am in charge and I decided to ask him to do it"....

I have made arrangements for an impartial "face to face" consultant from peninsula to chair the hearing and conduct any further investigations, before providing recommendations...The Consultant is impartial and has had no prior involvement in this matter... if you are unable to provide a satisfactory explanation for the matters of consented out above, your employment may be terminated in accordance with our disciplinary procedure.

There was no further detail about the first allegation; the third allegation related to emergency work Mr Clayton had asked a neighbour and handyman who had often worked for the club in the past to carry out when there had been a leak from the club macerator which had flooded the floor in the flat with effluent.

11.32 On 5 May 2020, C wrote a very strong letter to Mr Firth, the committee and to Peninsula (183-187) in which he referred to victimisation, bullying and harassment in recent months which started when he questioned the inappropriate behaviour of the stock taker. He complained of lack of notice and questioned extensively the procedure which was being followed but explained he would attend the disciplinary hearing. He criticised the running of the club with a lack of transparency and fairness and clearly defined roles for committee members and contended Mr Firth was acting as "judge, jury and executioner". He said he looked for an opportunity for mediation, but explained that he had been advised that he had a number of redress options open if there was "an intent to follow what is a crusade to drive him out of the club". He cited these as Grievance; Wrongful dismissal through a tribunal or civil court; Breach of contract; Failure to follow a CAS guidelines and good employment practice; Protection from Harrison and victimisation (Legal Act 1997); Wrongful eviction from my tide accommodation at a time of national crisis; failure to payment for 9 days wages when the club closed due to the coveted- 19 crisis; formal written notification to all club members of the steps that have been taken by you to drive me out of the club. Mr Clayton was very aware of the role of Peninsula in the background. The letter (183-187) does not refer specifically to protected

disclosures and is not one of the protected disclosures relied upon by Mr Clayton.

11.33 On 5 May 2020, Mr Firth replied saying that the club was a client of Peninsula which provided employment and HR advice, but that the particular service was to be provided by a completely different department to those they dealt with on a day to day basis. The HR Face2Face department would be conducting the interview and following the hearing, their consultant would produce a report of their recommendations of the outcome. It would be the decision of the committee whether to accept those or not. He stated that Mr Clayton would be notified of an outcome in due course, and, should it be dismissal, would be given sufficient notice to arrange alternative accommodation. (188-189)

11.34 In the Bundle there is a document headed: Minutes of Lowood Club Committee Meeting 2020: 6 May 2020 (Group phone call) (190). It names 9 committee members as being present, all of whom have signed the document. Whilst it purports to record "Secretary's Report: All committee agreed with having professional help for the disciplinary we would look at their recommendations", it is a highly suspect document for several reasons: there was no actual meeting and the signatures were plainly added later. Mr Firth in replying to Mr Clayton's second Subject Access Request on 17 July 2020 seeking copies and dates of club minutes where specific reference has been made to John Clayton replied: "Please note that we have already confirmed that this information does not exist, as such, we are under no obligation to collect this information for you". Mr Clayton attended a disciplinary interview with the Face2Face consultant by telephone at 11am on 6 May 2020, so there would not have been a great deal of time for a telephone ring around of all those members if the minute does accurately support at least telephone approval given by each committee member when telephoned individually by Mr Firth. In any event, even though Mr Clayton was not named, the reference to a disciplinary was undoubtedly a reference to him.

11.35 The lack of clarity whether this was a disciplinary hearing or an investigation meeting continued during the telephone call on 6 May 2020 which lasted over 1½ hours. Ms Hernandez, the Face2Face consultant recorded and then transcribed the telephone call (242-267). Mr Clayton was accompanied on the call by his friend Mr Boydon and by Mr Phil Smith. Mr Boydon began by questioning Ms Hernandez extensively about the process which was to be followed. Ms Hernandez made clear she had not yet spoken with Mr Firth, maintaining that she always did her meetings before she spoke with the client and she had only Mr Clayton's contract of employment, the letter calling him to the disciplinary hearing, Mr Clayton's reply to it and Mr Firth's further response to him. She stressed her separation from Peninsula, the advisor to the club, making clear that she could only make recommendations which it was for the employer to consider. She said she would only be considering

the allegations and not their context, a curious and troubling approach since generally allegations of misconduct cannot be wholly removed from the context surrounding them.

