# THE INDUSTRIAL TRIBUNALS

**CASE REF: 7058/19**

**CLAIMANT:** **Stephen Kelly**

**RESPONDENTS:**
1. **MBCC Foods (Ireland) Limited**
2. **MBCC Costa Ireland Limited**
3. **Kashmiri Foods (Ireland) Limited**
4. **New Costa Wholesale**
5. **MBCC Foods Limited**

# DECISION

The unanimous decision of the tribunal is that, for the reasons stated below, the claimant's claims are dismissed by the tribunal, in their entirety, without further Order.

**CONSTITUTION OF TRIBUNAL**

**Employment Judge:** **Mr J Leonard**

**Members:** **Mr M McKeown**
**Mr E Grant**

**APPEARANCES:**

**Ms Suzanne Bradley, Barrister-at-Law, instructed by MKB Law, Solicitors, appeared for the claimant.**

**Mr Sean Morris of Peninsula UK appeared for the respondents.**

## THE CLAIM, THE RESPONSE AND THE BACKROUND

1. By claim form dated 8 March 2019 and submitted on that date to the Office of Tribunals the claimant claimed against the fived named respondents in these proceedings. The claims included: unfair dismissal and breach of contract unlawful deductions. The details of claim were set forth in the claim form and subsequently clarified in the hearing process. The response made on behalf of Tuli Holdings (Ireland) Limited dated 1 May 2019 and received on that date by the Office of Tribunals indicated that the first, fourth and fifth-named respondents were related companies and had no direct relation to the claimant and the response further stated that the claimant had only ever worked under the second and third-named respondents, who should have been the only respondents listed. It was subsequently agreed between the parties that the sole employer of the claimant for the purpose of these proceedings was the second-named respondent, MBCC Costa

Ireland Limited. The claimant was also a director of the company Kashmiri Foods (Ireland) Limited. There was an issue which ultimately was seen as requiring resolution by the tribunal as to whether the claimant held both the role of employee and office-holder simultaneously at the time of his alleged dismissal and the tribunal shall comment further upon this matter. In the response to the claimant's claim it was denied that the claimant had been dismissed, whether constructively unfairly or at all and it was denied that there had been any breach of contract. Further detail was provided in the content of the response.

2. The matter was case-managed. In accordance with directions, witness statements were prepared and exchanged between the parties. Relevant witnesses attended in person to affirm the contents of their respective witness statements and to give oral evidence under cross-examination and to clarify various other evidential issues. The exception to this was Mr Raju Tuli, who provided a witness statement but who was not called to give evidence. Raju Tuli, since 2014, had been Chairman of Tuli Holdings on a semi-retirement basis. It was accepted by both parties that certain aspects of this witness statement were admissible before the tribunal and thus ought to be considered by the tribunal without contention, notwithstanding the non-appearance of Raju Tuli before the tribunal. The tribunal heard oral evidence from the following witnesses at hearing, who respectively adopted the contents of their witness statements and who were subject to cross-examination and to re-examination, as the case might be. These witnesses were: the claimant; Mr Gareth McKee who was formerly an employee of MBCC Costa Ireland Limited and who was latterly the owner of a firm known as "38 Espresso" (and also for a time a company known as "Curve Coffee"); Ms Viviane Nesbitt who was currently Operations Manager for Kashmiri Foods (Ireland) Limited; Ms Beverley McFall who was currently Business Resource Manager in MBCC Costa Ireland Limited; Mr Alex Lynch who was a former employee of Kashmiri Foods (Ireland) Limited; Mr Michael Conroy who was a director of Kashmiri Foods (Ireland) Limited and also of several companies within the Tuli Holdings group; Mr Sunny Tuli who was the proprietor of the companies within the Tuli Holdings group; and Mr John Carr who was Head of Sales of Kashmiri Foods (Ireland) Limited. John Carr was unable to attend the hearing as originally scheduled on account of illness, but he ultimately was in attendance and gave oral evidence. John Carr also filed a supplemental witness statement making certain amendments to his initial witness statement as provided to the tribunal. As mentioned, a witness statement was provided by Raju Tuli; there was no application for exclusion of any evidence contained in that witness statement by either side and indeed certain of the submissions in the case alluded to part of the evidence contained in that witness statement of Raju Tuli. Accordingly, insofar as material, the tribunal attached appropriate weight to the content of that statement, notwithstanding the fact that Raju Tuli was not called. The tribunal had the benefit of detailed written submissions, with replying submissions in each case (four sets of submissions in all) and the tribunal is most grateful to the respective representatives for the detail and precision comprised within these submissions and this has considerably assisted in the tribunal's deliberations. Finally, it must be mentioned that there was a regrettable, but unavoidable, delay on account of the Covid-19 pandemic restrictions and disruptions affecting tribunal business which has, indeed most regrettably, delayed the production of this decision.

**ISSUES PERTAINING TO THE WITNESS EVIDENCE**

3. It is necessary, at the outset, to make some observations regarding the quality and

cogency of certain parts of the witness evidence. The tribunal begins this task by saying that the tribunal encountered considerable difficulties with the evidence of a number of witnesses. Certain evidence was determined by the tribunal to be lacking in cogency and at times to be evasive, inconsistent, or otherwise unsatisfactory. The significance of this point relates to the fact that this was very much a case where some contended key events or circumstances, which strike fundamentally to the heart of the primary arguments of the parties, were in fundamental dispute. Such evidential difficulty is of course relatively commonly encountered, to a greater or lesser degree. However, in this case it was particularly evident and it must be said to an extent not routinely encountered. The tribunal was thus tasked with very carefully analysing all available evidence pertaining to key events and contentions and with separating out such evidence as was fully or substantially credible and consistent, on the one hand, against certain other evidence which, to a greater or lesser extent, lacked consistency and cogency and which, in some instances, was just not credible. There was a concession made by one witness that he had provided an initial witness statement to the tribunal which contained inaccuracies, which the tribunal can only conclude was a deliberate action at the time of this statement being composed and filed. That witness however did seek to correct this deficiency by filing a supplemental witness statement and thereafter the witness steadfastly maintained that his evidence, as corrected, was fully true and accurate. This correction was made prior to the witness tendering his oral evidence to the tribunal. It is important to mention that the foregoing difficulty encountered by the tribunal was certainly not confined to the evidence of only one side to the case. The tribunal received detailed submissions from both sides regarding issues of cogency and credibility of evidence. All of these submissions have been carefully considered. In what follows, if the tribunal has not expressly made observations regarding postulated inconsistencies or credibility issues as set forth in the respective submissions, it is not to be taken that any such submissions, from either side, were disregarded or were not properly and fully considered in the tribunal's assessment of the entirety of the evidence and the determination of matters of salient fact and the application of the law. In giving an account of how the tribunal approached this task of assessment of the relevant facts from the evidence, it might be helpful for the tribunal to make some preliminary observations regarding the evidence of certain individual witnesses. Insofar as there is not comment made at this point concerning specific parts of the evidence tendered, the tribunal shall endeavour further below to deal more specifically with matters of cogency and credibility, regarding specific matters, in giving an account as to how the tribunal has determined key matters of relevant fact.

4. Commencing firstly with the claimant, one of the more striking aspects of the claimant's evidence was his concession that he was capable of spreading "disinformation" (as he put it in response to cross-examination). This concerned, for example, issues emerging from a documentary record of text messages which the claimant had sent. To give perhaps some specific illustrations, when the accuracy of some text messages sent by the claimant to his former fellow employee, a Mr Alex Lynch, was called into question in cross-examination, at first the claimant provided what were assessed by the tribunal as being evasive replies, stating that he could not explain these text messages; indeed the claimant purported to express some degree of puzzlement. However, later in his evidence the claimant did concede that he had intentionally falsified information sent by him to Alex Lynch (described by claimant candidly as consisting of "disinformation"). The claimant's explanation for this was that he adopted this approach to establish in whom he could place his trust. He therefore conceded adopting this approach in some of his

text message conversations with Alex Lynch. The tribunal noted that these text messages otherwise appeared to be extremely personable, indeed amicable, such as those that might be exchanged between close friends. The same "disinformation" approach appears to have been adopted by the claimant as far as the evidence of certain text messages directed to others demonstrated (for example to an employee called Ms Maxine Dunn to whom the claimant stated (in reference it must be presumed to his interaction with Sunny Tuli at an 11 December 2018 meeting): "*I owe you an apology because I lied to you*"; "*No, not on gardening leave I told him to* […] *off on the day and that he was the biggest prick I had ever worked for*...". Part of this might have been explained by the, perhaps understandable, reluctance of the claimant, for instance, to reveal to others exactly what had occurred concerning the termination of his employment with the respondent. However, in some other text messages the claimant appeared to be quite open and forthright and clearly willing to speak expressly concerning his opinion of the respondent's senior management, in disparaging terms. Indeed the claimant made comments in some text messages (for example with Alex Lynch) demonstrating that he relished any difficulty the respondent might have been facing concerning dealings with other company personnel.

5. Another issue (connected to the clear and obvious embarrassment suffered by Alex Lynch regarding the content of some of these text messages being disclosed evidentially in open tribunal) was the claimant's evidence concerning whether he had deleted any of these text messages. When two separate documentary sources recording these text messages were set side-by-side in evidence, having initially flatly denied that he had deleted any such texts, or later denying that he had any recollection of deleting any such (a slightly different matter), the claimant ultimately made a concession under cross-examination that a text message had been deleted, but he attributed this to it being an accident. The considered assessment drawn by the tribunal from the foregoing matters, and generally from the tenor of the claimant's evidence, was that the claimant was capable of employing "disinformation" in his personal dealings with a number of work colleagues or former colleagues (examples again being Alex Lynch or Maxine Dunn) including some such with whom the claimant had apparently held a close friendship.

6. Also, of note to the tribunal was that, as the hearing proceeded, certain information had to be extracted from the claimant under cross-examination with considerable difficulty and only after a number of problematic and evasive responses had been provided by the claimant under such questioning. In a further, perhaps somewhat bizarre, response to questioning, the claimant maintained that he had not deleted texts but that he had told Alex Lynch that he had done so, in order to "pacify" him, as he put it. In this respect the claimant ultimately conceded that he had lied to Alex Lynch who was, at one stage at least, not only a business colleague but also apparently a very close friend.

7. The tribunal noted yet another illustration. This related to the claimant's response to cross-examination concerning certain documentation relating to a journey made by him to London on 31 March 2016 in the company of Gareth McKee and the fact that the claimant's signature appeared on company expense authorisation documentation. This response to questioning illustrated an endeavour by the claimant to be evasive and to attribute blame for what the claimant stated to be expense allocation mistakes for which others were responsible. In this case it was Viviane Nesbitt, but the claimant's account of the mistaken use of what he stated to be a company credit card was unconvincing. In connection with this and the issue

of whether or not the claimant had taken a day's annual leave in respect of the date of that 2016 London trip, the claimant's categorical evidence to the tribunal was that a colour-coded diary had been maintained in the respondent's office for that year, 2016, and, further, that this diary would have disclosed, without doubt, that he had taken annual leave on that particular date. No other evidence supported this contention. Indeed the only documentary evidence was that of a personal diary maintained by Beverley McFall for 2016, which did not make any reference whatsoever to the claimant taking annual leave on 31 March 2016, the date in question. There was a further matter concerning whether or not pay records did or did not include references to single-day annual leave. However, evidence on this was inconclusive but it did not positively support the claimant. One final illustration, perhaps at this point, is that the claimant maintained categorically, repeatedly and without equivocation, concerning a meeting with Michael Conroy and Sunny Tuli held on 11 December 2018, that this commenced at 10.30am, immediately after the other two had arrived in the respondent's Lisburn office premises. The claimant, further, gave an account indicating that the meeting had concluded by 11.15 am and that he had then left the office premises. The impossibility of this account being correct was demonstrated in the documentary evidence introduced on behalf of the respondent. This showed that Sunny Tuli's Flybe flight (departing Edinburgh at 10.55 am) was scheduled to land in Belfast City Airport at 11.50am. There was no evidence to counter that this timing, as documented, was accurate. Sunny Tuli could not possibly have been in attendance at the Lisburn premises throughout the claimant's stated times for the meeting. This was also supported by other witness evidence. This was so, notwithstanding what the claimant had maintained in his evidence, consistently. For these reasons, the tribunal harboured a number of concerns regarding the claimant's evidence, notwithstanding that he was depicted by his representative in submissions as providing "unimpeachable" evidence or, as it was put, that he was a "strikingly credible witness". The tribunal did not accept that to be the case. This assessment has been taken into account in the resolution of a number of evidential conflicts in the case.

8. The tribunal shall comment further specifically upon certain other issues pertaining to the claimant's evidence. These include the tribunal's factual assessment based upon any available evidence concerning a meeting which took place on 4 August 2016 between the claimant, Gareth McKee and John Carr at Gareth McKee's business premises located at Millisle, County Down, (the premises of 38 Espresso). It was on that occasion that a document was signed by the three (referred to by the parties as a "non-disclosure agreement", hereinafter referred to by the tribunal as the "NDA"). In respect of this August 2016 meeting the evidence of John Carr and the evidence of the claimant stands fundamentally in conflict and the facts of what actually occurred need to be resolved by the tribunal.