11.36 Mr Clayton sought to deal with the allegations as fully as he could. In particular he sought to explain why although Mr Firth was his “go-to person” and manager, in what he regarded as a committee-run club, he had become uncomfortable dealing with Mr Firth who had been responsible for passive aggressive bullying of him. He maintained he had never refused to accept Mr Firth as his line manager but because of all the treatment he had receiving in the last few months, the threats and feeling that he had made his mind up to get him off the premises and fired, he needed help from the committee and could not deal with Mr Firth one-to one. He fully explained his position in relation to the emergency call out of the contractor following the flood in April flood and acknowledged that there may have been very minor stock issues at times.

11.37 Ms Hernandez accepted that Mr Clayton could provide additional information about the allegations given the short notice he had off this telephone hearing. Accordingly, he provided a 16-page supplementary written Statement of Case on 11 May 2020 (197-213). This was an exceptionally detailed attempt at refuting the three allegations, providing very extensive background about his employment and the difficulties he had experienced especially with Mr and Mrs Firth. He felt that Mr Firth had started to change his manner towards him after he had reported the unscrupulous stocktaker, second guessing his judgement in a demeaning way and micro-managing him so as to make his job as Steward very difficult. He explained the history of his and Mrs Clayton's grievance about Mrs Firth and the unsatisfactory way it had been dealt with by Mr Firth and the committee. In respect of the first allegation, he put forward his version of the events of 17 March 2020, citing also the accounts of two members who were witnesses. On the second allegation, he pointed to the lack of clear written or verbal instructions about locking up procedures and maintained that he always regarded security as paramount and would permit Mr Firth to enter when informed in advance. He said Mr Firth's recent behaviour had resulted in his severe inability to have a working relationship with him. He denied that he had refused Mr Firth access to the club or told him “I don't recognise your authority”. He pointed out that Mr Firth had wrongly refused payment for the first 9 days of lockdown, with resulting financial difficulty for his family, in acknowledging that he had questioned Mr Firth's trustworthiness. He concluded this point: “I accept that I could have used some different words but given the stress I have been under from Mr Firth, I am worn down by this and I reacted in the heat of the moment to fight for my rights and those of my staff.” As to the third allegation, he strongly maintained that the flood of waste water was a health and safety hazard and he had acted in the emergency to call in a regular tradesman who had carried out extensive work at the club and attended promptly. He stressed the extraordinary circumstances of the emergency

occurring during lockdown. He also cross-referred to Mrs Clayton's statement and the health and safety concerns (as to fire safety) she too had raised. This was the second document containing alleged protected disclosures Mr Clayton relied upon.

11.38 In a statement dated 11 May 2020 for Ms Hernandez in support of Mr Clayton (215-220), Mrs Clayton strongly contended that Mr and Mrs Firth had engaged Peninsula in an orchestrated attempt through a contrived disciplinary process to remove Mr Clayton during the national lockdown, hoping this would go under the radar of club members. In an extensive passage of some 1½ pages, she referred back to the fire inspection on 22 January 2020, when the inspector had told her there was no record of anyone inhabiting the club as residents (and thus no proper fire inspection of the flat). She recorded the need for emergency provision of fire detectors and smoke alarms which had been identified and she criticised the fire evacuation routes from the upstairs flat, saying she felt Mr Firth downplayed the health and safety issues involved. More briefly, she also raised her concerns about the "escalating amount of petty cash slips turned in by Mr and Mrs Firth without any written backup or receipts." She continued: "In the past year, petty cash totalling over £3,000 has been requested by the Firths. Neither John or I are comfortable with this situation, but have continued to add them to the weekly reports, including the night we were locked down, when Mr Firth requested and received petty cash in the amount of £400." These were the alleged protected disclosures, made within her longer statement, which she relied upon in her claim.

11.39 No actual disciplinary hearing worthy of the label was held for the claimant Mr Clayton. Instead, the Face2Face Consultant, Ms Hernandez, prepared a Report dated 13 May 2020 Subject: Disciplinary Meeting 6 May 2020 in respect of Mr Clayton's employment as Steward at the club and the allegations against him. She introduced her role:

"The club instigated its disciplinary proceedings against Mr Clayton to formally resolve his alleged misconduct and in this vein, Mr Clayton was invited to attend a disciplinary hearing and I was instructed within my remit of a Face2Face Consultant to conduct the disciplinary hearing on behalf of the club.

Even though a commercial relationship exists between the club and Face2Face in terms of the provision of a human resource function, the role of the Face2Face consultants is to provide an impartial service. I will provide a report and recommendations on the evidence put forward by both parties and it is for Lowood Club to decide whether it follows the recommendations made for clarity however it is not within the remit of the face to face consultant to investigate whether the evidence provided is genuine but to accept it in good faith, and where no evidence exists, to determine an outcome based on the balance of probabilities supported by reasonable justification."

11.40 She set out:

“Consideration of these allegations included our discussion, his further submissions and the club’s responses to such”. I will state at the outset that Mr Clayton provided more extensive amount of information in order to provide them with some context and background into his perception of the situation, which was very useful as it facilitated my fuller understanding of his matters. However, none of the information provided to me which fell outside the allegations have been investigated or discussed within this report, as this report (might considerations) strictly focused on the disciplinary allegations only.”

Her report therefore was carefully tailored to consider Mr Firth’s allegations against Mr Clayton only, rather than the wider context. Although she purported to confirm that the committee was involved with all matters relating to Mr Clayton, saying these were discussed and minuted, and to refute that a unilateral decision by Mr Firth had been made to instigate disciplinary proceedings against Mr Clayton, she made no reference to the detail of those minutes nor any other evidence of the involvement of the committee. Ms Hernandez wholly failed to explain when and how her original instructions came about and did not list or refer expressly to the documents she had considered, other than attaching the transcript of Mr Clayton’s telephone interview. Although she cited Mr Firth’s responses to Mr Clayton’s comments, she did not explain when she had spoken with Mr Firth or what she had provided to him to comment upon.

11.41 On allegation one, she declined to interview Mrs Clayton or Mr Richard Smith, considering these were partial witnesses. However, since she had no CCTV footage, to resolve the conflict of versions after she had been given Mr Firth's version, she relied on the fact that Mr Firth had sought advice from Peninsula’s advice team in relation to stock and Mr Clayton's adverse reaction on 17 March as satisfying her the allegation was proven:

“Given that the club is aware that any action undertaken must be authorised by the advice team in advance of taking that action, and, any information shared with the advised team must be true and factual otherwise the advice received would be flawed thereby breaching the terms of the contract, I find that on the balance of probabilities, Mr Firth’s version of events is the more likely to have occurred”.

Having regard to the vagueness of the allegation, this was a remarkably self-serving justification from an impartial consultant to support a recommendation of dismissal, effectively relying on the fact the employer had sought the external advice initially in order to discipline the employee as the decisive factor enabling her to find that the alleged misconduct must have occurred. Ms Hernandez even sought to excuse a date error made by Mr Firth (referring to 18 instead of 17 March) by explaining that was the date he received his advice; an explanation not

given by Mr Firth or at least not recorded by Ms Hernandez as having been given by him.

- 11.42 On the second allegation and examples, again she found the allegation proved. Here her recommendation appeared more well-judged; she recorded Mr Clayton's steadfast position about the poor relationship with Mr Firth whose actions had "resulted in a severe inability to have a working relationship with him due to his behaviours in recent months towards me" as supporting the contention of failing to follow reasonable management instructions.
- 11.43 As to allegation three, failure to follow company procedures, in finding the allegation proved, Ms Hernandez explained she saw the point as being that the allegation was not about whether Mr Clayton took the appropriate action in the circumstances but that he failed to seek Mr Firth's permission in advance of doing so, although she failed to acknowledge the emergency and unusual situation under lockdown.
- 11.44 Accordingly, Ms Hernandez recommended Mr Clayton's termination of employment with notice, implicitly acknowledging that even the actions she found proved did not amount to gross misconduct, but feeling that Mr Clayton's inability to recognise Mr Firth as his line manager and finding him untrustworthy made it serious misconduct which did destroy the trust and confidence necessary for the employment relationship to continue.
- 11.45 While she provided a copy of her report with the telephone interview transcript and Face2Face Terms of business to Mr Firth, there is no evidence that she sent all the supporting documentation provided by Mr and Mrs Clayton, in particular their detailed statements, to him. On the evidence before me, I find that she did not do so and that he did not have them when he made his decision to accept her recommendation to dismiss Mr Clayton and his firm steer to the other committee members that they should likewise adopt the recommendation.
- 11.46 In the Bundle, there is another suspect set of committee minutes for 14 May 2020: Minutes of Lowood Club Committee Meeting Thursday 14th May 2020 (Group Phone Call) (277). These name as present 9 committee members, all of whom apparently signed a copy of the minute at a later date, with "Item 3: Secretary's report: All the committee agreed to follow the recommendations from Peninsula termination of employment with notice." Whether this minute was created soon after 14 May 2020 or much later is immaterial. As Mr Firth conceded, the document inaccurately seeks to record that an actual committee meeting at which all members of the committee were present was held and that they together reached a unanimous agreement. The only hint that this was not the case is the reference to a group phone call.