9. Turning then to an assessment of the evidence of other witnesses, the claimant's sole witness was Gareth McKee. Gareth McKee's evidence sought to corroborate the claimant's evidence in many respects. Specifically Gareth McKee sought to deny, in support of the claimant, that the claimant had any financial interest or business connection whatsoever with Gareth McKee's company, 38 Espresso. Gareth McKee steadfastly maintained that he had nothing other than a strong and long-lasting friendship with the claimant. He maintained that he had built up the business himself together with his wife, so why would he part with an interest to the claimant? On one specific issue, the tribunal noted that when questioned directly in cross-examination about whether the claimant had told him that he had been "sacked" by the respondent (consequent upon events which occurred on

11 December 2018), Gareth McKee's answer was that he "thought" that the claimant had told him this, but he was no more specific than that. The tribunal noted that specific response and fact that the claimant maintained a close friendship with Gareth McKee, which response was rather curious in context. However, in general terms, Gareth McKee sought to support the claimant. This evidence from Gareth McKee illustrated matters and evidential issues which accordingly require to be assessed in the broader context of all of the evidence and the tribunal need say nothing more about Gareth McKee's evidence at this point, but will mention below further issues arising from the evidence.

10. The respondent's witness John Carr provided some problematical evidence. John Carr regrettably was delayed in his scheduled appearance at tribunal on account of medical issues. His initial witness statement tendered to the tribunal contained what he conceded to be factual inaccuracies. John Carr (prior to his eventual appearance to give oral evidence) then sought to correct matters by filing a supplemental witness statement. This was done towards the conclusion of the hearing, but before his personal attendance at hearing. He provided an explanation, to which the tribunal shall allude below.

11. A particularly key part of John Carr's evidence (in the most part strongly disputed by the claimant) related to a meeting which occurred in 2016. In brief (and these initial facts, of themselves, are not in contention) John Carr had attended a meeting with Gareth McKee and with the claimant at Gareth McKee's Millisle business premises (38 Espresso) on 4 August 2016. At this meeting John Carr had signed a document (the NDA). This NDA was expressly drawn up so as to be between Curve Coffee Limited, of the one part, a company owned by Gareth McKee, and John Carr, of the other part. The document was countersigned by Gareth McKee on behalf of Curve Coffee Limited. Then the document was also signed by the claimant. It is clear that John Carr, for a considerable time, was entirely unwilling to reveal to the respondent's management, firstly, that he had indeed earlier met personally with Gareth McKee in County Cork some time before this August 2016 meeting and that he had then attended a meeting at Gareth McKee's premises in Millisle in August 2016 and, further, that he had there signed the NDA.

12. John Carr via the respondent's representative submitted to the tribunal, initially, a witness statement in effect indicating that he had not had any personal meeting with Gareth McKee prior to the August 2016 Millisle meeting. However, this factual inaccuracy in the initially-tendered witness statement was then subsequently corrected in John Carr's supplemental witness statement. In that supplemental witness statement John Carr did confirm the occurrence of the earlier meeting with Gareth McKee. However, the fact remains that John Carr, firstly (one must presume intentionally) sought to tender a witness statement to the tribunal, knowing that part of the content was inaccurate. The tribunal noted that John Carr had concealed the occurrence of the earlier meeting and the subsequent meeting with Gareth McKee and the claimant at which the NDA was signed - and the existence of the NDA - from Sunny Tuli and his senior management. The reasons for this concealment were explored. John Carr stated that such reasons included, firstly, his real concern about the legal implications of his even disclosing the existence of the NDA, never mind the contents and any potential legal ramifications. In respect of this he had been concerned enough to seek legal advice from a local solicitor, a Mr Coady, in Carlow. Another reason provided was to preserve his own interests and to obviate the risk of adverse consequences upon his career and employment if Sunny Tuli were to become aware of the NDA. A further reason was that he was

more junior in the organisation than the claimant and he was concerned that he might not be believed, in preference to the claimant.

13. Submitted inconsistencies concerning these reasons were set forth in submissions for the claimant. These related, for example, to the absence of any express penalty clause in the NDA and it was accordingly submitted that these concerns were not genuine and were indeed fabricated. However, the tribunal's assessment is that John Carr was genuinely concerned at revealing this information to senior management. Ultimately, according to his evidence, this continuing course of concealment was placing him under very considerable stress and he was hopeful that his (by then former) work colleague, Beverley McFall, would inform Sunny Tuli of the existence of the NDA, thereby enabling John Carr to make a disclosure to Sunny Tuli, without personally having initiated such a disclosure and thus breaching, upon his interpretation, the terms of the NDA. When this disclosure by Beverley McFall then did indeed occur, John Carr provided a copy of the NDA to Sunny Tuli. He also provided a written account of what he alleged had occurred in his dealings with the claimant and with Gareth McKee. In submissions, the claimant's representative submitted that John Carr had lied not only to his employers but also to the tribunal (in the latter case by setting forth the inaccurate portion comprised in the initial witness statement). It was accordingly submitted that the tribunal ought properly to attach no weight whatsoever to any part of John Carr's evidence in any respect.

14. The tribunal was thus faced with a witness who had expressly conceded on a number of occasions in cross-examination that he had been dishonest. To the tribunal he did not appear to continue to be evasive in making such a concession, albeit latterly. He was at this stage forthright and he did give an account of his reasons, notwithstanding these being challenged in cross-examination and in submissions. The issue for the tribunal to determine was thus whether the tribunal ought properly to accede to the claimant's submission that any evidence from John Carr was to be entirely discounted and accorded no weight whatsoever, or whether, nonetheless, some degree of weight might be attached to part of the evidence. There was, for example, the matter of John Carr's account of what he stated had transpired at the August 2016 Millisle meeting where the NDA was signed. In conducting such an assessment, the tribunal noted, specifically, that having made forthright concessions at hearing about the inaccuracy of certain specific parts of his original evidence (particularly the inaccuracy of the statement that he had never met Gareth McKee prior to the August 2016 Millisle meeting and his concealment of matters from senior management), nonetheless John Carr in an unwavering and steadfast manner, under cross-examination, maintained that the remainder of his evidence was fully accurate. This included his detailed account of the August 2016 meeting.

15. Having conducted this assessment and having approached the matter bearing in mind the substantial caveat that must of necessity be attached to John Carr's evidence, the tribunal was not inclined to accede to the claimant's representative's submission. Accordingly, the tribunal was not inclined to reject the entirety his evidence as carrying no weight. Viewing all of the available evidence in the round (in particular those aspects of John Carr's evidence which were steadfastly maintained by him as being accurate) the tribunal determined that it was appropriate that this should carry some weight. It was proper that this portion of the evidence ought to be set against the remainder of the evidence in conducting a proper determination of relevant matters of fact. To give perhaps some illustrations

of this, John Carr's evidence was that, in travelling from the South of Ireland to the 2016 Millisle meeting, as he was unfamiliar with the rural location, he had followed the claimant in his own vehicle, driving behind the claimant's car. The claimant had directed him to an unfamiliar, as John Carr saw it isolated, part of rural Northern Ireland. John Carr sought to depict this and the subsequent meeting which took place at Gareth McKee's premises as being something of an intimidating experience. He sought to have the tribunal accept that he felt genuinely anxious and vulnerable; he was genuinely worried for his own safety. He was attending a meeting in the presence of the claimant who was his line manager. After the claimant had signed the NDA document (John Carr maintained this was done by the claimant as a party thereto and not merely as a witness) the claimant had remained at the premises and discussions then took place between Gareth McKee, the claimant and himself regarding coffee equipment, account projections and other such business matters. These latter included the suggestion of John Carr possibly taking a stake in the business. This evidence thus depicts a business meeting proceeding which was of some further duration after the initial signature of the NDA documentation, as a prerequisite. John Carr's evidence puts the signature of the NDA taking place at the very outset of the meeting, before anything else was discussed. That evidence seems to align with the claimant's own evidence in that discrete respect. Set against all of this, the claimant's evidence was that he left Gareth McKee's premises immediately after the signature of the NDA (he states as a witness only) thereby apparently placing the claimant at the meeting for only a short period of time. The claimant did not recount anything else of significance taking place at the meeting, as far as he was concerned, before his departure. John Carr's further evidence was that, at the conclusion of the meeting, he had left Gareth McKee's premises in the company of the claimant (clearly some time later than has been conceded by the claimant). Again, he states that he followed the claimant's car in order to travel away from this unfamiliar location to his hotel in Belfast.

16. Analysing the conflicting accounts, notwithstanding the caveat which must be attached to John Carr's evidence for the foregoing reasons, noting furthermore that the tribunal is correspondingly entitled to attach a general caveat to the claimant's evidence, the tribunal, on balance, is disinclined to dismiss the entirety of John Carr's critical evidence regarding what occurred at this meeting as carrying no weight whatsoever. This is so notwithstanding the claimant's representative's invitation made in submissions. Having carefully assessed all of the evidence, the tribunal prefers the account of John Carr to the extent of the probable suggested duration of the meeting. The tribunal accepts that the meeting was very probably longer than has been conceded by claimant, in terms of the claimant's participation. Further, the tribunal accepts that it is more probable that John Carr was not left alone with Gareth McKee, with the claimant's involvement being only very transitory, and believes that John Carr did leave the premises upon conclusion of the meeting in the company of the claimant, who then directed him back to more familiar landmarks. At least in the foregoing respects, the tribunal prefers the evidence of John Carr. Of course that leaves to be resolved the fundamental evidential differences between John Carr and the claimant concerning the overall context and what was specifically discussed throughout the duration of this August 2016 meeting. The tribunal shall further resolve that fundamental issue in the determination set out below. It is sufficient to say that the tribunal has difficulty with a number of aspects of the claimant's account of the meeting, portrayed as being very brief as regards the claimant's own participation and in which the claimant, so he states, had comparatively little function save to introduce the parties

and then to sign (as a witness) the NDA and then leave, immediately thereafter.

17. The tribunal, in general terms, assessed the evidence of Sunny Tuli as being generally cogent and credible with no evident issues save in respect of a relatively discrete number of points which required further and careful examination. These are where Sunny Tuli's evidence was significantly at variance with that of the claimant, most especially regarding the timing of the commencement and duration of the 11 December 2018 meeting with the claimant and what precisely transpired at the meeting. That meeting was also attended by Michael Conroy. There were, however, a number of issues regarding Sunny Tuli's approach or subjective interpretation. These included, for example, whether or not Beverley McFall was allegedly bullied by him and as a consequence resigned, which Sunny Tuli denied or, to take another example, whether the claimant's bonus was at all times fixed and thus guaranteed as part of his remuneration package, or whether it was performance-related. Concerning the central facts about what precisely transpired at the 11 December 2018 meeting in the respondent's Lisburn office, there was a fundamental conflict between the claimant's evidence, on the one hand, and that of Sunny Tuli and Michael Conroy, on the other. The tribunal shall address the specifics of that fundamental and critical variance further below.

18. Beverley McFall displayed some distress and upset in the course of the tribunal hearing in giving her evidence. The tribunal's assessment is that this was linked, in Beverley McFall's subjective interpretation, to the manner in which, as a close acquaintance and former work colleague of the claimant, she felt that she had been dealt with by the claimant. Evidently Beverley McFall felt hurt, even betrayed, by some manner of conduct on the claimant's part. This manifested itself, at times, in Beverley McFall becoming tearful. Indeed, at one stage the tribunal afforded her a break in proceedings in order to compose herself. Beverley McFall's evidence was that the claimant had closely engaged with her at the time of her departure from employment with the respondent. The context of that departure appears from several emails introduced into evidence. From these it is clear that Beverley McFall raised an issue that she perceived herself as being treated differently from her sales colleagues. She believed that these colleagues were only submitting weekly reports, whereas she was required to submit daily reports to Sunny Tuli. This appears to have been a complaint of selective "micro-management" and associated matters. Things then appear to have come to a head and on 1 November 2016 Beverley McFall submitted a written letter of resignation. This was directed by her to the claimant, as a senior manager. This letter stated that Beverley McFall had been singled out to complete daily reporting and that she felt undervalued, demotivated and bullied, as she expressed it in the resignation letter. Sunny Tuli accepted this resignation by letter he directed to Beverley McFall dated 2 November 2016 and she left her employment, having provided notice, with effect from 31 January 2017. Whilst the documentary evidence concerning the reason for her departure expressly mentioned her dissatisfaction concerning the attitude shown to her by Sunny Tuli in relation to the requirement to provide daily reports and the fact that she felt undervalued and indeed bullied, having heard her further evidence at tribunal, the tribunal's assessment was that there was a suggestion made by Beverley McFall that the claimant had effectively "stoked" her discontent and that the claimant had assisted her in drafting the text of her resignation letter. In assessment of Beverley McFall's evidence, the tribunal's view was that this was generally credible and consistent with other evidence. However, there was a suggestion made on behalf of the claimant that Beverley McFall had been induced by some type of a personal or financial advantage not only to return to employment

with the respondent (having earlier, as mentioned, left on bad terms) but also to provide favourable evidence on the respondent's behalf to the tribunal. Having carefully considered that submission, the tribunal's view was that Beverley McFall gave largely clear and consistent evidence regarding her departure from the respondent's employment, also concerning how she passed the intervening time and her other employment and, further, concerning her eventual return to working with the respondent. To accept the claimant's underlying suggestion that Beverley McFall was induced in some manner to distort facts or to provide inaccurate evidence to the tribunal in aid of the respondent, would be to engage in a degree of impermissible speculation, without a proper clear and factual foundation for taking such a view, in the tribunal's considered assessment of all of the available evidence. Notwithstanding some robust submissions made on behalf of the claimant to the contrary, the tribunal accepts Beverley McFall as being a largely credible witness and does not accept the premise that Beverley McFall's evidence was dishonest and intentionally inaccurate, designed to assist the respondent and to provide false evidence adverse to the claimant's position.

19. Alex Lynch was a witness who gave consistent and credible evidence to the tribunal, albeit that he was deeply embarrassed at the content of some of his text messages exchanged with the claimant, which messages he had never believed would ultimately emerge in the course of formal legal proceedings. Some of these messages, especially the later ones, demonstrate that Alex Lynch in his communications with the claimant was greatly concerned that private text messages would be imported into the formal arena of a legal dispute. He did his very best to persuade the claimant not to do so, but indeed such messages ultimately appeared, evidentially. The tribunal did not discern anything in the evidence of Alex Lynch which, when relevant, might require to be excluded from the tribunal's proper consideration and not given due weight. Alex Lynch, for all his evident embarrassment, was a forthright and credible witness. One particularly significant piece of evidence from Alex Lynch was that on the date of the Lisburn meeting on 11 December 2018 and prior to the meeting commencing (Alex Lynch put the timing of this observation to be about 10.00 am), the claimant was visibly nervous. Alex Lynch stated that the claimant had said to him that the claimant had already cleared out his office and put everything in his car. This was deemed by the tribunal to be an important piece of evidence to which weight might be attributed, notwithstanding hearsay. At that stage the two were, it seems, apparently on good terms; there was no evident reason why the claimant would have not told Alex Lynch the truth on that specific point, in view of that relationship. Corroboration of this latter point would then emerge from the respondent's evidence that, at the conclusion of the meeting, the claimant immediately left the office where the meeting had been held and departed the Lisburn premises and did not return. The claimant's own evidence did not contradict that suggestion. Nonetheless, as was mentioned in submissions on behalf of the respondent, for the purposes of discovery of documents in the case the claimant appeared to have access to documentation which would normally have been kept in the office premises. Again, the tribunal will return to any significance to be attributed to this point, below.

20. Viviane Nesbitt was assessed by the tribunal as being a generally credible witness. For example, the tribunal had no reason to doubt her specific evidence regarding the absence of the maintenance of a diary system in 2016 for such matters as recording of annual leave, which evidence stood at variance with the claimant's. There was nonetheless a discrete issue concerning the evidence of Viviane Nesbitt. In her witness statement she had stated that she filled in an expenses form

concerning the month of April 2016, which monthly expenses covered the date of the London trip (31 March 2016). However, that expenses form had indeed been filled in by Beverley McFall. However, Viviane Nesbitt fully conceded her error in that regard and provided an explanation (as was observed in the respondent's submissions, the claimant himself had indeed made the same mistake, as emerges from his own witness statement). Viviane Nesbitt's evidence was considerably at variance with that of the claimant in certain respects, for example concerning what she portrayed as being discussions engaged in by her with the claimant concerning the claimant's stated plans to go into business with Gareth McKee (and 38 Espresso) and also concerning the claimant's general lack of attendance at the business premises and engagement with the respondent's business in the latter months of his employment.

21. The evidence of Michael Conroy stands fundamentally in conflict with that of the claimant, in key respects. The most significant of these conflicts relates to proper context and alleged events occurring in the course of the 11 December 2018 meeting. Michael Conroy's evidence, generally, aligns with that of Sunny Tuli. That meeting was arranged between Michael Conroy and Sunny Tuli in such a manner that Michael Conroy was to take the lead, at the end of the business review portion of the meeting. This was when the stage was reached where issues concerning the claimant's alleged conflict of interest and other matters were intended to be raised. There are fundamental evidential conflicts requiring to be resolved. The tribunal has carefully noted the claimant's representative's submissions regarding asserted evasive replies, however there are no other specific issues of consistency and credibility concerning Michael Conroy's evidence requiring to be remarked upon at this point, save for certain fundamental and significant issues of interpretation concerning alleged actions and words alleged to have been spoken at the 11 December 2018 meeting. There was one additional matter which arose in evidence concerning an alleged encounter between the claimant and Michael Conroy some time after, in July 2019 in County Carlow. Having considered the conflicting evidence in respect of this encounter (one person's word against another without corroboration concerning a chance meeting) the tribunal's assessment is that nothing material turns upon the matter and no specific facts require to be determined for the purposes of this decision.

## THE APPLICABLE LAW

### Unfair dismissal (constructive dismissal).

22. A central issue requiring to be determined in this case is whether or not the claimant was constructively dismissed.

### Constructive dismissal

22.1 The law regarding constructive dismissal is generally well-settled and indeed the relevant law and legal principles in this case were substantially agreed between the parties, with the exception of one issue concerning breach of contract which shall be alluded to below. In order successfully to claim constructive dismissal, four conditions must be met: (1) there must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach; (2) that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify the employee leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of

constituting a repudiation in law; (3) the employee must leave in response to the breach and not for some other, unconnected, reason; and (4) the employee must not delay too long in acting in response to the employer's breach, otherwise that employee runs the risk of being deemed to have waived the breach and to have agreed to vary the contract.

22.2 In ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA***, the Court of Appeal firmly supported the contract rather than reasonableness test for determining whether or not there has been a constructive dismissal. When deciding whether there has been a breach of contract, it is well-established that any tribunal must reach its own conclusion upon this question. The test is not whether a reasonable employer might have concluded that there was no breach: it is whether on the evidence adduced before it the tribunal considers whether there was a breach or not. Whilst the applicable test is contractual, reasonableness is not wholly irrelevant; it may be of evidential value. However, judicial determinations have held that many forms of unreasonable conduct shall constitute a breach of implied contractual terms. In many cases, this has been grounded upon the implied term that the employer will not act in a manner calculated or likely to damage the relationship of trust and confidence between employer and the employee (**see *Malik v Bank of Credit and Commerce International SA [1997] IRLR 462*, *[1997] ICR 606 HL*** *: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*."). The proper test is objective. If, adopting an objective approach, there has been no breach, then the employee's claim will fail (see ***Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493*, *[2005] IRLR 35***). There is, however, a limitation upon the implied term comprised within the *Malik* definition: that the employer must not engage in such behaviour without reasonable and proper cause. While in some cases concerning serious or wilful breach there will be little question of application, in other cases there might need to be assessed a balance between the interests of both parties concerning the reasonable and proper cause issue where the employer might claim to have had good reason, but that proposition is contested. (See ***Hilton v Shiner Ltd [2001] IRLR 727, EAT*** were the EAT held that it is not sufficient, in order to establish a breach of the trust and confidence term, to show that there had been acts by the employer which are likely to seriously damage the trust and confidence relationship but that, in addition, to constitute breach of the implied term, the employer's conduct must be without reasonable and proper cause). If there has been conduct which amounts to a breach of the implied term of trust and confidence, it will automatically follow that there has been a fundamental or repudiatory breach going to the root of the contract (see ***Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT***). Conduct which might involve a breach of this duty will include serious breaches of the employer's internal disciplinary and grievance procedures, at both original and appeal stages (***Blackburn v Aldi Stores Ltd [2013] IRLR 846, EAT***). The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach. Any conduct or action by the employer subsequent to an employee's resignation cannot convert such resignation into a constructive dismissal as any subsequent action of the employer was not of itself causative of dismissal. In regard to the issue of the employee's express communication of the reason for leaving to the employer, or otherwise, it is clear from ***Weathersfield Ltd v Sargent [1999] IRLR 94, [1999] ICR 425*** that the proposition that there can be no acceptance of a repudiation unless the employee tells the employer, at the time, that he is leaving because of the employer's repudiatory conduct is incorrect. Whilst

every case shall turn on its specific facts, where no reason is communicated to the employer at the time, the tribunal might more readily conclude that the repudiatory conduct was not the reason for leaving. So in each case the tribunal, considering all of the evidence, shall determine whether there has been an acceptance of repudiation. Thus acceptance of repudiation of the contract of employment shall normally result in the employee leaving and saying why he or she is leaving, but it is not necessary for the reason to be given at the time of leaving. However, express communication by the employee does demonstrate consistency and thus might serve to counter any argument that the employee in fact left for other reasons and has indeed devised any complaints later in order to claim unfair dismissal. Finally, the repudiatory breach or breaches by the employer need not be the sole cause of the employee leaving, provided they are an effective cause.

22.3 In regard to the matter of suspension from work, in ***East Berkshire Health Authority v Matadeen [1992] IRLR 336*, *[1992] ICR 723***, the EAT accepted that suspension itself was a stigma and that good industrial relations practice did not require it in every case and where a period of suspension was considered necessary the period should be as brief as possible and kept under review and it should be made clear that suspension is not considered a disciplinary action. Thus, it has been argued that suspension is not a neutral act and, against the argument, on behalf of the employer that it implies neither guilt nor innocence. However, this latter was disapproved by the Court of Appeal in ***Mezey v South West London & St George's Mental Health NHS Trust [2007] EWCA Civ 106*, *[2007] IRLR 244*** where Sedley LJ on behalf of the court accepted the proposition that suspension is not a neutral act***.*** Suspension must not therefore be a routine response to the need for investigation (see ***Agoreyo v London Borough of Lambeth [2017] EWHC 2019 (QB), [2018] ELR 159***).

22.4 The tribunal must bear in mind that an apparent resignation might constitute an effective dismissal or, in contrast, a mutual agreement to terminate the contract. The test in ***Martin v Glynwed Distribution Ltd [1983] IRLR 198*, *[1983] ICR 511*** was stated thus: *"Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated … the question … remains … "who* really *ended the contract of employment?"*

22.5 Cited in submissions, where substantial reliance was placed upon this case by the claimant's representative, was the case of ***Sandhu v Jan de Rijk Transport Ltd [2007] IRLR 519, CA****.* In that case the Court of Appeal held that, in reality, a manager had been dismissed. The facts, in brief, were that allegations of misconduct were made against the employee which were not investigated. The company decided that the employee should be dismissed. He was summoned to a meeting, not having been informed in advance of either the allegations against him or the purpose of the meeting. At the outset, he was informed that he was to be dismissed. The claimant managed to negotiate severance package terms. The claimant and the employer signed a document indicating that there was an agreed termination of contract, upon these severance terms. The Court of Appeal (overturning the findings of the tribunal at first instance and the Employment Appeal Tribunal to the effect that the claimant had resigned) determined that the key issue was whether the decision to resign had been caused by a threat of dismissal or by the agreed financial terms. There was no previous authority cited before the court concerning all matters occurring in the course of the one meeting. On the facts of that case, the Court of Appeal determined that all that the claimant was doing, accepting that he was going to be dismissed, was to negotiate the best terms

available to him. Once an employee had been effectively dismissed, any subsequent negotiation of terms could not undo that dismissal. Mr Sandhu was adjudged to have resigned because of the threat of dismissal, not because of the severance package he had negotiated. Further reliance was placed on the case of ***East Sussex County Council v Walker (1972) 7 ITR 280, NIRC****,* an early case on the point ("resign or be dismissed") where the court concluded that the employer had terminated the contract. The essence of these cases centres upon whether the employee is genuinely agreeing to a resignation of his or her free will, or whether this action is taken under the threat of a dismissal; in other words this is a causation test. Of necessity it is based very much on the specific facts of any case. (In an opposing argument concerning the applicability of these cases, the respondent's representative asserted that these cases were very much fact-specific and could be readily distinguished, upon the facts and for a number of reasons, from the instant case).

22.6 Thus any resignation must involve some manner of free choice by the employee. However, where the employer presents an employee with what is in effect a *fait accompli* and, in response, the employee accedes to a request that the employee shall take a formal step to bring the contract to an end that might constitute an employer dismissal. In this latter regard see ***Birch and Humber v University of Liverpool [1985] IRLR 165, CA*** where the relevant statutory provisions did not include a definition of "dismissal" in termination of contract by mutual agreement. Accordingly, the principle emerging is that in deciding whether or not there had been a dismissal, the court or tribunal should look at the substance, rather than the form, of transactions between the parties in order to determine the issue of whether a dismissal has occurred, or otherwise.

22.7 The claimant's representative in submissions cited the following extract from the **LRA Code of Practice on Disciplinary and Grievance Procedures** (with the tribunal's emphasis placed upon the especially relevant words):

"*What is the right to be accompanied?*

> *Workers have a* ***statutory right to be accompanied by a fellow worker or trade union official where they are required or invited by their employer to attend certain disciplinary or grievance hearings****. They must make a reasonable request to their employer to be accompanied. Further guidance on what a reasonable request is and who can accompany a worker appears at paragraphs 103-109.*

*What is a disciplinary hearing?*

> *For the purposes of this right,* ***disciplinary hearings are defined as meetings that could result in:***
>
> - *a formal warning being issued to a worker, such as a warning that will be placed on the worker's record;*
> - ***the taking of some*** *other* ***action, such as suspension without pay, demotion or dismissal****; or*
> - *the confirmation of a warning issued or some other action taken, such as an appeal hearing.*

## THE ISSUES TO BE DETERMINED

23. The issues to be determined may be stated thus: (1) firstly, the tribunal needs to determine whether any material issue arises regarding the employment status of the claimant as an employee and, further, as a director; (2) secondly the tribunal requires to determine whether or not the claimant was unfairly dismissed by the respondent, whether constructively dismissed or otherwise, and, (3) thirdly, the tribunal requires to determine whether the employer, or the company of which the claimant was a director, was (otherwise than 2 above) in breach of contract with the claimant. If any of these heads of claim are to be determined in favour of the claimant, the tribunal thereafter needs to determine the matter of appropriate remedy, insofar as applicable, including any appropriate compensation.