11.47 In reality, since he was keen to adopt and implement the recommendation as soon as possible, Mr Firth rang the committee members named in the “Minute” and told them of the recommendation. It is inferred that he encouraged them to agree with his view that the recommendation must be accepted and Mr Clayton must be dismissed; of course, they did so. The last to be telephoned was Mr Hooper who felt that, even had he wished to disagree (which he did not), he could not have stalled the dismissal since all the other committee members had agreed and there was a clear majority. The other committee members were not shown the report, simply telephoned and given the gist of it and asked to agree with the recommendation.

11.48 As a result, Mr Clayton was dismissed by letter dated 14 May 2020 from Mr Firth (278). Enclosing a copy of the Face2Face report, the short letter stated:

“As you know, we engaged a third party consultant to conduct the Disciplinary Hearing on 6 April 2020. Please find attached their report.

Having carefully considered the report of their findings and recommendations, it is our decision to dismiss you on the ground that the allegations raised against you have been proven to constitute that of serious misconduct, which has served to destroy the trust and confidence necessary to continue the employment relationship between yourself and the Club.

You are entitled to 4 weeks’ notice of termination and your employment will therefore end on 12th June 2020. Please be aware that as the accommodation is part of the working benefit we would expect you to vacate premises by no later than end of 12 June 2020...

You have the right to appeal against my decision introduced to do so you should write to Brian Firth/The Committee within five working days of receiving this letter giving the full reasons why you believe the disciplinary action taken against you is too severe or inappropriate”.

Although referring to notice of termination, the intention and what happened was immediate dismissal on 14 May 2020 with pay in lieu of notice. The letter referred both to “our decision” and “my decision”. Otherwise it generally followed Ms Hernandez’s wording. It made no reference to the input Mr Clayton had given; in particular, there was no suggestion that any consideration has been given to his 16-page statement or that of Mrs Clayton.

11.49 On 20 May 2020, Mr Clayton lodged a strong and detailed appeal (280-3), contending in summary that: 1) the disciplinary report was flawed and there was a failure to carry out a reasonable investigation into the allegations against him, 2) the penalty imposed was too severe, inappropriate and unfair and that 3) the decision to dismiss him was because of the complaints he had raised. On this third point, he cited his formal complaint on 25 January 2020 about Mrs Firth, in January 2020 informing Mr Firth of the recommendations by the Fire Service regarding

the flat which had not been complied with, his formal complaint on 18 March 2020 about Mr Firth's threat to "knock my fucking head off", his claim that he was owed 9 days' pay, and informing Mr Firth on 22 April 2020 about the waste water leak in the property which he had arranged to be repaired, which was a danger to health and safety. He maintained that Mr Firth had berated him for organising to have the emergency work carried out and subsequently took disciplinary action, that the allegations against him were merely a facade behind which his employer had chosen to hide. He said the real reason for his dismissal was the complaints and grievances he had raised. His employer had embarked on witch-hunt against him in response to these complaints and grievances, which has culminated in his automatically unfair dismissal. this was the first time the claimant made an express linkage between his own complaints and disclosures and the decision to dismiss him.

11.50 At page 284 in the Bundle, there is a third suspect set of Minutes: Minutes of Lowood Club Committee Meeting 2020. Tuesday 26th May 2020 (Group Phone Call). They purport to record that the same 9 committee members, who again have signed them, were present and that they received the Secretary's report and "All the committee agreed with the recommendation to turn down the appeal and back the original division (sic) to terminate the employment of John Clayton. No new evidence was brought to appeal".

11.51 On 26 May 2020, Mr Hooper rejected his appeal (285-286), without making clear who had dealt with the appeal or what process had been followed. Albeit in a longer explanation than the dismissal letter, he said the Club accepted the impartial consultant's report as a sufficient investigation and that the report had explained why witnesses were not interviewed. He referred Mr Clayton to the Employee Handbook stating: "We retain discretion in respect of the disciplinary procedures to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service you may not be in receipt of any warnings before dismissal". In respect of previous complaints, he stated: "You have raised complaints with the company previously. The company encourages employees to raise any issues when those appear and therefore you were given opportunity to attend a grievance hearing which you declined to attend. The allegation investigated by an independent consultant was unrelated to the allegation and decision reached. You have now exercised your right of appeal under our procedures and this decision is final". Although some attempt to answer Mr Clayton's grounds of appeal was made, there is no evidence of serious engagement by Mr Hooper or the committee with those grounds and especially with Mr Clayton's final assertion that the real reason for his dismissal was the complaints and grievances he had raised.

11.52 On 4 June 2020, Mr Clayton sent a letter headed; "Further Formal Grievance and Further Whistleblowing Submission" (295-298) stating a grievance that there had been a systematic failure by the committee to consider his grievances and whistle blowing submissions made in writing on 25 January, 31 January and 18 March 2020 and then on 4

May 2020. Originally relied upon as his third alleged protected disclosure, Mr Clayton acknowledged that this letter post-dated the dismissal; it post-dated the rejection of his appeal also.

- 11.53 Although there is a letter of dismissal dated 14 May 2020 for Mrs Clayton in the Bundle (279), that letter was never received by her. Had it been received, she may have better understood the reason for her dismissal. It read:

“Your weekly hours are derived from John’s 40 hours.

With John requesting to reduce his hours to allow him extra time to look after his ill granddaughter; It was agreed temporarily you would cover giving you the opportunity to pick up a maximum of 4 hours.

With John being given 4 weeks’ notice to termination of employment thus his employment ends 12 June 2020. Unfortunately, this means there is no longer any requirement for you to cover the hours John can not work. With this it is with regret that we have to inform you this is your formal notice of 4 weeks to terminate your employment also.

We are sorry it has come to this and wish you the best in your future endeavours.”

- 11.54 In the event, Mrs Clayton was only notified but she had been dismissed on 12 June 2020, when Mr Clayton handed her P45 to her, having been given it to hand to her (522). Dated 10 June 2020, it refers to the date of leaving as 14 June 2020. In reality, whether the decision to dismiss Mrs Clayton was made in May or June and whoever ultimately made that decision, no great consideration was given to it or time was spent upon it, since it was assumed that her employment and loss of employment simply followed that of Mr Clayton.

- 11.55 Mrs Clayton wrote to the committee on 16 June 2020, giving her letter the title “Unfair/Wrongful Dismissal and Breach of Contract” referring to: “Your actions and those of two members of the committee to dismiss me from my employment by issuing me with my P-45 on Friday 12 June 2020 without warning...” contending that these amounted to both unfair and wrongful dismissal and that it also seemed clear to her that the club was taking this action because she had also raised matters of concern in support of her husband including concerns coming within Whistleblowing legislation. She requested reinstatement (301-302).

- 11.56 Mr Firth responded to her letter on 18 June 2020, maintaining that since her employment was entirely dependant on Mr Clayton's and his employment had terminated she was no longer required to assist with ensuring he performed 40 hours a week and her own employment was terminated (303).

11.57 On 22 June 2020, she made a formal appeal against her dismissal, stressing that she was employed in her own right, that the club appeared guilty of indirect and direct sex discrimination and that she had made protected disclosures in her statement of 9 (actually 11) May 2020 (307-308).

11.58 That led to her appeal before Mr Grundill by telephone on 1 or 2 July 2020. She recorded and then transcribed the conversation (314-318). There was no challenge to the accuracy of her notes. Whilst Mr Grundill confirmed that she had not been dismissed for gross misconduct to the best of his knowledge, he was unable to explain fully why she had been dismissed and was out of his depth with the appeal concluding with him telling Mrs Clayton: "Oh I am really lost with this". Instead of dealing with her appeal initially, he offered her the opportunity of a separate appeal to a Face2Face consultant, which she declined (326).

11.59 On 8 July 2020 Mrs Clayton's appeal was dismissed by Mr Grundill, maintaining that she had been issued with a letter of termination on 14 May 2020 giving 4 weeks' notice (327).

11.60 Soon after Mr Clayton's dismissal there was a petition for his reinstatement supported by a large number of members and a call for an Extraordinary General Meeting of the club.

11.61 Some time later, once Mr Clayton's Subject Access Requests had been dealt with and he saw the (draft) letter dated 19 March 2020 (163), he raised it by telephone with Mr Grundill who denied that he had written the letter, saying he was in hospital with sepsis at the time. There was no challenge to the accuracy of Mr Clayton's transcript of the recorded telephone call (486-487).

12. The parties' submissions

12.1 The respondents provided written submissions, helpfully copied to the claimants the night before they made their own submissions. It was acknowledged that the fact that an employer already knew the content of the information disclosed did not prevent it being a protected disclosure. The respondent contended that a claimant relying upon a protected disclosure would generally raise it clearly from the outset within their ET1 claim form.