## FINDINGS OF FACT MATERIAL TO THE ISSUES

24. On account of the oral and documentary evidence adduced, the tribunal determined the following material findings of fact from the evidence, relevant to the issues. In setting out the commentary above concerning the matter of consistency and credibility of evidence taken from the various witnesses, the tribunal has already made some observations which do not necessitate any or much repetition below. The tribunal has also incorporated into the following some references to the respective submissions of the parties.

24.1 The second-named respondent, MBCC Costa Ireland Limited, together with the other four named respondents in this matter exist as related companies, held by Tuli Holdings (Ireland) Limited ("Tuli Holdings"). The first and fifth-named respondents are of no material concern in this case as they had no contractual or other direct relationship with the claimant, but rather they merely formed other component parts of Tuli Holdings. These companies are, expressed in general terms, connected with the coffee business. Raju Tuli since 2014 has been Chairman of Tuli Holdings on a semi-retirement basis. When Raju Tuli semi-retired, his brother Sunny Tuli commenced overseeing the running of the businesses comprised within Tuli Holdings. Prior to becoming Chairman, Raju Tuli was directly involved in the management of Kashmiri Foods (Ireland) Limited and MBCC Costa Ireland Limited.

24.2 The claimant, who possessed many years of experience in this industry entered into a contract of employment with the fifth-named respondent, MBCC Foods Limited, commencing on 3 March 2008, with the job title being "Wholesale Manager". The basic contractual details concerning that post were set forth in a letter dated 28 February 2008 to the claimant, signed by Raju Tuli on behalf of MBCC Foods Limited. Despite the somewhat similar names, it is understood that this contract was with the fifth-named respondent MBCC Foods Limited, as opposed to the first-named respondent, MBCC Foods (Ireland) Limited. The stated terms provided, inter alia, for a basic salary of £40,000 per annum, together with an incentive scheme made available based on achievement of agreed targets, with details to be confirmed at the start of the employment together with the provision of a company vehicle. It was expressly provided that this contract was to be for a fixed term of 12 months, ending on 2 March 2009. It was further stated that, subject to satisfactory achievements, the contract might be extended and become permanent. The claimant signed and dated acceptance of these basic terms on 19 March 2008. It appears, from any evidence available to the tribunal, that there was no further

formal documentation regarding contractual extension or amendment of other contractual terms provided to the claimant at any time thereafter, save as would be evident from documentation in respect of remuneration paid to the claimant from time to time. However, by apparent mutual agreement the contractual term was extended (indefinitely) beyond 2 March 2009. Further to that, the identity of the employer was changed to become that of the second-named respondent, MBCC Costa Ireland Limited. It was this latter commercial entity which remained the claimant's employer until the end of the employment contract. The tribunal was thus provided with no evidence concerning any formal amendments made to any other agreed terms. For convenience, hereinafter the tribunal shall refer to the employer, MBCC Costa Ireland Limited, as "MBCC" or merely as "the respondent".

24.3 The Wholesale Division of the business with which the claimant was concerned in MBCC continued to grow. From 2011 onwards, as is apparent from the wages records and other evidence, the claimant received an annual bonus. The claimant's evidence was that this bonus was based upon 17.5% of nett profit of the Costa Wholesale Division run by MBCC. In 2014 the claimant was requested to start up and to run the Costa Express Division in Ireland. His basic salary was increased from £40,000 to £84,000 per annum. The claimant's contention was that at the time there was introduced an agreed bonus of £16,000 each year. The claimant asserts that this bonus was guaranteed and thus not performance-related, either personal performance or company performance. This latter assertion was strenuously disputed by the respondent.

24.4 The employment of the claimant with the respondent came to an end on account of events occurring in mid-December 2018. It is the specific circumstances and broader context under which the employment came to an end that occupy the primary focus of the tribunal, with evidence also regarding events leading up to this. At the material time, December 2018, the claimant was paid an agreed monthly salary of £7,000 (£84,000 per annum). In addition to this role the claimant was a director of Kashmiri Foods (Ireland) Limited ("Kashmiri"). He commenced in that directorship role in 2013. It is not believed that the claimant had any written service contractual terms in respect of the Kashmiri directorship, nor that he received any remuneration for the directorship in addition to his MBCC salary.

24.5 There is also the matter of the disputed bonus. The tribunal explored this bonus issue in some detail in the course of receiving evidence from the parties. In evidence, Sunny Tuli confirmed that the claimant received a bonus calculated on performance during a completed year up to 31 January. Sunny Tuli asserted that bonuses paid by the Tuli Group companies were performance-related and that he had personally communicated this condition to the claimant verbally when he took over the business and that, prior to this, it had been communicated by his brother Raju Tuli, who had initially taken the decision on awarding the claimant a bonus. Sunny Tuli asserted that the claimant would have been well aware that bonuses were performance-related. This would have been so on account of the fact that the claimant was instrumental in doing the work concerning bonus calculation for other members of staff. Opposing this, the claimant sought to introduce evidence of others whose bonus was, so he contended, "guaranteed" and not performance-related. Sunny Tuli did concede in cross-examination that the bonus awarded to Beverley McFall was fixed and not performance-related, but he stated that this was an entirely different situation to that of the claimant. The tribunal notes that the bonus arrangement available to the claimant from the outset of employment had been performance-related. The initial terms had provided for an incentive scheme

upon achievement of agreed targets. The claimant seeks to persuade the tribunal that this initially-agreed agreement then changed and that his bonus became guaranteed, irrespective of performance. Examining any evidence, the tribunal cannot support that conclusion and any bonus was performance-related. Indeed no bonus was awarded in 2015, as has been mentioned in the respondent's submissions.

24.6 A substantial part of the course of the claimant's employment with the respondent seems to have been comparatively uneventful. By all accounts, the claimant conducted his senior role with the respondent in an effective manner over a number of years. In terms of the commitment and dedication of the claimant to the business, as asserted, the tribunal did hear some evidence that the claimant had suffered two periods of significant illness but that he had nonetheless attended the business as best he could when he could otherwise have been absent. This related to the years 2013 and 2017. There was some witness evidence, for example from Viviane Nesbitt, suggesting a lack of attendance at the office and a general lack of commitment to the business in the latter years, which Viviane Nesbitt clearly sought in her evidence to link to the claimant's expressly stated working relationship with Gareth McKee and the claimant's expressly articulated plans to leave the business. However, it was the precise nature of the claimant's interaction with and relationship with that former employee of the business, Gareth McKee and Gareth McKee's business interests, that ultimately gave rise to concern on the part of Sunni Tuli.

24.7 Gareth McKee had joined MBCC in 2010 as a Service Engineer. However, he had personally known the claimant for approximately 26 years and the two had previously worked together in various different companies. Gareth McKee left in March 2012 in order to pursue his own business interests and to focus his attention on his coffee service business. Gareth McKee had formed a company called "38 Espresso" which he operated from premises located on his family farm located at Millisle, County Down. In evidence, he described this business as being a "cottage industry" serving local business in Northern Ireland, bars, restaurants and office coffee. Gareth McKee, materially, contended that his 38 Espresso business operated in business market segments in which MBCC did not conduct business and that his company had never competed with MBCC. Despite having left MBCC, Gareth McKee continued to conduct service work and training for MBCC and he had also purchased various items from MBCC.

**THE LONDON TRIP - 31 MARCH 2016**

24.8 On 31 March 2016 Gareth McKee and the claimant travelled by air to London with the carrier Aer Lingus. The claimant's evidence was that he and Gareth McKee spent the day visiting coffee shops and inspecting micro-coffee roasters in central London, including Costa Express sites. The claimant states that had requested Viviane Nesbitt (then Accounts Assistant, now Operations Manager) to book these Aer Lingus flights. The means by which the flights were paid for emerged as an issue of contention in this case. However, at the immediate time any issue was not apparent to the respondent's senior management. A credit card was used to pay the sum of £55.98 for the two Aer Lingus flights. The claimant signed off a company monthly business expenses sheet which referenced the Aer Lingus flights. This then triggered the applicable cost of these flights being processed as a company business expense. The claimant's explanation in his witness statement evidence for this was: "*I can only surmise that at the time I had requested Viviane* [ Nesbitt] *to book a flight she used the company credit card in error to book the £55*

*flight and not my own card. I never gave Viviane an instruction to use the Company Credit card for this booking. If this error had ever been brought to my attention then I would have corrected it*". In contrast, the respondent's view of this, when the information was revealed as a result of a subsequent investigation, was that the claimant had endeavoured to conduct work to further his personal interests on company time and, indeed, incurring a company expense, as claimed in expenses.

24.9 Viviane Nesbitt's evidence was that the claimant had told her expressly to charge these flights as a business expense. She further stated that she had been asked to book flights "at least a couple of times" on behalf of the claimant and Gareth McKee and that she already knew the two "worked together". In reference to Viviane Nesbitt's allusion to "at least a couple of times", no specific details of any other relevant flights or attributed expenses were provided in evidence to the tribunal. In giving his oral evidence, the claimant then accepted that he did not have a company credit card at the particular time of these flight bookings. It seems that such a company credit card was not provided until some months later, in October 2016. The claimant asserted in his evidence that Viviane Nesbitt held his personal credit card in the office for such expenses, including flights. Further, the claimant was adamant in his assertion that this trip to London was made whilst he was on a day's annual leave and indeed with the full knowledge and approval of the respondent in accordance with then existing leave arrangements. However Sunny Tuli's assertion was that he was entirely unaware of this trip and he maintained that the claimant was certainly not on approved annual leave on that date and indeed that the claimant's payslips did not disclose that he took any annual leave during the month of March 2016. To counter this, the claimant asserted that individual days of annual leave were not recorded on payslips. However, the respondent's evidence disputed that to be so and contended that any individual days of annual leave were properly to be shown on payslips. The tribunal was invited to examine the payslips, but the results of that examination were somewhat inconclusive in that the evidence was unclear as to how annual leave was routinely recorded in any payslips. To endeavour to corroborate his assertion, the claimant stated that this annual leave was recorded in accordance with a diary system maintained in use by himself and by Viviane Nesbitt. The claimant asserted that this diary system was colour-coded, with identification of individuals and annual leave recorded. However, Viviane Nesbitt's evidence was that she was not aware of any such system at the time and that there was no written system for recording annual leave, of the diary type as described by the claimant, introduced until April 2017. In clarification of any evidence concerning the existence of a diary system for recording annual leave in 2016, as asserted by the claimant, whilst copy diary evidence was provided covering a period from January 2017 onwards, no evidence of this nature was available to assist the tribunal in resolving the conflict between the claimant's evidence and that of the respondent's witnesses concerning the year 2016. There was noted a copy of a personal diary of Beverley McFall introduced into evidence concerning the year 2016, but that made no mention whatsoever of the claimant. Specifically there was no mention of the date of the London trip upon which the claimant asserts he took a day's annual leave. There appears to be nothing evidentially, apart from the claimant's own testimony, positively supporting the contention that the claimant was on a day's annual leave on the date of the trip to London with Gareth McKee. That contention was firmly rejected by the respondent. The assertion was that this was nothing other than a normal working day for the claimant.

**THE MILLISLE MEETING - 4 AUGUST 2016**

24.10 John Carr, Kashmiri's Head of Sales (Costa Express), was based in County Carlow. He was due to be in Northern Ireland on 4 August 2016. On that date he had arranged to meet with the claimant and he attended Gareth McKee's premises in Millisle. As mentioned above, the tribunal accepts, as a fact, that John Carr was conducted to the meeting by driving his own car which followed the claimant's car in what was to him an unfamiliar locality. In evidence (as corrected in the supplemental witness statement) he confirmed that he had earlier met Gareth McKee in County Cork some months before. However, he sought to conceal the occurrence of such an earlier meeting and also his 4 August 2016 meeting with Gareth McKee from his employers over a considerable period of time thereafter. The tribunal has made some observations concerning John Carr's stated motivation for this concealment. In this respect, the tribunal determines that John Carr's evidence, as to the reasons for such motivation, is credible; the tribunal accepts as credible his explanation as to why he would do this. His further evidence is that it was the claimant who produced a written confidentiality agreement (the NDA), not Gareth McKee as the claimant would have the tribunal believe. John Carr states that it was the claimant, again not Gareth McKee, who informed him he was required to sign this NDA before the meeting continued. In contrast therefore to the claimant's evidence, which stresses claimant's peripheral role only, John Carr's evidence seeks to place the claimant as being a primary actor in the meeting. John Carr read the NDA document which related to Gareth McKee's company, Curve Coffee Limited. His evidence was that he felt anxious and vulnerable, both on account of the isolated and unfamiliar location of the Millisle meeting and also due to the fact that the claimant was his manager. The tribunal accepts this the latter evidence from John Carr as being credible. In this context, he agreed to sign two copies of the NDA document and Gareth McKee then countersigned the two copies. The claimant also placed his signature on the two copies, apparently when requested by John Carr to do so. The claimant's version, in contrast, was that he signed the documents at John Carr's request but merely as a witness and certainly not in any other capacity. However, John Carr's clear understanding was that the claimant signed as a party, as he made clear in his evidence. John Carr retained one copy.

24.11 The tribunal had sight of a copy of the NDA document, which bears the signatures of all three. John Carr's testimony in respect of what then transpired was that the claimant (rather than immediately leaving the meeting as he would have the tribunal believe) then proceeded to explain in some detail that he was setting up a concept to compete with Costa Express and that he had decided to create a new brand of coffee which would be roasted in the 38 Espresso premises where the meeting was being conducted. John Carr's assertion was that the claimant described himself as being a "silent partner" in the new business venture. His evidence was that he was shown a coffee roaster and that there was a discussion about projected profit and loss accounts and, indeed, that he was asked to become involved in working for Curve Coffee. The availability of share options was suggested to him as a bonus, or that John Carr could invest in the venture, if he wished. However he maintained in his evidence that at the time he was not interested in working for Curve Coffee, but that he felt very uncomfortable concerning the situation after having signed the NDA. His priority, he asserts, was to exit the meeting and the situation in safety. His further assertion was that the claimant, after having initially indicated that he planned to leave the respondent by Christmas of that year, then stated that he would remain with the respondent until he had received his work bonus for the year,

before resigning. John Carr's evidence was that after the meeting had concluded he left in the company of the claimant. He drove following the claimant's car and it was the claimant who directed him away from the Millisle premises and towards his hotel accommodation in Belfast.

24.12 John Carr maintained that following the meeting and the signature of the NDA he felt extremely anxious about his position and he took legal advice from a local solicitor in Carlow. However, he did not inform either Raju Tuli or Sunni Tuli about what had transpired. His further assertion was that there were two further attempts made by the claimant to have him work for 38 Espresso. The first of these he alleged occurred on a flight to Bristol a few months after the August 2016 meeting and, further, on one occasion in a hotel in Lisburn. On that latter occasion John Carr asserts that he indicated to the claimant that he felt he was being professionally undermined and bullied and that, whilst it appeared that the claimant was leaving, John Carr wanted nothing to do with the new venture. John Carr's further evidence was that on a January 2017 flight to Edinburgh with the claimant, he raised concerns regarding the claimant "poaching" (this was the word he used in his witness statement evidence, the accuracy of which he maintained under cross-examination at hearing) staff from the respondent's business, including an engineer, James McGill, who had left to work for 38 Espresso and also Beverley McFall. John Carr asserts that the claimant admitted to "poaching" those staff but stated that he was not planning to take other staff, unless John Carr himself was interested. However the latter made it clear to the claimant that he was not interested.

24.13 In fundamentally conflicting evidence, the claimant's version of events was that it was Gareth McKee who asked John Carr to sign the NDA, as Gareth McKee did not want people to know the style or type of coffee roaster or the beans and blends that he was using. The claimant asserted that John Carr signed without hesitation and, as the claimant was preparing to leave, John Carr requested that the claimant also would sign the NDA. Whilst the claimant felt that this was peculiar, as he was not staying at the meeting he agreed to sign and then he left the meeting. The evidence of the only other person present at this meeting, Gareth McKee, was in material respects in concurrence with the claimant's evidence and that it was Gareth McKee, not the claimant, who had requested John Carr to sign the NDA and, likewise, that John Carr had signed the agreement without hesitation. Gareth McKee's further evidence, in alignment with the evidence of the claimant, was that as the claimant was preparing to leave John Carr requested the claimant also to sign the NDA, that the claimant also signed and then left the meeting. Gareth McKee's evidence was thus that John Carr stayed behind after the claimant's departure and that he was then shown equipment and the coffee beans and technical matters and market potential were freely discussed. The claimant's evidence and that of Gareth McKee, on the one hand, stands in clear conflict with that of John Carr. Whilst John Carr did not expressly comment in his written witness statement and his supplemental statement on whether the claimant departed prior to John Carr's own departure, he did confirm expressly in his oral evidence that he was concerned at the circumstances and that his priority was to leave the meeting safely and that he left with the claimant and followed him back to Belfast.

24.14 Attaching appropriate weight to all of the available evidence concerning this 2016 meeting, the tribunal's considered conclusion is as follows: Firstly, for the reasons indicated above, taking everything into account regarding the two contrasting

accounts, the tribunal believes this to have been a meeting of some duration. The participation of the claimant at the meeting was very probably not merely confined to introducing the parties in a very transitory way, signing the NDA as a witness upon request by John Carr, and then immediately departing. The tribunal accepts the genuineness of John Carr's apprehension about the circumstances of the meeting and believes it improbable that he would willingly have stayed behind with a relative stranger, someone he had met previously only once and in an unfamiliar location and not departed in the company of the claimant when he had a clear opportunity to do so. The tribunal's factual determination, on balance, is that there was very probably a full discussion regarding a business proposition relating to the supply of coffee and coffee equipment. This certainly took place between John Carr and Gareth McKee. The claimant denies that he was any part of that conversation. However, John Carr places the claimant at the very center of any discussions regarding the business, any profit and loss accounts projections, the equipment and such matters. Because the tribunal is dealing with two contrasting accounts provided by two witnesses where general but significant caveats require to be attached to their respective evidence, this leaves the evidence of Gareth McKee to be considered. This is of itself corroborative of the claimant's account. There was a long-standing friendship between Gareth McKee and the claimant. If the respondent's position on this is to be accepted, the claimant had everything to gain by endeavouring to distance himself from any business discussions which might have occurred at the meeting. This distancing would be achieved by endeavouring to place himself at the meeting only for introductory purposes. His presence there was confirmed conclusively by his signature upon the NDA document; this places him at the meeting. However, claimant seeks to assert that he departed immediately thereafter.

24.15 Having assessed the evidence, the tribunal has considerable difficulty in accepting the claimant's account of matters, notwithstanding the attempt to corroborate by Gareth McKee. This is certainly so as regards the timing and duration of the claimant's participation. It is impossible to determine, upon the basis of the available evidence, the extent to which the claimant himself participated actively in any business discussions, or even initiated these, notwithstanding John Carr's specific assertions. Nonetheless the tribunal's considered view is that there was in all probability more to the meeting than the claimant is prepared to concede to the tribunal. The conclusion is that the three attended a meeting designed to discuss business matters which was not a brief meeting only and which might well have involved some degree of active participation by the claimant, although the tribunal cannot be precise as to the exact degree of such participation. The tribunal accepts the proposition that the claimant was there throughout the meeting. He departed with John Carr and provided directions to John Carr to assist in his journey towards Belfast. The tribunal believes that it is unnecessary for it to reach any more specific conclusions, other than the foregoing.

24.16 Much has been made in this case, both evidentially and also in submissions, concerning whether the respondent's business and the business of Gareth McKee (38 Espresso and, insofar as applicable, Curve Coffee) did or did not compete or, as it has been put, did or did not "operate in the same channels". The tribunal has noted the evidence presented from both sides, for example the allusions to supply of coffee and equipment to businesses such as Pramerica Letterkenny, Irish Ferries or the Glenavon Hotel, with assertions for and against the proposition that there was competition. However, the tribunal's primary focus must be upon the critical events which occurred on 11 December 2018 and what was in the minds of the parties at

that time, both in regard to the issue of potential competition between the respondent's business and that of Gareth McKee and also potential conflicts of interest and other such matters. The tribunal accordingly believes that is it is unnecessary for it to reach a concluded determination whether, objectively viewed, there was or was not business competition or the businesses were or were not operating in the same channels. That is not a task for the tribunal. This is so as the central legal tests concerning breach of contract and constructive dismissal focus on whether there has been repudiatory breach in respect of which, from the perspective of a reasonable person, the employer has shown an intention to abandon and not to perform the contract. The surrounding circumstances may be relevant, in this instance the state of the respondent's witnesses' belief concerning the facts or suspicions about competition or otherwise as one of the issues of genuine concern. Thus the tribunal believes that it need only focus on whether these were genuinely held views or beliefs based upon some degree of reasonable apprehension, rather than the objective reality of whether there was or was not actual business competition. The focus is accordingly on what Sunny Tuli and Michael Conroy believed or suspected and whether they had a proper basis for such belief or suspicion.

**"THE ANONYMOUS LETTERS" NOVEMBER - DECEMBER 2018.**

24.17 Sunny Tuli, Raju Tuli and a director called Sekar Natarajan, as business directors of Tuli Holdings, each received identically-worded copies of a letter dated 29 November 2018. The tribunal had sight of one copy of this letter. The cypher "PI" appears at the foot and a substantial part of the letter contains adverse references to the alleged dishonesty of a third party (who does not need to be identified for the purposes of this decision). However, the letter concludes as follows: "*It is important to stress that Stephen Kelly is not part of our investigations. You should however be aware that during this process we discovered that he has a connection with at least one other coffee wholesaler "38 Espresso" which may represent a possible conflict of interest. We cannot disclose anything further at this time*."

24.18 Michael Conroy, director of companies within Tuli Holdings, who had not himself received a copy of the letter, was sent a copy by either Raju Tuli or Sunny Tuli; it was not clear by which. Michael Conroy had scheduled a meeting with John Carr, as Kashmiri's Head of Sales, on 6 December 2018. At that meeting John Carr asked Michael Conroy if he knew about a conflict of interest in relation to the claimant. Michael Conroy informed John Carr that he had seen a letter received by the shareholders which mentioned a conflict of interest involving the claimant and 38 Espresso. The evidence from the two was slightly different in some respects, primarily concerning the sequencing in which these matters were discussed. However, the tribunal's general conclusion of fact is that there was a discussion between the two which included discussions regarding an engineer who had worked for the respondent, James McGill. There was also the suggestion made that Beverley McFall, as a past employee of the business, might be approached concerning 38 Espresso. John Carr denied that he had used the word "solicited" (for employment), as attributed by Michael Conroy to him in evidence in this context and sought to emphasise more that it was his suggestion that Michael Conroy should approach former employees such as Beverley McFall who had worked for 38 Espresso. The tribunal however accepts the general tenor of the evidence which related to discussions concerning former employees of the respondent and any potential connections with 38 Espresso in the matter of potential conflict of interest concerning the claimant and 38 Espresso. A particular matter of note was that John

Carr did not mention the 2016 NDA to Michael Conroy at this meeting, but the tribunal accepts his evidence that he was hoping that in the prospect of Beverley McFall having further discussions with Michael Conroy, the existence of the NDA would be brought to the latter's attention by Beverley McFall. However, John Carr refrained from mentioning to Michael Conroy, at this 6 December 2018 meeting, the significant matter of the 2016 Millisle meeting and the NDA. As mentioned, in giving his evidence he has accounted for his stated reasons for failing to do so.

**THE INVESTIGATIONS FOLLOWING RECEIPT OF "THE ANONYMOUS LETTER" AND INFORMATION FROM JOHN CARR**

24.19 Sunny Tuli together with Raju Tuli and Michael Conroy proceeded with an investigation which commenced following viewing the content of allegations contained within the "anonymous letter". Whilst this was portrayed in the claimant's submissions as the respondent launching into a wide-ranging investigation, immediately or very shortly after receipt of the letter, in evidence Sunny Tuli stated that the approach was effectively incremental. At first he had treated part of the content of the anonymous letter with a measure of scepticism. However he was genuinely concerned about the allusion to a possible conflict of interest on the claimant's part. According to Sunny Tuli the concerns were effectively escalated when Michael Conroy reported to him on 6 December 2018 the conversation that he had with John Carr on that day, after which Michael Conroy received a number of emails from John Carr. Michael Conroy informed Sunny Tuli at that point that John Carr had suggested that some staff had been solicited for employment by 38 Espresso directly by the claimant, with the names of James McGill and Beverley McFall being mentioned. It appears that, at that point, Sunny Tuli had been unaware that James McGill had commenced working with 38 Espresso. Sunny Tuli agreed with Michael Conroy that the matter required investigation and the two discussed how best to safeguard the business from any potential perceived threat. Accordingly, the tribunal observes not a wide-ranging investigation arising immediately from the anonymous letter, as portrayed on behalf of the claimant, but rather an incremental, albeit relatively fast-moving situation, commencing with receipt of the letter which of itself did not cause the instigation of a fuller investigation. Instead, discussions took place between John Carr and Michael Conroy a short time afterwards which caused Michael Conroy to become, in the tribunal's assessment, quite genuinely concerned at potential misconduct and possible conflict of interest on the part of a very senior manager. Indeed, in answer to cross-examination it was accepted by the claimant himself that any employer was entitled to investigate potential misconduct. Thus a process was set in train.