12.2 Both claimants made closing submissions. Mr Clayton maintained that his authenticity and integrity had come through clearly at the hearing. He had embraced the role of Steward in a committee-run club but had been disappointed to find out the Club's committee had very little involvement in running it; the Secretary, Mr Firth, treated it as his own private property. He had brought a serious series of problems involving the Secretary and his

wife to the attention of the committee but they failed to uphold their duty of care to him and his family. He and his wife found out that Mr Firth had contracted with an outside HR firm, Peninsula, from an early stage to assist his intention to drive Mr Clayton out of the club. Mr Firth's motivation, threats and actions were directly linked to the protected disclosures relating to health and safety, breach of legal obligation and criminal offences. The respondents' whole process was littered with false statements such as the letter Mr Gundrill said he wrote (before later admitting he never wrote it and then blaming Peninsula) and committee minutes written up and signed by members when there had been no meeting. At times, Committee members used to ask him about what was going on, showing they had no idea what Mr Firth was doing. They had not been part of the process to terminate his employment yet sadly they have no moral compass and followed Mr Firth without exception. Mr Clayton's work, performance and conduct had never been held in question as was showed by 140 members signing a petition of support; other factors drove his dismissal, which were directly due to his challenge and concerns raised about matters which carry public disclosure interest. It had come as a harsh awakening and hurtful surprise to discover in a "quaint, old-fashioned working men's club" how devious and malicious one man's all-consuming quest for power could be; that was Mr Firth, with Mr Clayton and his family his unwitting victims.

12.3 Mrs Clayton referred to the club handbook "Whistleblowers" (129) contending that she had disclosed Mr and Mrs Firth habitually took sizeable paid cash payments without detailed receipts, a possible criminal offence. When she was dismissed without notice, she fought for her rights because she felt her dismissal failed to comply with legal obligations. Her appeal before Mr Grundill had to be terminated because he didn't know why she was fired; it was a miscarriage of justice. She made her 11 May 2020 statement during the investigation believing her family's health and safety was in danger and her husband was dismissed partly because of the flood point, having tried his best to protect her home by asking a neighbour and regular club handyman to stop a mascerator flood, she was nonplussed. Her whistleblowing disclosures were not only dismissed without investigation by Ms Hernandez and the respondent's committee men, the information revealed in her statement was actually used against her husband and herself to hasten their dismissals. She only learnt of her dismissal when she received her P45 on 12 June 2020 via her husband, and referred to did she; she pointed to the date of 10 June 2020 on her P45 (522).

13. The Law

13.1 By Section 43B of the Employment Rights Act 1996:

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject...

(d)that the health or safety of any individual has been, is being or is likely to be endangered...”,

13.2 By Section 43C:

“(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ...—

(a)to his employer, or

(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i)the conduct of a person other than his employer, or

(ii)any other matter for which a person other than his employer has legal responsibility,

to that other person...”

13.3 By section 103A:

“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.”

13.4 By section 108:

(1) “Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination...”

(3) Subsection (1) does not apply if—

...(ff)section 103A applies...”.

13.5 The Court of Appeal in Kuzel v Roche Products Ltd [2008] ICR 799 confirmed that where the employee lacks two years’ continuous service, the burden of proving the inadmissible reason of having made protected disclosures lies with the claimant (as in other inadmissible reason unfair dismissal claims where the 2-year service qualification is not met).

13.6 In looking to discern the reason or principal reason for dismissal, I was careful to consider who actually motivated or drove the decision and what their mindset was, consistent with recent reported authorities, such as the Supreme Court decision in Royal Mail Group v Jhuti 2020 IRLR 129.

13.7 I had regard throughout to the Employment Tribunals Rules of Procedure 2013, in particular its overriding objective of dealing with cases justly and fairly at rule 2.

14 Conclusions

14.1 Protected Disclosures: I concluded that Mr. John Clayton made written protected disclosures both of an alleged criminal offence on 18

March 2020 in relation to the incident at the bar the previous day before and in his statement of the 11 May in respect of fire and flood breach of legal obligation and danger to health and safety matters, although at the hearing he did back away from significant reliance on the fire safety aspect as a causative factor in his dismissal. Mrs Julie Clayton also made protected disclosures in relation to the breach of legal obligation and health and safety danger matters and she made another specific disclosure alleging the possible commission by Mr Firth of a criminal offence of taking petty cash.

14.2 In each case, I am satisfied the claimants made disclosures which were more than mere allegations and which amounted to disclosures of information they reasonably believed tended to show the failures or wrongful acts referred to and were in the public interest. Although they arise from their employment relationship with the club, the public interest certainly covers the membership of the club (a significant group of members of the public who had joined the club) even though it was a private members' club. The disclosures were made to the claimants' employer in Mr Clayton's case in his letter of 18 March 2020 and in both cases in their respective statements of 11 May to the respondents' agent Ms Hernandez. Accordingly, I conclude that both claimants established that they had made the protected disclosures set out at paragraph 4.1.1 and 4.1.2 above respectively.