24.20 So this was a genuine concern, albeit in its infancy and Sunny Tuli and Michael Conroy determined that it ought to be further investigated. In the tribunal's determination the decision to do so was reasonable and proportionate, given the preliminary information imparted and the potentially serious consequences if a senior business manager were to be ultimately found guilty, after process, of significant misconduct and causing significant prejudice to the respondent's commercial interests. Of course, this was not in any manner a protracted investigation. Rather, it was conducted over a very short period of time, with a number of enquiries producing nothing of material significance concerning any allegation of breach of duty by the claimant as an employee or director.

24.21 Sunny Tuli tasked head office with investigating several issues. These issues

included: checking online against 38 Espresso with Companies House; checking details of any former company staff who had left and then worked for 38 Espresso and any financial transactions that might be seen as irregular or deemed to provide any evidence of poaching of staff. The company accountant looked into whether there had been payments from the business to 38 Espresso. Vehicle tracking information was checked. Raju Tuli contacted Beverley McFall by telephone. In his witness statement Raju Tuli states that Beverley McFall, after an initial hesitancy, divulged to him that she knew about the relationship between the claimant and 38 Espresso and also another brand, Curve Coffee. He states that Beverley McFall informed him that she felt uncomfortable but had known about the claimant conducting business with Espresso 38 and Curve Coffee whilst an employee of the respondent and that this was awkward as the claimant had been her line manager. She confirmed that after leaving the respondent's employment she went to work for 38 Espresso, although she had since left the business. Raju Tuli was apparently unaware of this latter. He communicated this information to Sunny Tuli. This is confirmed in the evidence of Sunny Tuli.

24.22 Sunny Tuli received an email sent 7 December 2018 from John Carr with an attachment consisting of a copy of the NDA and a lengthy document which had been prepared by John Carr consisting of the equivalent of nearly 12 pages of text which, in evidence, John Carr confirmed having compiled over a period of time. The majority of this lengthy document was not opened to the tribunal. Indeed, for this reason it was submitted by the claimant's representative that the tribunal should take no account of the document; there was however no express application for the document to be excluded from the evidence bundle at the outset of the hearing and for the tribunal not to have any sight whatsoever of the document, as would sometimes be the case where a document is fundamentally disputed. It is perhaps sufficient to say that the document purports to be something in the nature of a journal of John Carr's alleged experiences in the business. As mentioned in submissions, as this was not put to the claimant in order to afford to him an opportunity to challenge the document in whole or in part, the tribunal felt it best to attach little weight to the content of the document, save to observe that such a document was sent to and received by Sunny Tuli and that, in context of the direct communications Michael Conroy had had with John Carr, this seems to have enhanced the sense of concern about potential prejudice emerging to the interests of the business. Accordingly, the tribunal is in no doubt that Sunny Tuli together with Michael Conroy did harbour quite genuine concerns, in the light of any information then available and in their possession at that time.

24.23 The tribunal's considered assessment is therefore that Sunny Tuli and Michael Conroy were quite genuinely acutely conscious of the potential seriousness of the matter. The claimant held a very senior position. He was thus capable, potentially as they saw it, of inflicting significant commercial damage and they felt that the claimant must be, in all respects, beyond reproach. The challenge made in submissions on behalf of the claimant is, firstly, that any evidence obtained at the time of the 11 December 2018 meeting with the claimant was entirely insubstantial, indeed ephemeral. Furthermore, that by any objective standard this could not properly necessitate the claimant being confronted at the meeting in the manner in which this is stated to have occurred. For the claimant, it is submitted that the asserted confrontational tactics were adopted without informing the claimant of the proper substance of any allegations. It is argued that this was entirely inappropriate, being both oppressive and disproportionate and designed effectively to deprive the claimant of any free will and to bully and cajole the claimant into

signing a forced resignation, without there being grounds of any substance. Of course, for the respondent these propositions are entirely rejected.

24.24 Sunny Tuli took advice from Peninsula in anticipation that a suspension of the claimant might be necessitated. A draft suspension letter was prepared (dated 10 December 2018). The evidence of Sunny Tuli is that this letter was prepared and held by him in anticipation that it might need to be deployed in the forthcoming meeting, if a decision was taken to proceed with the suspension of the claimant dependent upon the responses from the claimant to any questions put to him. It is perhaps worthwhile setting out the content of the letter in full. It reads as follows:

> "*Dear Stephen,*
>
> *I write to confirm that you have been suspended on contractual pay to allow an investigation to take place following the allegations of involvement with a competing company, attempted poaching of key staff and fraudulently receiving pay for time not worked.*
>
> *As your employer we have the duty to fully and properly investigate this matter.*
>
> *Suspension from duty on contractual pay is not regarded as disciplinary action. It is merely a holding measure pending further investigations where it is undesirable for an individual to remain on duty.*
>
> *The duration of the suspension will only be for as long as it takes to complete the investigation. During suspension you remain our employee and continue to be bound by your terms and conditions of employment. It may be necessary for me to contact you and/or require you to attend an investigation meeting and you are required to make yourself available during your normal working hours.*
>
> *You are instructed not to contact or to attempt to contact or influence anyone connected with the investigation in any way or to discuss this matter with any other employee or client of ours. I am duty-bound to inform you that a failure to abide by this instruction would be treated as an act of misconduct.*
>
> *However, if there is anyone whom you feel could provide a witness statement which would help in investigating the allegations against you, then please contact me and I will arrange for them to be interviewed.*
>
> *Should the investigation indicate that there is some substance in the allegation(s) you will be required to attend a disciplinary hearing. You will be provided with all relevant documentation prior to the hearing and you will be notified in writing of the time, date and venue.*
>
> *Once our investigations have been completed, we will contact you again to inform you of what action, if any, we will be taking.*
>
> *If you have any queries regarding the contents of this letter please contact me.*
>
> *Yours Sincerely,*

*Sunny Tuli* "

**THE MEETING OF 11 DECEMBER 2018**

24.25 There was a business meeting scheduled by Sunny Tuli for 11 December 2018 at the respondent's Lisburn offices. The tribunal accepts that this meeting had been arranged prior to any concerns being raised regarding the claimant. It had been scheduled as a business performance or review meeting to be held in advance of a significant business meeting scheduled later that day with what was termed "Plc" (the parent company) in Dublin. Sunny Tuli, at the conclusion of this business performance meeting, planned to raise other matters when he met with the claimant. Michael Conroy travelled to the meeting, having in advance arranged with Sunny Tuli that, at the conclusion, they would ask the claimant about the allegation of a possible "conflict of interest" and ask questions concerning his possible involvement with 38 Espresso and other matters of concern. It was arranged that Michael Conroy would lead the questioning. What appears to have been a relatively normal but quite detailed business review meeting proceeded on that day, 11 December 2018, commencing once Michael Conroy and Sunny Tuli had arrived at Lisburn. At the conclusion of the business review meeting Michael Conroy indicated to the claimant that a conversation was required to clear up some information recently brought to the respondent's attention. This second stage then proceeded as arranged.

24.26 The claimant was asked questions by Michael Conroy initially, but Sunny Tuli at times also questioned the claimant. There were no written minutes taken nor was it recorded in electronic or in any other form. The respondent's evidence was that written minutes of a business review meeting of type that had immediately preceded this part would have been very unusual. It appears that the two did not determine that the taking of written minutes would be necessitated when the second stage of the meeting was reached. In the absence of any formal recording of the meeting and in view of the conflicting evidence, the progression of this stage of the meeting, the sequencing of questioning and responses, was at times unclear. It was somewhat difficult for the tribunal to form with any degree of precision a view of the sequencing of questioning. The best that the tribunal can do is to summarise its determination, upon balance of probabilities, regarding issues which were expressly raised with the claimant either by Michael Conroy or by Sunny Tuli and the claimant's responses. Thus the tribunal shall determine what probably transpired in the course of the meeting. The evidence of the three witnesses present at the meeting requires careful scrutiny.

24.27 Commencing, firstly, with the evidence of Sunny Tuli concerning what followed after the business review, Sunny Tuli states that Michael Conroy commenced this part of the meeting by informing the claimant that a conversation was needed to clear up some questions regarding information recently brought to the respondent's attention. Michael Conroy for the most part asked the questions although Sunny Tuli did contribute. Some questions were repeated when the claimant's answers were deemed not to be consistent. Sunny Tuli in his evidence indicated that he could not recall the precise order in which the questions were asked, but asserted that he nonetheless had a clear recollection. When asked if he had ever signed a confidentiality or non-disclosure agreement in connection with 38 Espresso, the claimant denied this and when asked if he had ever paid for flights for anyone not employed by the business the claimant also denied this. When

asked if he had travelled to London with anyone during business hours at company expense, the claimant likewise denied this. The claimant was then asked if he had any relationship or connection with 38 Espresso. In reply, he stated that he was a friend of Gareth McKee and that the respondent had used 38 Espresso to service a few machines at busy times and the claimant believed that he had approval for this. He indicated that the only business being done was the servicing of a few coffee machines. The claimant was then asked again if he had ever solicited an employee for alternative employment. Michael Conroy then commented that the claimant should think hard about his answer. In reply (denying any solicitation) the claimant stated that maybe people had left and ended up working for 38 Espresso. Sunny Tuli's further evidence (noting his lack of precise recollection of the sequencing of questions) is that the claimant was then passed a copy of the flight booking details and asked the purpose of the travel, how expensed, the nature of the trip and why claimant was in London with Gareth McKee on a normal working day and with no business agenda for his employer. When Michael Conroy asked the claimant to explain what the day was about, it is the evidence of Sunny Tuli that the claimant looked shocked and Michael Conroy asked if he wanted some time to consider answering further questions and the claimant stated that he would like to take five or ten minutes; he then left the meeting room. Sunny Tuli states that he also left the room at this time as he wanted to make sure that the claimant did not say anything untoward to other employees in the office. Whilst outside, Sunny Tuli states that he observed the claimant putting files into his car. However he did not challenge the claimant on this as he was still director of the company and Sunny Tuli states that he was unaware that the claimant was about to resign. A short time later the meeting resumed. It was explained by Sunny Tuli that they had concerns based on the answers the claimant had given so far and the lack of clarity. It was further explained that there appeared to be issues around the claimant directing alternative business and the claimant's directorship that required investigation. Sunny Tuli states that the claimant was then asked by Michael Conroy about the Director of Corporate Enforcement and, in response to requested clarification about this from the claimant, Michael Conroy mentioned the duties of the position of a director. Sunny Tuli deemed the answers given by the claimant to be unsatisfactory, evasive and incomplete. He indicates that he knew that the claimant was being dishonest. Specifically, when asked about flights and the claimant's use of the company credit card and the purpose of the shared travel with Gareth McKee on company time, the claimant had denied that it had happened. However Sunny Tuli was aware that the claimant had made this trip and travelled to London on company time with Gareth McKee when there was no business being conducted for the respondent. When Michael Conroy again asked the claimant if he had solicited any employees to work elsewhere and asked employees to sign an NDA, Sunny Tuli's evidence is that the claimant then indicated that he wanted three months' salary to leave his role, but that Sunny Tuli was not willing to pay that amount. According to Sunny Tuli the claimant was shown a letter which had been drafted (the suspension letter). There were further discussions about terms and then two months' salary was agreed. The claimant then resigned on terms set out in the handwritten letter. Sunny Tuli specifically denies that either he or Michael Conroy put the claimant under significant duress to resign at the meeting and asserts in his evidence that it was solely the claimant's decision to resign. He further asserts that they were prepared to suspend the claimant and to carry on with the investigation and his opinion was that it was highly likely that disciplinary proceedings would have resulted.

24.28 Michael Conroy's evidence was in most respects in accordance with that of Sunny

Tuli. He states that he asked the claimant several questions and that Sunny Tuli also asked questions and that some questions were repeated and received a different answer to the first time asked. Like Sunny Tuli, Michael Conroy could not recall the precise order of questioning. The evidence otherwise is substantially in accordance with that of Sunny Tuli. Michael Conroy states that when passed the flight booking details the claimant's demeanour changed completely, that he looked shocked and that Michael Conroy felt that his pretence had stopped at that point. He was asked if he wanted some time to consider answering further questions and he subsequently took five or ten minutes out of the meeting room. When the claimant returned Michael Conroy explained that there appeared to be issues around the claimant directing alternative businesses and he asked the claimant if he knew about the Director of Corporate Enforcement and he proceeded to explain the duty of care and other duties of the position of company director. The remainder of Michael Conroy's evidence is generally in accordance with that of Sunny Tuli and Michael Conroy specifically denies placing the claimant under significant duress to resign at the meeting or that the claimant had no other choice.

24.29 The claimant's evidence, diverging significantly from that of the other two present, is that the initial part of the meeting commenced at 10.30am and the claimant implies in his account that this part was quite brief. He states that Sunny Tuli then asked him about his relationship with Gareth McKee. In evidence, the claimant proceeds with what purports to be a direct account (in quotes) of the words actually spoken (which are as mentioned below). He states that Sunny Tuli then asked if he had ever signed an NDA and at that point Michael Conroy interjected and stated that he wished the claimant to think very carefully about this before he replied. The claimant's evidence records his reply as being that he had signed many NDA's over the years and that Michael Conroy had been present when he had signed some of them - was there any particular NDA to which they were referring? The claimant's further evidence is that at this point Sunny Tuli left the room for a short period and then returned and handed him the suspension letter, with the specified allegations of involvement with a competing company, poaching key staff and fraudulently receiving pay for time not worked. The claimant states that he was completely shocked and stunned when he read the letter. He states that he asked the two what this was about and who had made the allegations against him. He states that Sunny Tuli then told him that he would need to sign the letter. He replied that he was not signing any letter until he knew the nature of the allegations and who had made them. He alleges that Sunny Tuli then replied, "I have a dossier on you so thick" and made a gesture with his hand. His evidence is that after a brief period of silence Michael Conroy then turned to him and said, "there is another option here that will make all this go away" and that Michael Conroy then said, "you resign with immediate effect". The evidence then recounts that Sunny Tuli then said to him that he had done well (mentioning his enhancement in salary) and that it was a small world and that he would turn up somewhere. Michael Conroy then said that it was important that he had an unblemished record. The claimant then states that Sunny Tuli agreed some practical issues regarding return of company mobile phone and car and he was told not to contact any member of staff. If he agreed these terms, he would be paid salary on 20 December 2018 and again on 20 January 2019. However, if he did not write his own resignation at the bottom of the letter of suspension, he would not be paid a penny of his annual bonus. The claimant states that he protested his innocence and that he had answered Sunny Tuli's questions fully, however the latter seemed uninterested in his replies. He states that he felt that it was clear that the reason for the visit that day was not to hold a business review but to sack him, regardless of what he said. He further

states that he felt he had no other option but to sign a resignation letter and to leave.

24.30 What is not in doubt (although whether this was done under significant duress or otherwise is an issue to be resolved) is that the claimant then proceeded to write in manuscript and to sign on the final page of the suspension letter the following words:

> "*I Stephen Kelly agree to resign my position with MBCC with the following terms*
>
> *(1) December pay in full*
> *(2) January pay in full*
> *(3) car return on 21st December 18*
> *(4) phone return to Edinburgh FAO S Tuli 14 Dec.*
>
> *Stephen Kelly agrees not to contact any member of staff and understands that in the event of this January pay will not be received*."

24.31 The tribunal has carefully assessed the foregoing conflicting accounts. The claimant's witness statement evidence and his subsequent oral evidence asserts that the claimant was contacted on 6 December 2018 by Sunny Tuli by telephone and told that Sunny Tuli was going to be in Belfast on 11 December 2018 and would be in the Lisburn office at 10.30 am. This was depicted by the claimant as being "just a business review". Sunny Tuli and Michael Conroy duly arrived at the Lisburn office on 11 December 2018. The tribunal does not accept the accuracy of the claimant's evidence regarding commencement time and duration of the meeting. Once in the boardroom, the claimant then describes what must have been a very brief only business review meeting proceeding. The tribunal however rejects as inaccurate any suggestion made by the claimant that the business review meeting was of brief duration only. The claimant very clearly seeks to suggest that this first part of the meeting was intended merely as a pretext only in order to provide an opportunity to confront him. The tribunal's conclusion is that this was a proper business review meeting, attended by all three, in advance of a very important meeting later that day. The meeting subsisted for an appropriate period of time and it was not merely some type of pretext, in the tribunal's determination of the facts, notwithstanding the claimant's depiction otherwise.

24.32 Regarding the next stage, the claimant states that Sunny Tuli indicated that he wanted to speak to the claimant on another matter and, as far as the claimant's witness statement evidence goes, "*He asked me about my relationship with Gareth McKee*". The claimant's evidence was that in reply he stated, "*I have known Gareth McKee for about 25 years, he is a trusted and good friend of mine. Gareth had worked in MBCC as a service engineer for about 18 months, he left to establish his own coffee and service business 38 Espresso but still works with MBCC on servicing, carrying out pressure safety testing and has bought items from us over the years*". The claimant further explained in his response, "*Gareth's business is focused in pubs, bars and restaurants and some independent coffee bars which are not approved channels for Costa so we are not competing business*". The accuracy of this part of the claimant's evidence was challenged on behalf of the respondent. The basis of the challenge was that, as stated by the claimant, this purported verbatim account is a somewhat complex and detailed reply, providing much more detail than obviously necessitated, in response to an opening question from Sunny

Tuli which was it seems relatively short and straightforward. It is submitted that the length, complexity and defensive nature of the reply, designed to counter any suggestion of competing businesses, tended to undermine the veracity of the claimant's evidence that this was a direct verbatim account of his initial response to the opening question, notwithstanding that he seeks to portray this as such. The tribunal does find it curious, if the claimant's evidence as to sequencing is indeed accurate, that claimant would apparently respond to a simple brief introductory question, posed at the outset, by the provision of a relatively detailed and somewhat defensive response, raising the point expressly that there was no conflict in business interests. It may well have been that at some point in the questioning the claimant felt it necessary to justify and to explain why, as he saw it, there was no conflict between Gareth McKee's business of 38 Espresso and the respondent's business. However the tribunal does find, based upon the claimant's own suggestion of the sequencing of questions and what he alleges was actually stated, that this part of the claimant's evidence is curious and indeed may not be an accurate account of what transpired at the opening of the meeting or, if it is accurate, this demonstrates an alignment with the evidence of Alex Lynch to the effect that the claimant was fully or highly alert (prior to the questioning actually commencing) to potential questioning and alert to the need to defend his position concerning anticipated allegations about any conflicts and competing businesses. If that latter proposition is correct, the claimant was certainly not "ambushed" by this questioning: he must have anticipated this.

24.33 The claimant's further evidence was that Sunny Tuli then asked if the claimant had ever signed an NDA and that, at this point, Michael Conroy interjected and stated that he wanted the claimant to think very carefully before replying. According to Sunny Tuli's evidence, Michael Conroy did ask the claimant to think hard about his answer to a question. However this pertained to a question concerning whether the claimant had ever solicited an employee of the respondent for alternative employment. The claimant's evidence was that he immediately replied that he had signed many NDA's over the years and that he asked if any particular NDA was being referred to. The two appear to have found the claimant's answer evasive. Sunny Tuli's evidence was at this point the claimant was passed a copy of the flight booking details concerning the 2016 Aer Lingus flight to London. (It is noted that the claimant makes no mention of this in his own witness statement). He was asked about the nature of the trip and how expensed. Sunny Tuli states that the claimant looked shocked at being confronted with this documentary information and, in order to consider his position, he left the room. Sunny Tuli states he also left the room and he observed the claimant putting files into his car. His reason not to challenge has been indicated; he states he was unaware the claimant was about to resign. In contrast, the claimant says that Sunny Tuli left the room, returned and handed the claimant the suspension letter containing the specified allegations.

24.34 The claimant says that he was completely shocked and stunned. He questioned what this was all about and who had made the allegations, that Sunny Tully told him that he would need to sign the letter, but that he indicated he would not sign until he knew the nature of the allegations and who had made them. The claimant's allegation, "I have a dossier on you so thick" is very much contested, for the respondent. The claimant's contention of Michael Conroy initiating a forced resignation ("there is another option……") and the threat that if the claimant did not write his own resignation he would not be paid a penny of his annual bonus, is all rejected by the respondent. Also strenuously rejected by the respondent is the claimant's contention that he was put under immense pressure and that the reason

for the two visiting that day was not to hold a business review but to sack him, regardless of what he said. The respondent's case denies any assertion that the claimant felt that he had no other option but to sign a resignation letter and to leave. Far from what the claimant has asserted, Sunny Tuli and Michael Conroy, in terms, have suggested that once matters were broached with the claimant, it was he who endeavoured to reach some type of a "deal" in the context of being prepared to tender his resignation and the proof of this is the hand-written resignation.

24.35 The tribunal's task is to seek to resolve these conflicts. What in reality did actually transpire? As has been identified (and as is common case in submissions), the key question of law is whether there was in fact a dismissal - the fundamental question being: "who really ended it?". This resolution of these matters is of fundamental significance to the central issue concerning whether or not the claimant freely tendered his resignation (whether the claimant "really ended it") or whether, in the alternative, the claimant was placed in a situation where, in effect, he was denied any free will or free choice and the claimant felt that he had no option but to resign. That might be either, upon one possibility, a "resign or be sacked" situation or, the other possibility, a "pressurised resignation", although both might have overlapping characteristics.

24.36 In conducting this task, the tribunal must assess the relative credibility of witnesses whose evidence underpins the two conflicting versions and the quality and weight of any relevant evidence. To assist in a resolution, the tribunal took into account the following matters. Dealing firstly with the claimant's evidence, the tribunal's assessment is that the claimant has been at great pains to distance himself from any suggestion that Gareth McKee and the claimant were working in concert (with the claimant being the "silent partner"). Accordingly, one would expect the claimant and Gareth McKee to have a common purpose in portraying a version of events with little apparent deflection in evidence between the two. The tribunal has commented above upon matters of general credibility and consistency regarding the claimant's evidence. The tribunal does not accept, notwithstanding submissions by the claimant's representative, that the claimant was a "strikingly credible witness". The tribunal's further assessment is that Gareth McKee has shown a propensity to align his evidence to that of the claimant and an example of this concerns the duration of the claimant's participation in the 2016 meeting with John Carr in the 38 Espresso premises. This casts doubt on the integrity of Gareth McKee's evidence. This alignment has been part of an endeavour, from the claimant's perspective, to distance himself from an active participation in this 2016 meeting, other than as a merely transitory engagement. Supported evidentially by Gareth McKee, the claimant's assertion is that nothing material occurred, that he merely directed John Carr to the Millisle meeting and that, at John Carr's request, he signed (as a witness only) the NDA, departing immediately thereafter. The tribunal does not accept the claimant's evidence regarding the brief duration only of his attendance at the meeting. This correspondingly throws doubt upon Gareth McKee's evidence in support of the claimant. This casts a general shadow over the claimant's evidence in the case.

24.37 Turning then to the evidence, firstly, of Sunny Tuli, the tribunal observes a successful businessman, owner of a significant group of companies within a commercial organisation. It is a hypothetical possibility that Sunny Tuli would be well capable of coordinating a strategy designed to undermine the essence of the claimant's case by ensuring an alignment of respondent witness evidence and potentially exercising power and control over subordinates to ensure that evidence

provided was indeed effective in challenging the claimant. Such a strategy has been asserted in the claimant's representative's submissions. Accordingly, the tribunal has been invited to be entirely sceptical concerning evidence from the various respondent witnesses, with the suggestion that they have been possibly induced, coached or even coerced, into providing evidence favourable to the respondent. Accordingly, there is an alleged commonality between the evidence of a number of respondent witnesses concerning, for example, assertions that the claimant was quite vocal on a number of occasions concerning his intention to leave this employment and concerning his association with Gareth McKee's business, on occasions mentioning that he was merely awaiting his bonus before leaving.

24.38 Examining Michael Conroy, we see a senior manager informed of the anonymous letter and then, a short time afterwards, on 6 December 2018 at a meeting with John Carr, informed of certain information which was then discussed with Sunny Tuli, followed by further information sent by John Carr by email the following day. This information, initiated further investigation of the claimant concerning a potential conflict of interest, possible financial irregularities and circumstances of former employees being then employed by 38 Espresso. It is common case that specific investigations took place at that point. It has been strongly asserted in submissions for the claimant that these investigations did not produce anything of real substance. Certainly, no formal recorded connection between the claimant and 38 Espresso emerged from a Companies House search. There was scrutiny by the respondent's company accountant of possible financial dealings between the respondent and 38 Espresso. Nothing emerged from vehicle tracking records. Beverley McFall was contacted concerning the circumstances of her joining 38 Espresso. It is noted that in the witness evidence of Raju Tuli he does not state expressly that Beverley McFall informed him that she had been "poached" and this point has indeed been drawn to the tribunal's attention in the claimant's submissions. John Carr's information as provided to Sunny Tuli in advance of the 11 December 2018 meeting was thus largely uncorroborated by other sources of information. There was the record of the expenses claim and the London flight booking made in 2016. That was certainly concrete evidence but it has been submitted as being relatively insignificant and indeed grounded upon something in the nature of a bookkeeping or administrative error, with the point being contested that this was actually a working day for the claimant. However, the tribunal bears in mind that these preliminary investigations took place over a very short period of time (that is to say between 7 December 2018, which was a Friday, when the emailed information was first imparted by John Carr and 10 December, which was a Monday, being the date prior to the meeting as scheduled). Evidently the decision was made to move at an early stage so as to put the concerns raised by John Carr directly to the claimant. In view of the circumstances of a very senior manager being involved in allegations including those raised by John Carr in conversation and subsequently by email, the tribunal can comprehend why decisions of this type were taken by Sunny Tully and Michael Conroy. For this reason Sunny Tuli and Michael Conroy arranged to raise matters directly and personally with the claimant at the conclusion of the business meeting scheduled for 11 December 2018.

24.39 One of the centrally-contested issues advanced in submissions between the parties relates to the manner in which this meeting was arranged and conducted and whether there would have been any proper basis for suspension of the claimant, albeit on full pay. Some issues are not in contention. Firstly, the claimant was not expressly provided, by any means, with any formal or informal advance notification that specific issues were to be raised with him regarding his conduct and potential

business associations and any conflict of interest. Notwithstanding this, the tribunal accepts as entirely credible the evidence of Alex Lynch that in advance of the meeting the claimant was visibly nervous. The claimant said to Alex Lynch, in a key piece of evidence which is fully accepted by the tribunal, that he had already cleared out his office and put everything in his car. The tribunal accepts that this statement was made to Alex Lynch on the morning of the meeting and in advance of commencement, prior to the arrival of both Sunny Tuli and Michael Conroy. By whatever means or on whatever account, the claimant was alert to something which was about to be addressed at the meeting. This was of such significance or import that the claimant had indeed cleared his office and had stated to Alex Lynch that he had done so. Indeed the further evidence, again fully accepted by the tribunal, is that the claimant did not return at the conclusion of the meeting to his office to remove any personal effects.