14.3 "Automatic" Unfair Dismissal: Although of course it is not decisive that Mr Clayton failed to refer to and rely upon his making of protected disclosures in his very detailed letter/statement of 5 May 2020 setting out his position in response to the three misconduct allegations, it certainly shows what his thinking was at the time. Likewise, his longer statement to Ms Hernandez for the disciplinary investigation, relied upon the two key events of him reporting the stocktaker, and along with Mrs Clayton, making a grievance about Mrs Firth's behaviour as the two "key events" which formed the basis of his relationship with Mr Firth beginning to unravel; neither of those were his protected disclosures relied on within the proceedings.

14.4 Mr Firth was seen by the committee as someone who could do no wrong, make no wrong decision and whose word was followed. In considering the mindset of the decision makers it is primarily that of Mr Firth to be considered. Although the burden of proof is on the claimants, this is really determined not on the burden of proof but by deciding what the reason or principal reason i.e. the "real" reason for their dismissal was. I have great sympathy for both claimants and if they each had two years' continuous service and had been dismissed in the same circumstances, I would readily have found concluded that they would have been ordinarily unfairly dismissed. I have found gross inaccuracies and inconsistencies in the respondents' case, such as that already noted about the arranged grievance meeting on the 4 February 2020 and the pleaded case that the 19 March letter was sent to Mr Clayton and the very clear effort by Mr Firth to present in evidence Committee Minutes which purported to show a very full involvement from the whole committee in the stages of decision-making.

14.5 However, returning to the primary mindset of Mr Firth orchestrating the committee, I do not find on the balance of probabilities that the reason or principal reason for Mr Clayton's dismissal was that he had made protected disclosures. It is quite clear that Mr Firth was seeking to engineer Mr Clayton's dismissal as Steward well before the first protected disclosure of the 18 March 2020 and, at the latest, by late January 2020. The "writing on the wall" was clear once Mr and Mrs Clayton took the courageous step to complain to the committee about the behaviour of Mrs Firth, the Club Secretary's wife, who was not herself a committee member or employee. That effectively made Mr Clayton's and in consequence Mrs Clayton's position untenable in the long term. That original grievance complaint by Mr and Mrs Clayton about Mrs Firth is not one of the protected disclosures relied upon but caused Mr Firth immediately to act upon some minor concern raised by a member the Mr Clayton had been working the bar after he had been drinking with others in the club; he seized upon this with alacrity and took Peninsula advice at that early stage with the result that Mr Clayton was issued with a "letter of concern", a disciplinary pre-warning.

14.6 Mr Clayton's first protected disclosure was made at a stage when Mr Firth was about to "throw the book" again at Mr Clayton, through Mr Grundill as the committee member calling Mr Clayton to a disciplinary hearing, although the 19 March 2020 draft letter was never sent. However, the outcome was already inevitable and, aside from his protected disclosures, Mr Clayton continued to do things which showed he did not recognise Mr Firth's authority which Mr Firth was able to rely on to achieve his aim of terminating Mr Clayton's employment.

14.7 On 4 May 2020 Mr Clayton was given the letter dated 1 May 2020 calling him to a disciplinary hearing on 5 May, but when he protested vigorously and long in letter form that same day this was hastily changed to become an investigation hearing. No satisfactory disciplinary hearing was ever held and instead Mr Clayton was dismissed as a result of a ring around by Mr Firth when he had possession of a report from the Face2Face consultant Ms Hernandez which was to an extent self-serving. In contrast to the normal disciplinary procedure of clarifying allegations of misconduct before putting them to the accused employee, Ms Hernandez sought Mr Clayton's version upon somewhat general allegations and then sought the comments of Mr Firth before making recommendations. In no way could the reaching of those recommendations or the process followed by Mr Firth and the other committee members in reliance on Ms Hernandez's report be described as a fair process, but that is not the point since this was never an ordinary unfair dismissal claim.