24.40 Finally, it may be mentioned that upon conclusion of the employment there was a deduction made from the final salary due to the claimant. It appears, presumably upon legal advice, that it was thereafter recognised that this deduction was not properly made and the sum in question was then paid to the claimant, prior to conclusion of the legal proceedings.

## THE TRIBUNAL'S CONCLUSIONS AND DETERMINATION

25. Submissions have portrayed both Sunny Tuli and Michael Conroy as having no genuine concern or belief in any potential wrongdoing on the claimant's part: that this was seized upon as a device to force the claimant's pressurised resignation, as part of a prearranged plan. It is contended that this was nothing more than an "ambush", designed to deprive the claimant of any free will and to force him to sign a written resignation. More difficult to ascertain, notwithstanding the extensive content of the claimant's representative's well-rehearsed and detailed submissions and all of the evidence, is precisely the underlying motivation on the part of either Sunny Tuli or Michael Conroy in effectively compelling the claimant to resign at this point, as has been asserted. Motivation is not at all clear. Further, it is correspondingly not at all clear, if this was indeed a prearranged plan, why the letter of suspension that was handed to the claimant would allude to suspension upon full pay pending further investigation (and the remaining contents of the letter proposing due and proper process) if the motivation of the two was to force the claimant into an immediate resignation. Was the letter merely some type of a "smokescreen" to cover everything? The tribunal has considered the possibility, going with the claimant's submissions (or what might be implied from the claimant's submissions) for the time being, that perhaps the prospect of compelling an immediate resignation from the claimant was opportunistic only, seized upon in the moment on foot of Michael Conroy's alleged suggestion. However, this latter appears to strain the case made on behalf of the claimant, in the tribunal's view. The tribunal's best understanding of the claimant's case is that everything here was carefully planned in advance of the meeting in order to ensure that there was an effective resignation arising as a consequence of the meeting. These two possibilities thus do not appear easily reconcilable, in accordance with the case made on behalf of the claimant.

26. The best that the tribunal can make of this (from the claimant's perspective) is the case that John Carr intentionally fed false information to management, there was then an overreaction, that conclusions of wrongdoing were jumped at by Sunny Tuli and Michael Conroy and that then (perhaps with some measure of opportunism

although again that is not as far as can be understood the claimant's case) it was suggested by Michael Conroy that it would be in the claimant's best interests if he were to resign, the two having placed the claimant within such an oppressive atmosphere that he was deprived entirely of any free will, to such an extent that the claimant, notwithstanding his status as a very experienced and senior member of the organisation, could not even countenance the progression of a further disciplinary investigation whilst he was suspended on full pay, the latter course having been expressly set out in the letter.

27. The evidence was, common to both sides, that at this particular stage the meeting was somewhat fraught and difficult. The respondent's evidence is that the claimant appeared to be, variously, "shocked" (the evidence of Sunny Tuli) or (taking this evidence from Michael Conroy) when asked if the claimant had ever solicited an employee for alternative employment, "*Up to that point, my recollection is that the claimant seem flustered by these questions. He was red-faced but calm. He seemed to anticipate questions were going to be asked*", but then when he was passed the (Aer Lingus) flight booking details and questioned about travelling with Gareth McKee to London, "*Stephen's demeanour changed completely. He looked shocked and I felt his pretence stopped at that point*". Accordingly, it is common case (for the claimant's version is that he was "completely shocked and stunned" when he received a copy of the suspension letter) that the atmosphere at that point in the meeting and the claimant's demeanour arising from these events was "shocked". The issue is, as has been alluded to in submissions from both sides, whether this evident demeanour of "shock" was sufficiently grave and all-pervasive to such an extent as to take away the claimant's power of free will and reasoning and thus effectively to deprive the claimant of the capacity to make a rational decision regarding any resignation. In other words, the question to be addressed is whether the claimant took this action of his own free will or if he was, in effect, brow-beaten into a resignation, as it might be expressed. One would expect a guilty man who feels that he has been "caught out" to be flustered, even shocked, but nonetheless possessing the necessary free will to resign, that course being assessed as the better option, in comparison to alternatives. In contrast, an innocent man, or a man who is guilty of nothing of great substance, if confronted by an extremely oppressive and fraught situation and thus effectively deprived of free will and the capacity to make a rational decision, might be induced to take a rash and impulsive step, in the heat of the moment. It is that latter proposition which has been advanced on behalf of the claimant, but the proposition is entirely rejected on behalf of the respondent.

28. The difficulty with the claimant's submission that he was effectively deprived of free will and thus effectively forced to resign, is the counter-argument that he was indeed being suspended pending a further investigation which might then have led to a disciplinary process in accordance with the respondent's procedure. The claimant had no need to resign at that point, whatever the pressure he might have felt. Available to him was the route of accepting suspension on full pay and permitting any investigation to take its course (noting that the claimant was entirely familiar with the respondent's disciplinary process and thus that he knew the various stages of that process). Available was the possibility, as he might wish, of challenging any evidence or any case made against him. His position in this case is that there was nothing whatsoever of any substance. He could have robustly defended his position. This was always open to him. Why then did he not follow that seemingly obvious path? The claimant's submission rests upon the central premise that the claimant was so oppressed by the conduct of Sunny Tuli and Michael Conroy in the

course of this meeting that he was entirely deprived of any free will: that he was placed by the two in such a state of mind whereby he felt that he had absolutely no alternative but to write out the words of the resignation.

29. Having considered matters, in the light of all the available evidence, the tribunal rejects the claimant's account and the proposition advanced for the following reasons. The tribunal's considered belief is that Sunny Tuli and Michael Conroy harboured entirely genuine concerns. These commenced with receipt of the anonymous letter. The concerns were amplified once further information was received from John Carr. Much has been made in the claimant's submissions regarding the absence of anything concrete emerging from the preliminary investigations, save for the Aer Lingus flight records and flight expense records from 2016. The case is made that these had emerged in an audit some weeks before but were not regarded then as serious enough to warrant any further action. However, there is no evidence that these were expressly brought at any earlier time to the attention of Sunny Tuli. The absence of anything more concrete did not serve to assuage fears. However the tribunal accepts the significance of the point that, however unsubstantiated by much in the way of hard evidence at this stage, this was an allegation emerging against a very senior employee (and a director of Kashmiri) whereby if mistakes were made in pursuing the matter properly, there could have been very significant adverse financial consequences for the business. That fact must be taken into account in assessment of the reasonableness or otherwise of management's approach.

30. Sunny Tuli and Michael Conroy felt it was the best course to investigate further by discussing the matter in an early face-to-face preliminary meeting with the claimant. The tribunal believes that the two quite genuinely found the claimant's attitude in the course of that meeting to be both defensive and evasive. The questioning did little or nothing to suggest that further enquiries should not be pursued or that the matter ought properly to be dropped forthwith. Notwithstanding how this meeting has been portrayed by the claimant's representative in some adept and skilful submissions, the tribunal accepts that this was intended to be a preliminary meeting only. It was reasonable on the part of the respondent's senior management to conduct such a preliminary meeting in the light of genuinely-held concerns, notwithstanding that evidence was somewhat sparse at that stage. The claimant was quite aware that there existed a disciplinary process, for he had himself on one occasion engaged in a managerial capacity in that disciplinary process concerning an employee. He was thus aware that there were specific stages involved in that process, including a formal investigation stage and, as required, a disciplinary stage beyond that. The tribunal reminds itself again that the claimant was a senior manager. It does not accept that, unlike a more junior employee, the claimant would be readily placed in a situation of oppression, that he might easily be so overwhelmed or overawed by circumstances to the extent that he might be entirely deprived of free will: this to the extent that he would be entirely unable to make a rational and considered decision whether or not to accept a suspension on full pay in the terms stated. The tribunal does not accept the premise that, instead of making such a rational or considered decision, he effectively "panicked" or was overwhelmed and acceded under compulsion to a demand made to him to write out his own resignation. The tribunal in that respect prefers the evidence of Sunny Tuli and Michael Conroy.

31. The issue has been raised concerning whether there ought to have been given to the claimant advance notice of the allegations and to have been afforded to him the right to be accompanied. Examining the submissions and the law on this, the

tribunal accepts the proposition that this was intended to be a preliminary meeting only, as a precursor to any further disciplinary investigation. That much is expressly stated in the suspension letter which, upon any reading, seeks to classify and to describe the process clearly. The tribunal is satisfied that this letter encompasses what was the respondent's genuine intention and the plan, dependent upon what emerged in the course of the initial meeting of 11 December 2018. It is accordingly made entirely clear in the letter that this was to be a suspension on full pay and that further stages were to follow. The respondent's witnesses have been heavily criticised in submissions for their failure to notify the claimant in advance of the nature and purpose of the meeting. The LRA code and the statutory provisions regarding the right to be accompanied have been cited in argument. However, this was not a suspension without pay and the tribunal's determination is that there was no legal entitlement (or none such that has been drawn to the tribunal's attention) under these specific and particular circumstances, to be accompanied in such a preliminary meeting prior to the commencement of a further and full disciplinary process, insofar as that might have been applicable.

32. It has also been argued that to suspend the claimant (whether with or without pay) constituted a fundamental breach of contract, capable of grounding a claim for constructive dismissal. For the respondent, it is submitted that that proposition is not correct. Whilst the tribunal is not aware of any express condition in the written contract permitting suspension, whether on full pay or otherwise (in effect that part of the original written contract still applicable, as nothing further followed that) pending a disciplinary investigation or disciplinary proceedings being taken, nonetheless no persuasive authority has been cited in argument supporting the proposition that suspension of the claimant on full pay, in these specific circumstances, constitutes a fundamental breach of contract that might support constructive dismissal. It has of course been suggested that any suspension was indeed pre-empted by the claimant's own action in resigning. Here, the tribunal accepts the respondent's argument in submissions that there was no express or implied right under the contract to be provided with work and certainly that the claimant was not to be deprived of any remuneration on account of his being suspended on full pay, if that had indeed occurred. As mentioned, the proposed suspension did not crystallise in view of the claimant's resignation. In any event, such suspension as proposed would not have constituted a fundamental breach of contract permitting the claimant to claim constructive dismissal on that account, upon a pre-emptive basis.

33. The tribunal does not consider, upon the determined facts, that this was a "resign or be sacked" situation in accordance with the various scenarios such as are illustrated in the authorities cited in argument. There is insufficient on the facts to ground an argument that there was a constructive dismissal arising from a breach of the "trust and confidence" term that is properly to be implied into any contract of employment. Further, there is nothing determined by the tribunal upon the facts specifically in the conduct of either Michael Conroy or Sunny Tuli in terms of the discussion which transpired with claimant on that day which would amount to sufficient to constitute fundamental breach of the trust and confidence term or indeed any other express or implied term in the contract of employment. Accordingly, there is nothing to support the contention to the extent or degree required to support a positive finding of constructive dismissal in this case, taking into account the legal principles applicable.

34. In view of the foregoing findings, it is perhaps unnecessary for the tribunal to

mention further the claimant's motivation in writing out and in signing the resignation, save to say, once again, that the tribunal does not accept that any of this supports the legal proposition that this was a constructive dismissal. Rather, the claimant resigned from employment in circumstances where he had in effect a free choice whether or not to do so. The tribunal's finding is: "the claimant ended it". This is the question requiring an answer from the tribunal. Accordingly, there has been no dismissal of the claimant by the respondent.

35. Returning then to the issues requiring to be determined, the tribunal's conclusion is as follows:

(1) Firstly, the claimant was an employee of MBCC and at the time this contract of employment came to an end, he also held the office of director in Kashmiri (but without any specific written terms of service as such an office-holder in that regard). It is noted that the tribunal did not receive any evidence nor any corresponding submissions concerning how that latter directorship came to be formally terminated and any possible breaches of contract specifically arising thereby. Accordingly no further finding needs to be made by the tribunal on the point.

(2) Secondly, for the reasons stated above the tribunal's determination is that the claimant was not dismissed and so there is no issue arising concerning whether the claimant was unfairly dismissed by the respondent, whether that be constructively dismissed or otherwise,

(3) Thirdly, in respect of the issue of whether the employer, or the company of which the claimant was a director, was (otherwise than 2 above) in breach of contract with the claimant, again, the tribunal's determination is as above stated. The tribunal does not conclude that the claimant's contract at time of termination provided for a guaranteed bonus unrelated to performance, with unpaid sums due upon conclusion of the contract.

(4) Finally, as none of these heads of claim are determined in favour of the claimant, no issue arises regarding the matter of appropriate remedy

36. The foregoing being so, the claimant's claims are dismissed by the tribunal, in their entirety, without further Order.

**Employment Judge:**

**Date and place of hearing:** **20, 21, 22, 23 & 24 January, 11 & 12 February and 16 March 2020, Belfast.**

**Date decision recorded in register and issued to parties:**