14.8 Analysing the causation of the dismissal of each claimant, I consider that in Mr Clayton's case the die was already cast. Of the two specified protected disclosures, Mr Firth wholly played down the impact of Mr Clayton's 18 March 2020 grievance, disclosing a possible criminal offence, in his evidence; in my view, he was entitled to do so. He had intended to pursue the claimant as a disciplinary matter in respect of Mr Clayton's actions on 17 March 2020 after he deliberately presented a notice to Mr Clayton in the bar in front of witnesses. Although this may have been a very

questionable management procedure, the events that day do no credit to Mr Clayton either since he became angry and spluttered spittle onto Mr Firth, in turn aggravating Mr Firth. When the police investigated Mr Clayton's linked police complaint, other witnesses were spoken to including Mr Richard Smith. That matter was quite understandably taken no further and cannot have had any significant causative influence on Mr Firth's decision to accept Ms Hernandez's recommendation to dismiss and pass it on to the remaining members of the committee.

14.9 Turning to the 11 May 2020 disclosures in the statement provided by Mr Clayton in the investigation, I am not satisfied on the balance of probabilities that Mr Firth ever saw them at that time (still less that the statement was passed on to the other committee members). Ms Hernandez report was completed on 13 May 2020 and Mr Clayton's dismissal was implemented on 14 May 2020, after Mr Firth had made his series of telephone calls to other members of the committee. On this point, I was struck by Mr Firth's evidence when I questioned him about the contents of Mr and Mrs Clayton's 11 May 2020 statements. Ms Hernandez's report does not even cite the attachments or the documents relied upon and deals exceptionally briefly with the information provided by Mr Clayton (and indeed Mrs Clayton) concentrating almost exclusively upon the three allegations Mr Firth had presented her to deal with. I cannot find as a causative link that she passed on Mr Clayton's statement or if she did so that the small sections within that statement which amount to protected disclosures then formed a significant influence on his decision to accept the recommendation to dismiss Mr Clayton and to make that clear to each of the members of the committee by telephone in succession. As already explained, Mr Firth's determination to ensure Mr Clayton's dismissal long predated that time. Although it is right that in his letter of appeal Mr Clayton did make some reference to protected disclosures, he was most unfairly denied any meaningful appeal; Mr Hooper rejected his appeal on paper and again I do not find any causative link between the protected disclosures and the rejection of the appeal which taints the final appeal stage of the dismissal so as to mean that the making of protected disclosures was indeed the reason of principal reason for that dismissal.

14.10 In summary, in Mr Clayton's case, the principal or "real reason" for his dismissal was that it was the culmination of what Mr Firth had been seeking to bring about at least since the end of January 2020, because of challenges to his sole management of the club which Mr Clayton had brought about and the breakdown of their working relationship, especially following his and Mrs Clayton's strong criticism of Mrs Firth in their grievance. The circumstances of the 17 March 2020 bar incident (as distinct from Mr Clayton's protected disclosure about it) and the subsequent difficulties during lockdown, such as Mr Clayton's behaviour on 29 April 2020 or in engaging the local contractor to deal at once with the flooding without first getting authority from Mr Firth, provided ample opportunity for Mr Firth to commence the disciplinary action which resulted in dismissal as he intended. Again, however, the fact that he had made protected disclosures by then was not the reason or principal reason for his dismissal on 14 May 2020.

14.10 Mrs Clayton was not dismissed until 12 June 2020. I was quite satisfied on the balance of probabilities that the letter of dismissal dated 14 May 2020 was not actually delivered to her, a conclusion fully supported by the dates on her P45 and of her letters resisting and appealing against this dismissal were only written by her after 12 June 2020. When that dismissal did come about, it was simply implementing the respondents' intention from when Mr Clayton was dismissed. Although Mrs Clayton was entitled to be offended by the respondents' view of her that she was merely an adjunct to Mr Clayton and not a full employee in her own right, it was abundantly clear from the evidence (and I find as a fact) that even Mr Firth, each of other respondents and no doubt the rest of the committee, saw Mrs Clayton in that way. There was a complete lack of recognition of her having been formally employed and provided with a formal statement of terms of employment six months later; she was viewed as only being cover for Mr Clayton. In her case, too, I am not satisfied that Mr Firth and still more so the other members of the committee actually saw or were aware of the content of her 11 May 2020 statement which included her protected disclosures, even the most important one relating to petty cash. Those disclosures can have had no causative influence upon the decision to dismiss her; the reason for her dismissal was that Mr Firth and the respondents viewed her only as cover for her husband, the Steward, whose employment entirely depended upon his continued employment.

14.11 Ultimately despite my sympathy for the predicament of the claimants and criticisms of the actions and procedure followed by the Club and Mr Firth in particular, I conclude that in each case the principal reason for dismissal was not their making of protected disclosures. This was the only basis for bringing claims that they had been unfairly dismissed since they each plainly lacked the 2-year service qualification for ordinary unfair dismissal.

Employment Judge Parkin

Date: 16 July 2021

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